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THE UNION OF LAW AND EQUITY

A PREREQUISITE TO PROCEDURAL REVISION†

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THE HISTORICAL VIEWPOINT

IN 1850, only thirteen years after its admission to the Union as a sovereign state, Michigan constitutionally acknowledged the currently popular proposition that law and equity procedure ought to be fused. The mandate was clear and simple; by the ratification of the 1850 Constitution the people of Michigan directed that "The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings."[1] However intense was the resistance at that time to the influence of the New York Field Code, and however ominous was the challenge to its sweeping reform, it must have been felt that the code objective of unified procedure was a meritorious one.[2] Within the year the legislature took action to comply with the constitutional mandate. Its sole accomplishment consisted of an act ordering the supreme court to adopt and revise rules so as to improve practice by "1. The abolishing of the

† This paper was prepared for the guidance of a Committee on Michigan Procedural Revision jointly created by the Michigan Legislature, the Supreme Court of Michigan, and the Michigan State Bar to recommend revision of Michigan statutes and rules. The need for the joinder of law and equity procedure was thought to be so fundamental that this paper was prepared as a basic study for the committee. In it an attempt is made to bring to the attention of the Michigan lawyers, judges, and legislators an analysis of the Michigan Constitution, statutes, and cases and the experience of other states that have amalgamated law and equity procedure. We hope that this discussion will also be useful elsewhere in the field of procedural reform.—The Authors.

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1 MICH. CONST., art. 6, §5 (1850).

2 New York had provided: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished." N.Y. Laws (1848) c. 379, §62.

distinction between law and equity proceedings, as far as practicable. . . ."[3]

In 1887 the legislature took an additional step toward equating law and equity procedure. The statutes which established chancery procedure were amended by adding "and either party shall also be entitled to the right to a jury, to be demanded in the manner as in a suit at law, and the verdict of such a jury on any question of fact shall have the same force and effect in the circuit [court] in chancery, and in the supreme court on appeal, as the verdict of a jury in an action at law."[4] This attempt to "abolish the distinction between law and equity proceedings as far as practicable" by providing for the trial of all causes by procedure known at law was ill-fated. It lasted only until 1889 when the Michigan Supreme Court, in *Brown v. Kalamazoo Circuit Judge*,[5] ruled the statute unconstitutional on the ground that "It is within the power of the legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights."[6] The court made clear that neither the right to jury trial at law, nor the right to judge trial in chancery, could be impaired by legislative action. So far as the right to jury trial is concerned any effort to amalgamate the procedure at law and in equity must deal with issues historically legal or equitable. Blanket abolition of the distinctions without protecting the right to jury or judge trial on issues of fact could not be tolerated.

The legislative conscience was apparently satisfied by its delegation of power to the supreme court and its abortive attempt to equate chancery proceedings with those at common law. For sixty-four years after its first action, bench and bar alike tolerated two separate courts and many forms of actions. Not until 1915 was the constitutional directive at least partially satisfied by a provision permitting transfer of causes between the two sides of the court.[7] More than forty additional years have passed, a total of 107 years since the original unequivocal directive, without full realization of the dream of those early Michigan citizens.

Perhaps the more than half-century delay on Michigan's part was not harmful in light of the fact that the early attempts at

[3] Laws (1851) p. 108.
[4] Public Acts (1887) No. 267.
[5] 75 Mich. 274, 42 N.W. 827 (1889).
[6] Id. at 283.
[7] Mich. Comp. Laws (1948) §611.2.

amalgamation were treated harshly by the judges.[8] Before action was taken in 1915, the evolution of blended procedure was proceeding well, and the early obstacles to its success were found to be surmountable. For example, the Supreme Court of Judicature Act of 1873[9] effectively wrought the consolidation of all the superior courts of England. It combined all legal and equitable powers within one court, and then, for administrative convenience, sliced the great court into five separate divisions along the jurisdictional channels of the old procedure while allowing cases to be transferred from one division to another without prejudice. So it was that Maitland prophesied: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well established rule administered by the High Court of Justice."[10]

Looking forward to that day, the United States Supreme Court, in 1912, promulgated equity rules 22 and 23[11] which Congress supplemented and completed by the Law and Equity Act of 1915.[12] The new federal equity rules sought in a very moderate way the accomplishments of the English act. The remodeled framework became another example of what even conservative states could and ought to do in the way of reform.

With the English and federal predecessor acts before them, the Michigan legislators adopted the Judicature Act of 1915 and by its provisions the aged mandate—by then reaffirmed in the Constitution of 1908[13]—was carried one step closer to realization.

8 55 YALE L.J. 826 (1946); Clark and Wright, "The Judicial Council and the Rule-Making Power: A Dissent and Protest," 1 SYRACUSE L. REV. 346 (1950); Kharas, "A Century of Law—Equity Merger in New York," 1 SYRACUSE L. REV. 186 (1949); McArthur v. Moffet, 143 Wis. 564 at 567, 128 N.W. 445 (1910): "The cold, not to say inhuman, treatment of the infant Code received from the New York judges is a matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators."

9 35 & 36 Vict., c. 66. The present form of the act was enacted in 1925. For a history of English reform, see Sunderland, "The English Struggle for Procedural Reform," 39 HARV. L. REV. 725 (1926); Millar, "The Old Regime and the New in Civil Procedure," 14 N.Y. UNIV. L. REV. 1, 197 (1936-1937).

10 MAITLAND, EQUITY 20 (1910).

11 226 U.S., Appendix I. The indebtedness to English practice with respect to each rule is pointed out in HOPKINS, THE NEW FEDERAL EQUITY RULES, 8th ed., 37 et seq. (1933).

12 38 Stat. 956 (1915).

13 MICH. CONST., art. VII, §5.

That step was a short one, however, for the act required all civil actions to be characterized either legal or equitable and then forbade them to be joined. Each action so characterized had to be tried on the proper side of the court although transfer between sides was allowed. Commenting on the cautious transition to this conservative notion of a single court with double jurisdiction, Professor Sunderland wrote: "It may be hoped that the good effects of the Act will so favorably impress the bar and the public that the way may be paved for a subsequent consolidation of jurisdictions."[14]

Twenty-three years later the consolidation of law and equity was completed in the federal system by the adoption of new court rules creating but one form of action.[15] How unfortunate it is, that more than forty years after the passage of the Judicature Act, in the light of the overwhelming further reform in the federal courts and in many other American jurisdictions,[16] that the consolidation which the constitution requires has not been attained.

THE MERIT OF MERGER

Aside from the constitutional admonition to abolish procedural distinctions, there are numerous independent reasons in support of full merger of law and equity. These are grounded for the most part on trial convenience. At early common law the primary goal of pleading was to establish a single issue of fact or law to be presented in court for adjudication.[17] Michigan was one of the first American jurisdictions to recognize the economic extravagance of this ancient pleading logic. By statute it was sought to save litigants the time and expense of several suits by allowing liberal joinder of causes of action. Thus a Michigan plaintiff may join as many causes as he has against a defendant. If it appears that the issues involved cannot be conveniently disposed of together the court may order separate trials.[18] Convenience is the criterion upon which adjudication of all issues between identical parties in one proceeding depends. Other than this, the only substantial

14 Sunderland, "The Michigan Judicature Act of 1915," 14 MICH. L. REV. 273 at 280 (1916).

15 Federal Rules of Civil Procedure (1938).

16 A total of 29 jurisdictions have abolished the distinction between law and equity and have provided for a single cause of action. Authorities are collected in Appendix A.

17 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 4th ed., 639-656 (1935); Blume, "Theory of Pleading," 47 MICH. L. REV. 297 (1949).

18 Mich. Comp. Laws (1948) §608.1.

limitation is the express statutory provision that legal and equitable causes may not be joined.[19]

As far as it goes, Michigan's rule of convenience is a good one. Its marked success in actual practice has been evidenced by ever increasing adoption of free joinder provisions.[20] However, every reason in support of that success applies with equal force to allowing joinder of legal and equitable claims. Such an extension would complete the simplification of procedure already begun, so that all issues between parties could reach final settlement in the course of a single proceeding in a unified court. An analysis of the problems arising under Michigan's divided court system and a comparison with the practice of other jurisdictions follows.

Joinder of Legal and Equitable Causes of Action

It was early recognized that great injustices often resulted from the separation of law from equity.[21] The archaic concept of two entirely separate courts was altered in Michigan by adoption of the Judicature Act of 1915 which provided for free transfer of causes between the law and equity sides of the court.[22] To a large extent, this partial reform in court structure relieved Michigan suitors of the harsh inequity of summary dismissal whenever actions

19 Subject to the chancery practice of granting legal relief as an incidental concomitant of the equitable relief.

20 37 COL. L. REV. 462 (1937); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE, c. X (1952); CLARK, CODE PLEADING, 2d ed., §68 (1947); BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES, c. 3, p. 87 (1954); Blume, "Free Joinder of Parties, Claims, and Counterclaims," 2 F.R.D. 250 (1941).

21 . . . "the books are filled with cases, in which the injustice has been imposed upon parties, of suffering the loss of a substantial right, because of a mistake in the choice of a forum [law or chancery court], before which its enforcement was sought. If it were necessary, scores of cases might be cited, in which, after a long and protracted controversy upon the merits, the cause ultimately turned upon the question of mistaken jurisdiction. . . .

"Shall we be told, that the jurisdictions are clearly defined, and that, if mistaken, it must be the fault of the party? Every person conversant with the subject, knows that it is often one of great doubt, and that courts themselves are involved in contradictory decisions. The other objection to the two jurisdictions is still stronger. It cannot be wise to keep the machinery of justice so imperfect that one court shall not be able to decide the whole of a cause. . . . Though courts of equity have a rule, that when they have acquired jurisdiction for one purpose, they will retain it, so as to do complete justice between the parties, there are instances where a party is sent to law, after having obtained all that a court of equity could give him. So are there numerous instances, of parties driven into a court of equity to obtain adequate relief, after having exhausted all the powers of a court of law. And it has even happened, that there were different portions of the same claim, of which one belonged to a legal, and the other to an equitable tribunal." FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (New York) 73-74, 146 (1848). See also A CENTURY OF LAW REFORM 177-240 (1901); LORD BOWEN, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516 (1907).

22 Mich. Comp. Laws (1948) §611.2. The text of this statute is set out in the text at note 49 infra.

were commenced in the wrong court. However, the very same factors previously causing injustice still exist to foster inconvenience and delay in the trial of lawsuits, especially in the situations like those that follow.

By express statutory prohibition, legal and equitable causes of action cannot be joined in Michigan.[23] Two Michigan cases point up the inconvenience inherent in this restriction. *Peczeniuk v. Danielak*[24] involved a bill to foreclose a real estate mortgage. Both the original mortgagor and the subsequent purchaser of the premises were joined as defendants. Each defendant filed a cross-bill in the nature of indebitatus assumpsit against the other. The plaintiff abandoned his action leaving only the cross-bills between defendants, upon which the lower court rendered judgment. On appeal the whole action was dismissed, the court citing the statutory prohibition against joinder of legal and equitable causes and remitting the defendants to actions at law.[25]

A more recent case, *Monroe v. Bixby*,[26] likewise involved a bill to foreclose, but the court here set aside a decree dismissing the bill. However, recovery was denied the plaintiff on a separate claim regarding furniture alleged to have been left on the premises when the mortgagor took possession. The court cited the *Peczeniuk* case in denying the latter claim.

It is submitted that under procedure providing for but one cause of action, there could have been complete disposition of all the issues involved in these two cases in a single proceeding.[27] In both actions, evidence bearing on the legal issues in dispute was presented for the purpose of resolving the equitable question

23 ". . .but legal and equitable causes of action shall not be joined." Mich. Comp. Laws (1948) §608.1.

24 277 Mich. 151, 269 N.W. 125 (1936).

25 The Michigan Supreme Court at page 153, *sua sponte* propounded the following question: "In this suit to foreclose a mortgage, with foreclosure abandoned by the plaintiff, what jurisdiction did the court have to enter an assumpsit judgment upon claims of one defendant against the other, arising out of alleged agreements wholly foreign to the foreclosure suit?" The record discloses no objection by either defendant to chancery's jurisdiction to try the matter.

26 330 Mich. 353, 47 N.W. (2d) 643 (1951).

27 In regard to the maintenance of cross-claims between defendants under the federal rules see amended rule 13 (g) and committee note of 1946 to amended § (g) for express authorization to state cross-claims "relating to any property arising out of the subject matter of the action." See also 3 MOORE, FEDERAL PRACTICE, 2d ed., §13.31 (1948). In regard to joinder of legal claims wholly independent of equitable claims under the federal rules, see Holcomb v. Holcomb, (D.C. Cir. 1954) 209 F. (2d) 794, where the court states, "It follows that a wife's suit to assert a right in her husband's property is distinct from and unrelated to her suit for divorce. Nevertheless two such actions may be joined, under Rule 18 (a), Federal Rules of Civil Procedure. . . ."

of foreclosure, and the conclusions drawn thereupon could have been used to resolve the legal claims at the same time.[28] Admittedly, as the court stated in the *Peczeniuk* case, the cross-claim between co-defendants had nothing to do with plaintiff's right to foreclose. However, both defendants were present in court at the same time, each with a desire to settle the dispute between them that had arisen out of the property which was the subject matter of the action. Rather than having the distinction between law and equity as the arbitrary basis for compulsory separation of actions, trial convenience should dictate the result on this question. The trial convenience theory is recognized in the same section of the statute that prohibits the joinder of law and equity actions in respect to actions joined within each side of the court, thus bringing common sense to at least a portion of the actions filed.[29]

Not only does the law-equity distinction in Michigan practice limit the joinder of wholly independent actions, but also it may result in a court being unable to grant all the relief necessary to complete disposition of a single cause of action. This result is illustrated in two recent cases, *Kundel v. Portz*[30] and *Bologa v. Pitsillos*.[31] Each plaintiff alleging misrepresentation brought an action at law to recover money paid under a contract to purchase and to cancel promissory notes given under said contract. Each was awarded a judgment on the merits, but both requests for cancellation of the notes were denied because the actions were brought on the law side of the court and only the judge sitting in chancery could so decree. This result necessitated a second suit in each case—a needless burden upon the time of the court, the attorneys, and their clients.

It may be argued that the plaintiff in each case initially should have brought his action in chancery since it is well established in Michigan that both law and chancery have concurrent jurisdiction to give relief for fraud.[32] The power of equity to return the pur-

[28] The effect of a demand for jury trial on any of the legal issues is discussed infra under the heading *Judicial Marshaling of Trial.*

[29] This discretion to order separate trials exists presently in Michigan with regard to joinder of separate causes within the two sides of the court. See Mich. Comp. Laws (1948) §608.1, wherein is found the provision as follows: "If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials. . . ." Similar provision would be carried over to a merged procedure by adoption of federal rule 42 (b), "The court in the furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third party claim. . . ."

[30] 301 Mich. 195, 3 N.W. (2d) 61 (1942).

[31] 308 Mich. 182, 13 N.W. (2d) 253 (1944).

[32] Marshall v. Ullmann, 335 Mich. 66, 55 N.W. (2d) 731 (1952); Fred Macey Co. v. Macey, 143 Mich. 138, 106 N.W. 722 (1906).

chase money and to cancel the notes would have avoided the necessity of two actions. This result is not as certain as it may first appear because of the possibility of an equitable defense being sustained and thus defeating the power of equity to decide the case. For example, it is often difficult, as a practical matter, to determine whether delay in rescinding an allegedly fraudulent contract constitutes affirmance of the bargain. In a decision involving facts substantially the same as those in the cases under consideration, the Michigan Supreme Court held that delay or laches short of the statute of limitations is not a defense to a later action at law for damages based on the fraud.[33] Therefore, had either Kundel or Bologa been guilty of laches, a second action at law would inevitably follow in order that relief could be given on the legal aspect of their claims. So there is possibility that two actions will be required to obtain a final settlement, no matter in which side of the court the action is commenced. Under merged procedure, legal and equitable causes of action may be joined. The court would thus have full power to grant both legal and equitable relief in cases like *Kundel* and *Bologa*. If an equitable rule such as laches is sustained to defeat a grant of equitable relief, the same court could determine the legal facet of the fraud.

There are certain situations where legal and equitable causes may be joined by means of a doctrine called "equitable joinder." It was held early, in Michigan, that once equity had taken jurisdiction over the subject matter and over the parties for one purpose, it would retain jurisdiction in order to settle all disputes relating to the same subject matter between the parties.[34] Michigan courts have, in fact, been rather liberal in allowing a joinder of related claims for legal and equitable relief on the equity side of the court.[35] But before this rule can be applied, some ground of

33 Poloms v. Peterson, 249 Mich. 306, 228 N.W. 711 (1930).

34 Rickle v. Dow, 39 Mich. 91 (1878); Chase v. Boughton, 93 Mich. 285, 54 N.W. 44 (1892).

35 Following are typical situations: *Action to Reform an Instrument and Recover on it as Reformed,* Flanagan v. Harder, 270 Mich. 288, 258 N.W. 633 (1935); *Action to Enjoin Continuing Tort and for Damages for Past Tort,* The Epworth Assembly League v. Ludington and Northern Ry., 223 Mich. 589, 194 N.W. 562 (1923); McDonald v. Sargent, 308 Mich. 341, 13 N.W. (2d) 843 (1944); Rhoades v. McNamara, 135 Mich. 644, 98 N.W. 392 (1904); *Action for Specific Performance and Damages,* Lamberts v. Lemley, 314 Mich. 417, 22 N.W. (2d) 759 (1946); Schook v. Zimmerman, 188 Mich. 617, 155 N.W. 526 (1915); Frank v. Coyle, 310 Mich. 14, 16 N.W. (2d) 649 (1944); *Action to Cancel Deed and to Recover Possession or Damages,* Ronczkowski v. Jozwiak, 230 Mich. 327, 203 N.W. 105 (1925); *Action for Accounting and for Damages,* Austin v. Socony Vacuum Oil Co., 291 Mich. 513, 289 N.W. 235 (1939); Airport Recreation Club, Inc. v. Morris, 288 Mich. 694, 286 N.W. 131 (1939); *Action for Specific Restitution and for Damages,* Heth v. Oxendale, 238 Mich. 236, 213 N.W. 133 (1927); Latimer v. Piper, 261 Mich. 123, 246 N.W. 65 (1933); *Action to Quiet Title and for Damages,* Matthews v. McLouth, 232 Mich. 468, 205 N.W. 580 (1925).

equitable jurisdiction must first be asserted and established.[36] This, of course, limits the use of equitable joinder to cases where the legal relief is only incidental to the equitable purpose of the action. Moreover, along with the doctrine of equitable joinder must be considered the recent Michigan case of *Michigan Bean Co. v. Burrel Engineering and Construction Co.*[37] Plaintiff filed a bill in equity to "remove cloud on title and for injunction" against Burrel and four materialmen, three of whom had filed liens on plaintiff's property newly constructed by Burrel.[38] Upon final decree, the lower court dismissed the bill of complaint as to all defendants except Burrel. This left a plain action at law arising from a dispute over a building contract between plaintiff and Burrel, and the judgment as rendered contained no injunctive or equitable relief. On appeal, the court dismissed the bill without prejudice to either party to transfer the cause to the law side of the court. Thus, on the facts of this case, if plaintiff fails to establish a right to equitable relief, he can get no relief at all from the chancery side of the court. The impracticability of such a rule is obvious, since often a plaintiff does not know whether he has valid rights at law or in equity until a ruling is made by the court in which he dockets his action. The problem is not unique, for the rule of the *Burrel* case, and the pleading uncertainty it fosters, arises whenever a suitor may think he is entitled to either legal or equitable relief, or both, on a particular cause of action.[39]

In addition to the more convenient administration of remedies, the ability to join legal and equitable causes of action would simplify Michigan pleading practice. Whenever an action is commenced, it must today be characterized as legal or equitable so that it may be docketed on the proper side of the court.[40] One of the fundamental grounds for docketing an action on the equity side has traditionally been the inadequacy of the remedy at law. Therefore, it follows that in order to state a valid cause of action, the inadequacy of the legal remedy must appear in the bill of complaint, or otherwise chancery cannot take jurisdiction to try

36 Sharon v. Fee, 203 Mich. 152, 168 N.W. 1045 (1918).

37 306 Mich. 420, 11 N.W. (2d) 12 (1943).

38 Plaintiff, in his brief, summarized that the bill was to "remove clouds on title, to determine invalidity of liens filed, to specifically enforce the Burrel obligation to write fixed price contract as agreed, to restrain fraudulent claims of baseless cost plus contract, to avoid multiplicity of suits in foreign jurisdicton." Plaintiff also asked that all defendants be restrained from bringing any other suits at law and a temporary injunction was, in fact, issued to that effect.

39 For example, in any of the cases cited in note 35.

40 "Section 1. Civil actions are divided into equitable actions and actions at law. . . ." Mich. Comp. Laws (1948) §611.1.

the action.[41] Under merged procedure, if the legal remedy is adequate, there likewise can be no relief granted of an equitable nature. However, in most cases, this circumstance need not be made binding at the pleading stage of the trial; rather, legal and equitable relief is awarded according to which is warranted by the proofs at trial.[42] The question need not be considered until after it has been determined that the plaintiff is entitled to some relief of either nature. Even if Michigan were to retain the present pleading requirements,[43] under a unified court system a failure to state facts sufficient to support a grant of equitable relief would not deprive the court of all jurisdiction to hear the cause. The equitable remedy could still be obtained in the same proceeding by amending the pleading in proper instances. Under this procedure the pleader would be saved the often impossible task of alleging his need for equity before an intelligent decision in the matter could be made.

The benefits derived from the ability to join legal and equitable causes of action are now enjoyed in the federal and thirty-three state jurisdictions.[44] After providing for a single form of action,[45] the federal rules further provide that a plaintiff "may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party."[46] Of the states, twenty-three achieve this result with similar rule or statutory language. Five imply as much from the creation of one form of action. Even Florida, Illinois, Iowa, and Oregon, states with two-sided courts, have expressly provided for joinder of legal and equitable claims in a single action, notwithstanding their otherwise divided court system. Most striking of all is the situation in New Jersey, where in 1947 it was *constitutionally* provided that "4. Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any

41 Marshall v. Ullmann, 335 Mich. 66, 55 N.W. (2d) 731 (1952); Cole v. McFall, 48 Mich. 227, 12 N.W. 166 (1882).

42 "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

43 See Mich. Court Rule 17(1) (1945); Mich. Comp. Laws (1948) §614.1.

44 Citations of the relevant statutes and rules are collected in Appendix B.

45 "There shall be one form of action to be known as 'civil action.'" Rule 2, Fed. Rules Civ. Proc., 28 U.S.C. (1952).

46 Rule 18(a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

cause so that all matters in controversy between the parties may be completely determined."[47] Michigan, however, is one of fourteen states which still employ either separate courts entirely, or separate divisions within one court and which do not allow the joinder of legal and equitable claims.[48] It is submitted that the establishing of a single form of action, together with a joinder rule similar to federal rule 18 (a), would cure this one important defect in Michigan practice. Such a course would carry out the spirit of the liberal joinder of claims so long established as a part of Michigan procedure.

Transfer of Actions Between Sides

A much needed reform in Michigan's dual court system appeared in the Judicature Act of 1915, where it was provided:

> "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."[49]

This section of the act was based on the common sense idea that plaintiffs need not commence, nor defendants answer, a wholly new proceeding whenever, by initial mistake, the original cause was docketed on the wrong side of the court.[50] The inequity of dismissing "mis-placed" actions was, in most cases, corrected; and, in addition, the free transfer provision eliminated much of the time and effort that had formerly preceded trial on the merits. But even this admitted improvement in trial practice was but a partial reform. The ability to transfer causes did much to remove the rigid procedural barrier between the separate jurisdictions of law and equity, but left, as analysis will show, many of the appurtenant complexities inherent in divided practice.

The earliest Michigan case illustrating one weakness of transfer as a means for preventing procedural mistrial was that of

47 N.J. CONST., art. 6, §3, ¶4.

48 They are Alabama, Delaware, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, West Virginia.

49 Mich. Comp. Laws (1948) §611.2.

50 Sunderland, "The Michigan Judicature Act of 1915," 14 MICH. L. REV. 273 (1916).

Brennen v. Livingston Circuit Judge,[51] decided in 1924. An action had been commenced in the Livingston county circuit court, in chancery, by a real estate broker suing on an exclusive agency contract. Service of process was made on defendants Brennen in Washtenaw County, which was the place of their residence. Upon defendants' motion to dismiss for want of equity jurisdiction, the court agreed that there existed an adequate remedy at law and transferred the case to the law side. After the law declaration had been served, defendants appeared specially and again moved to dismiss, this time on the ground that the court lacked jurisdiction over the defendants in that original process had been served beyond the county lines, authorized in chancery suits but prohibited in law actions.[52] The motion was overruled and defendants Brennen sought review of the ruling by a mandamus proceeding against the trial judge. It was then held, by the Michigan Supreme Court, that service of process was insufficient, and the trial court was directed to dismiss the action. In the opinion, the court stated that "There is no language in the transfer statute suggesting a construction by which jurisdiction over the person in an action at law may be served through commencing, as a suit in equity, a case which should have been brought as an action on the law side of the court and serving chancery process on a non-resident defendant outside of the county in which the case is begun."[53]

This same problem has reached the Michigan Supreme Court on three successive occasions. In *Baker v. Lansing Co.*,[54] a bill in equity was filed to obtain an accounting and money decree for lumber sold to defendant. Defendant's motion to dismiss for lack of equity was denied in the circuit court. Interlocutory appeal of the ruling was denied, without prejudice, and the case remanded for hearing. Trial on the merits proceeded, resulting in a money decree for plaintiff based on evidence of admissions in letters and records of defendant's officers. After completion of the trial and award of the decree, the appellate court held that plaintiff did have, on the basis of the trial record, an adequate remedy at

51 229 Mich. 426, 201 N.W. 467 (1924).

52 "Sec. 27. All civil process issued from any court of record may be served anywhere within the state where the party upon whom service is to be made may be found, in the following cases:

1. When the process is issued out of a court in chancery;

2. When the process is issued out of a court at law, when the suit is brought in the county where the defendant, or one of the defendants if there be more than one, resides. . . ." Mich. Comp. Laws (1948) §613.27.

53 229 Mich. 426 at 430.

54 307 Mich. 493, 12 N.W. (2d) 377 (1943).

law. The action was dismissed rather than transferred on the same grounds given in the Brennen case. In the subsequent cases of *Cyril J. Burke, Inc. v. Eddy & Co., Inc.*[55] and *Marshall v. Ullmann*[56] analogous fact situations were presented, but because of interlocutory appellate rulings on the motions to dismiss, both suits were, in fact, dismissed before time and effort were expended on a needless trial of the merits.

As these cases show, the ability to transfer freely between sides of the court has not entirely prevented dismissal of actions commenced on the wrong side of the court. Existing provisions regarding the range of process have, in certain instances, rendered the transfer provision ineffective. A plaintiff suing out-of-county residents in equity risks dismissal rather than transfer whenever objection is made to the jurisdiction of equity over the subject matter. In cases like *Baker v. Lansing,* where the character of the action was not clear until trial was had, the lapse of time before dismissal may be sufficient to bar the action from ever being brought. In all cases where interlocutory review is had to obtain a conclusive ruling as to jurisdiction, the delay and expense is substantial. A modern society should not tolerate the delay, expense and even deprivation of rights made necessary under present statutes.

Michigan's transfer statute is a verbatim copy of federal equity rule 22, superseded, in 1938, by the new federal rules providing a complete merger of law and equity proceedings.[57] Many of the weaknesses of free transfer can be observed by comparing it with the practice under a completely merged procedure. The most obvious difference is the elimination of the need for transfer in a unified court with one form of action. Because there is no unnecessary procedural distinction between law and equity under federal practice, there is only one place to commence a civil action.[58] Under Michigan practice, however, a motion to transfer a cause to the opposite side of the court involves a determination of whether the action is legal or equitable. Such a determination involves a delay in getting to the merits of the claim. The length of this delay depends, to a great extent, on how clearly legal or

[55] 332 Mich. 300, 51 N.W. (2d) 238 (1952).

[56] 335 Mich. 66, 55 N.W. (2d) 731 (1952).

[57] Grauman v. City Co. of New York, (S.D. N.Y. 1939) 31 F. Supp. 172. For a detailed discussion of federal equity practice under this rule, see 2 MOORE, FEDERAL PRACTICE, 2d ed., §2.03 (1948).

[58] "The Federal Rules of Civil Procedure have abolished the forms of action and procedural distinctions, and provide for a single action and mode of procedure." Ransom v. Staso Milling Co., (D.C. Vt. 1941) 2 F.R.D. 128.

equitable the particular action happens to be. From the cases discussed above it is apparent that interlocutory appeal or mandamus is sometimes required when the character of the action is not clear.[59] Actions commenced in equity may have to be transferred if at any time during the course of the trial the facts supporting equitable jurisdiction cannot be established or become altered.[60] Under blended procedure the court may determine the legal issues, if any, in whatever manner convenience allows when facts supporting the equitable claim evaporate.[61] Trial convenience is not a criterion by which Michigan judges may retain jurisdiction and dispose of all the issues between the parties, because if the nature of the action is clearly legal, the court must transfer it to the law side.[62] On the other hand, if neither party moves for transfer during the course of the trial, the appellate court may dismiss the action upon a holding that trial was had on the wrong side.[63]

Equitable Defenses to Actions at Law

At the present time in Michigan, a separate chancery suit is required whenever a defendant wishes to assert an equitable rule or principle as a defense to a legal cause of action.[64] A court of law has no jurisdiction to apply rules of equity, even when to do so would necessarily defeat or diminish an otherwise valid legal claim.[65] For example, a defense to an ejectment action cannot be based upon grounds that the deed involved was drawn under a mutual mistake of fact, for the Michigan Supreme Court has stated:

59 That mandamus will issue in order to correct an erroneous order of transfer, see Commissioner of Insurance v. Lapeer Circuit Judge, 302 Mich. 614, 5 N.W. (2d) 505 (1942).

60 In contract action for injunction and specific relief, where agreement had six months to run at time suit was commenced, held, expiration of the six month period before case could be heard on the merits made transfer not only proper, but obligatory. White Star Refining Co. v. Evans, 269 Mich. 636, 257 N.W. 915 (1934); and comment, 14 MICH. S.B.J. 358 at 360 (1935). See also Christian v. Porter, 340 Mich. 300, 65 N.W. (2d) 779 (1954).

61 Infra, *Joinder of Legal and Equitable Causes of Action.*

62 Christian v. Porter, 340 Mich. 300, 65 N.W. (2d) 779 (1954); White Star Refining Co. v. Evans, 269 Mich. 636, 257 N.W. 957 (1934); Lake Superior Brass Foundry Co. v. Houghton Circuit Judge, 209 Mich. 380, 176 N.W. 409 (1920).

63 Kamulski v. Head, 317 Mich. 132, 26 N.W. (2d) 735 (1947); Policha v. Voss, 292 Mich. 494, 290 N.W. 881 (1940). Such dismissals are made without prejudice to either party to move the trial court for transfer within a specified period after the appeal decision, provided, of course, there is no personal jurisdiction problem.

64 Olmstead v. Johnson, 313 Mich. 57, 20 N.W. (2d) 809 (1945); Barker v. Klingler, 302 Mich. 282, 4 N.W. (2d) 596 (1942); Scott v. Grow, 301 Mich. 226, 3 N.W. (2d) 254 (1942); Thompson v. Doore, 269 Mich. 466, 257 N.W. 864 (1934); Bush v. Merriman, 87 Mich. 260, 49 N.W. 567 (1891); Jeffery v. Hursh, 42 Mich. 563, 4 N.W. 303 (1880).

65 Critz v. Cropsey, 190 Mich. 690, 157 N.W. 356 (1916); Barnes v. Spencer & Barnes Co., 162 Mich. 509, 127 N.W. 752 (1910); Dole v. McGraw, 71 Mich. 106, 38 N.W. 686 (1888); Gardiner v. Fargo, 58 Mich. 72, 24 N.W. 655 (1885).

"In this State the distinction between law and equity, as applied to remedies, has been kept up. The courts of law have no jurisdiction to reform written agreements. The jurisdiction is exclusively vested in courts of equity, and it has long been settled that if, by reason of fraud, mistake, accident, or surprise, an instrument does not express the true intent and meaning of the parties, equity will upon satisfactory evidence reform it."[66]

The additional formality required by a separate suit in chancery may cause delay and expense both to the court and to the parties. The parties must prepare and file two sets of pleadings. The plaintiff in equity must set forth, in his complaint, facts sufficient to support a decree for the relief requested. If it is desirable to restrain further prosecution of the law action, he is required in addition to pray for a temporary injunction.[67] Process must be issued and served as in any chancery suit.[68] When the defendant answers, he may be restrained from proceeding with his legal action until the court, in chancery, disposes of the equitable claims which might affect the outcome of that action.[69] If the legal action restrained is a personal action, the party applying for the injunction must post a bond to cover damages and costs that might result from the stay of proceedings.[70] This is mandatory and cannot be dispensed with by the court.[71] If the action restrained is one for the recovery or possession of real property, a similar bond must be executed if that action is stayed after verdict has been ren-

66 Bush v. Merriman, 87 Mich. 260 at 268, 49 N.W. 567 (1891).

67 "Sec. 3. Where an injunction or temporary injunction or other extraordinary process is desired, the same shall be prayed for specifically. The prayer for summons may be omitted and the plaintiff shall be entitled to process of summons on filing the bill of complaint, and to other process when prayed for and ordered by competent authority." Michigan Court Rule 21 (1945).

68 Ibid.

69 See, e.g., Noble v. Grandin, 125 Mich. 383, 84 N.W. 465 (1900) (contract action enjoined); Gross v. Kay, 330 Mich. 156, 47 N.W. (2d) 59 (1951) (action on a check enjoined); Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114, 123 N.W. 547 (1909) (action on insurance policy enjoined); Maes v. Olmsted, 247 Mich. 180, 225 N.W. 583 (1929) (action of ejectment enjoined).

70 "No injunction shall issue to stay the trial of any personal action in a court of law, until the party applying therefor shall execute a bond with one (1) or more sufficient sureties, to the plaintiff in such action at law, in such sum as the circuit judge or other officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff, or his legal representatives, of all moneys which may be recovered by said plaintiff, or his representatives, or the collection of which may be stayed by such injunction, in such action at law, for the debt or damages, and for the costs therein; and also for the payment of such costs as may be awarded to them in the court in chancery, in the suit in which such an injunction shall issue." Mich. Comp. Laws (1948) §619.8.

71 Quail v. Wayne Circuit Judge, 249 Mich. 425, 228 N.W. 775 (1930).

dered.[72] It is discretionary with the court to require a bond upon issuance of a preliminary injunction whenever there is no rule or statute so requiring.[73]

The additional formality required by the divided procedure, together with the need for restraining further proceedings in the original law action, could be wholly eliminated by combining the separate jurisdictions of law and equity. In the federal courts, for example, a party defending against a legal claim is allowed to plead, in his answer, any equitable claims he may have against his opponent.[74] Likewise, an attack on such an equitable claim can be made by reply if the claim has been denominated as a counterclaim or if the court feels a reply would be desirable.[75] In other words, the substance of purely equitable matters may be set forth, in a unified procedural system, in the same pleading that Michigan procedure would limit to law matters.

Furthermore, if all claims and defenses between the parties can be presented in a single action, there is no need to issue a preliminary injunction or to execute a statutory bond. While it may be advantageous to determine the equitable matters before the legal claims, the trial judge does not have to enjoin anyone from proceeding with the legal aspects of the case. The priority of equity is maintained when convenient, under merged procedure, by the court's discretion to order hearings on the equitable issues before taking up the legal issues.[76]

The needless procedural formality of separate actions at law and in equity to resolve a single dispute is avoided in the twenty-nine jurisdictions where procedural differences between law and equity have been abolished in favor of one form of action.[77] Ten states with divided courts, in an effort to accomplish the results of a unified procedure, have recognized the practical advantage

72 Mich. Comp. Laws (1948) §619.13. The provision is mandatory. Chamberlain v. Durfee, 264 Mich. 194, 249 N.W. 486 (1933).

73 Barkovits v. Veres, 254 Mich. 543, 236 N.W. 857 (1931); American Foundry & Machinery Co. v. Charlevoix Circuit Judge, 138 Mich. 167, 101 N.W. 210 (1904).

74 "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." Rule 18 (a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

75 "There shall be a complaint and an answer; and there shall be a reply to be counterclaim denominated as such; . . . No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer." Rule 7 (a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

76 This subject and the effect of a timely demand for jury trial is discussed infra under the heading *Judicial Marshaling of Trial.*

77 Citations of the relevant statutes and rules are collected in Appendix A.

of pleading "equitable defenses" in actions at law, and have enacted statutes permitting it, making a total of 39 jurisdictions allowing the pleading of equitable defenses.[78] Only Michigan and eight other states still require equitable claims and defenses to be tried in a separate action in chancery.[79]

The adoption of the so-called "equitable defense" statutes without a full consolidation of law and equity proceedings has not proved satisfactory.[80] As Professor Hinton points out, an equitable defense is not actually a defense at all, but rather a claim for affirmative relief historically cognizable only in equity.[81] For example, a claim of fraud or mistake may be grounds for reformation or cancellation of an instrument in equity. Nothing about such an affirmative claim is in the nature of a defense. Yet when the instrument is sued upon in an action at law, recovery may be diminished or even denied if the equitable grounds for reformation or cancellation can be asserted successfully. In this respect, the assertion of equitable claims of fraud or mistake appears to be a defensive tactic but is not strictly a defense.

This historical conception has caused unsatisfactory results under many equitable defense statutes. Construction of such statutes has resulted in three general interpretations of what can be pleaded as an equitable defense. The first is to the effect that any equitable matter, which if sued upon in chancery would have restrained the pending law action, could be pleaded as a defense to the law action. The Oregon provision and the decisions under it are illustrative of this view.[82] This provision appears reasonably satisfactory since the basic purpose of eliminating two separate actions where one would be enough is, to some extent, accomplished. Nevertheless, the court must decide at the pleading stage what equitable matters are material to the defense.[83] Equitable

78 Citations of the relevant statutes and rules are collected in Appendix C.

79 They are Delaware, Michigan, Mississippi, New Hampshire, Pennsylvania, Tennessee, Virginia, Vermont, and West Virginia.

80 Hinton, "Equitable Defenses Under the Codes," 18 MICH. L. REV. 717 (1920); Cook, "Equitable Defenses," 32 YALE L.J. 645 (1923); CLARK, CODE PLEADING, 2d ed., §98 (1947); McBaine, "Equitable Defenses to Actions at Law in the Federal Courts," 17 CALIF. L. REV. 592 (1929); Adams, "Federal Practice as to Equitable Defenses in Actions at Law," 10 A.B.A.J. 467 (1924); POMEROY, EQUITY JURISPRUDENCE, 5th ed., §§1366-1374 (1941).

81 Hinton, "Equitable Defenses Under the Codes," 18 MICH. L. REV. 717 (1920).

82 ". . . [C]ross-bills are abolished; . . . [and] in an action at law where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matter up by answer, without the necessity of filing a complaint on the equity side of the court. . . ." Ore. Rev. Stat. (1953) §16.460; comment, 34 ORE. L. REV. 55 (1954).

83 Hunt v. Bishop, 191 Ore. 541, 229 P. (2d) 960 (1951); Jacobson v. Wheeler, 191 Ore. 384, 230 P. (2d) 550 (1951).

issues setting forth a counterclaim cannot appear in the answer for the statute authorizes the pleading of defenses only.[84] Furthermore, there is danger that the right to jury trial would be unduly expanded under a statute that makes historically equitable issues into defenses at law. Indeed, this has been thought to be the reason for the remaining two interpretations which define an equitable defense more narrowly.[85]

The second interpretation of what may be pleaded as an equitable defense can be summarized by saying that some, but not all, equitable matters can be pleaded by way of answer to an action at law. It is impossible to classify all the grounds that have been relied on in the effort to determine the scope of an equitable defense within this category, but a decision construing the Maine statute is typical of this narrower view.[86] The case involved an action to foreclose a mortgage on real property. The answer alleged that the instrument was created under mutual mistake, and that if reformed, as it ought to be, the plaintiff would have no present right to foreclose. In ruling that such matter could not be pleaded by way of defense, the Maine Supreme Court said:

> "This right of reformation of a written instrument is not mere matter of defense to an action in which the instrument is set up as the basis or source of a right. It is an independent affirmative right arising as soon as the instrument is delivered. Being independent of any action at law and requiring decrees in equity for its enforcement, it should be enforced by a separate suit in equity and not interposed as an equitable defense to an action at law. . . . The statute, R.S., ch. 84, sec. 17,[87] does not go so far as to provide that it shall, or even may, be done in an action at law."[88]

Thus it can be seen that under such a statute, construed as it was by the Maine court, there would be no procedural simplification in cases like *Bush v. Merriman,*[89] discussed previously. There

84 Hamilton v. Hamilton Mammoth Mines, 110 Ore. 546, 223 P. 926 (1924).

85 Hinton, "Equitable Defenses Under the Code," 18 MICH. L. REV. 717 at 732 (1920).

86 Martin v. Smith, 102 Me. 27, 65 A. 257 (1906). The equitable defense statute then governing provided: "Any defendant may plead in defense to any action at law in the supreme judicial court, any matter which would be ground for relief in equity, and shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff; such matter of defense shall be pleaded in the form of a brief statement under the general issue. And, by counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of defendant." Maine Rev. Stat. (1903) c. 84, §17.

87 Ibid.

88 Martin v. Smith, 102 Me. 27 at 32.

89 87 Mich. 260, 49 N.W. 567 (1891).

are few equitable matters that could not, with historical justification, be called independent and affirmative. To do so would render the equitable defense statute completely meaningless.

The 1915 amendment to the judicial code provided an equitable defense statute in federal procedure.[90] The construction given this provision by the federal judges represents the third interpretation of an equitable defense statute. The statute provides no new defenses, but rather provides a new way of obtaining equitable relief by the device of a cross-action. Thus it was stated by the Eighth Circuit:

> "We are clearly of the opinion that, when equitable relief is asked in an action at law under the statute above quoted, the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what otherwise must frequently ensue—confusion and embrassment in the progress of the action."[91]

This idea was subsequently followed by later constructions of the provision.[92] It would appear that such a statute would do little to simplify present Michigan procedure, since as interpreted by the federal courts the distinction between actions at law and suits in equity was maintained. The federal practice of always trying the equitable cross-action before the law action preserves the absolute priority given to suits in equity by the Michigan practice of restraining further proceedings at law. The better practice, from the standpoint of trial convenience would be to allow the trial judge discretion to order trial of the issues, whether legal or equitable, in whatever order the exigencies of the case before him required.[93]

The foregoing equitable defense interpretations result from provisions in jurisdictions with otherwise divided courts of law and equity. It should be noted that the same problems have arisen under merged procedures in circumstances where the pleader is

[90] "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication." 38 Stat. 956 (1915).

[91] Union Pacific Ry. Co. v. Syas, (8th Cir. 1917) 246 F. 561 at 566.

[92] Fay v. Hill, (8th Cir. 1918) 249 F. 415; Liberty Oil Co. v. Condon Nat. Bank, 260 U.S. 235 (1922).

[93] This subject is discussed infra under the heading *Judicial Marshaling of Trial.*

required to state in his answer or reply, whether the equitable matter pleaded is a defense or a counterclaim.[94] The historical conception of the affirmative nature of equitable relief as observed by Professor Hinton has made impossible a clearcut distinction between equitable defenses and counterclaims.[95] If the pleader is rigidly required to apply the correct label to the equitable matter set forth in the answer or reply, undue procedural formality will result in cases where the wrong name has been used. In an effort to provide a clearer test some courts in the code states have stated that equitable matter calling for affirmative relief is a counterclaim, while equitable matter not requiring affirmative relief is a defense.[96] However, such a test is not practical as its effect is to shift the problem of defining a defense to that of defining affirmative relief, equally subject to confusion. Courts can hold that all equitable relief is affirmative by using the historical analogy previously discussed.

The practice under present federal procedure has been most satisfactory.[97] Discretion is given to the court, on terms, to treat pleading improperly designated as properly designated.[98] If the opposite party is led to believe that a counterclaim is a defense because it was mistakenly named, the court, under rule 7 (a), has the discretion to permit a reply, and thus allow a defense to such counterclaim.[99]

Counterclaim

In Michigan there are several methods by which a defendant may assert a claim against a plaintiff. The common law right of recoupment has been recognized by statute.[100] It allows a defend-

94 Note 80 supra.

95 Note 81 supra.

96 See, e.g., Susquehanna S. S. Co. v. A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381 (1925); Chicago & N.W. R. Co. v. McKeigue, 126 Wis. 574, 105 N.W. 1030 (1906).

97 CLARK, CODE PLEADING, 2d ed., §98 (1947).

98 ". . . When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Rule 8 (c), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

99 Note 75 supra.

100 "In any action, in any court, if the defendant shall claim damages by way of recoupment, by plea or otherwise, in pursuance of the rules and practices of such court, and on the trial of the issue formed, if the court or the jury trying the same shall find such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount of the demand of the plaintiff, the court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff, as in cases of judgment and execution on plea or notice of off-sets." Mich. Comp. Laws (1948) §615.10.

ant to recover damages due him based on the cross-liability of the plaintiff growing out of the same transaction.[101] A statutory right of set-off is also provided whereby a defendant may reduce his liability by setting off claims arising from judgment or contract.[102] If such claims result in a balance due the defendant, an affirmative judgment may be rendered accordingly.[103] In addition to set-off and recoupment, a defendant to any action based on grounds of negligence or breach of statutory duty may file a cross-declaration of negligence based on the occurrence forming the basis of the plaintiff's case.[104] In chancery cases for the payment and recovery of money set-off is allowed in the same manner as in actions at law.[105] The more usual method of obtaining affirmative relief from a plaintiff in chancery, however, is by cross-bill.[106]

No matter which of these methods are used by a defendant, it is clear that he is not allowed to allege against a plaintiff an equitable claim in a law action or a legal claim in chancery. It has been

101 Ladd v. Reed, 320 Mich. 167, 30 N.W. (2d) 822 (1948); Meyers v. Jay-Bee Realty Corp., 300 Mich. 522, 2 N.W. (2d) 488 (1942).

102 "In the following cases and under the following circumstances a defendant may set off demands which he has against the plaintiff:

1. It must be a demand arising upon judgment or decree, or upon contract express or implied . . . ;

2. It must be due to him in his own right . . . ;

3. It must have existed at the time of commencement of the suit, and must then have belonged to the defendant;

4. It can be allowed only in actions found upon demands which could themselves be the subject of set-off according to law;

5. If there be several defendants, the demand set-off must be due to all of them jointly . . . ;

6. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff having no real interest in the contract upon which the suit is founded. . . ." Mich. Comp. Laws (1948) §615.1.

103 "If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered for the defendant for the amount thereof. . . ." Mich. Comp. Laws (1948) §615.5.

104 "In any action hereafter brought in any court of the state to recover damages for any injury to person or property, wherein recovery is sought because of the alleged negligence of the defendant, . . . or for the alleged breach of a statutory duty owing thereby, such a defendant may at the time of filing and serving his plea, also file and serve a cross-declaration against the plaintiff setting forth the facts in any cause of action for damages or injury to his person or property because of the alleged negligence of the plaintiff . . . arising out of the occurrence, forming the basis of the plaintiff's case. . . ." Mich. Comp. Laws (1948) §615.11.

105 "In suits in equity for the payment and recovery of money, set-offs shall be allowed in the same manner, and with the like effect, as in actions at law." Mich. Comp. Laws (1948) §615.9.

106 "In any action in equity where a defendant desires to obtain affirmative relief against a plaintiff or co-defendant, he may file a cross bill." Michigan Court Rule 22, §1 (1945); the issues raised by the cross bill must be germane to the original bill, Youngs v. West, 317 Mich. 538, 27 N.W. (2d) 88 (1947); American State Bank of Detroit v. Van Dyke, 278 Mich. 471, 270 N.W. 753 (1936).

repeatedly held that a court of law has no jurisdiction to try an equitable right asserted by way of set-off or recoupment.[107] Similarly, a cross-claim will not be tried in equity if the defendant would have an adequate remedy by asserting the claim as an original action at law.[108] Therefore, every claim a defendant has against his opponent, which, because of the distinction between law and equity cannot be used to defeat recovery by plaintiff, must be tried in a separate action. The additional procedural formality involved in two separate actions has been discussed with respect to pleading equitable defenses to actions at law.[109] The inconvenience involved in requiring that separate claims be made is as great as the inconvenience of requiring separate actions for equitable defenses. Indeed, the historical nature of equitable rights prevents a clear distinction between an equitable defense and an equitable claim.[110] Every reason for allowing equitable defenses to actions at law applies with equal force to allowing affirmative equitable claims to be asserted by a defendant at law.

Many jurisdictions have recognized the convenience of pleading equitable counterclaims to actions for legal relief, and vice versa. For example, Ohio allows a defendant to assert substantially the same claims against a defendant as does Michigan; that is, claims arising from the same transaction or from contract or judgment.[111] But because Ohio has established a single form of civil action,[112] it has been provided that such claims can be pleaded without regard to their legal or equitable nature.[113] Illinois courts have, like Michigan's, a law and an equity side.[114] Unlike either Michigan or Ohio provisions, that jurisdiction permits a defendant to plead any claim he may have against a plaintiff, without regard

107 Note 65 supra.

108 Landskroener v. Henning, 221 Mich. 558, 191 N.W. 943 (1923).

109 Supra, under heading *Equitable Defenses to Actions at Law.*

110 Ibid.

111 "A counterclaim is a cause of action existing in favor of one or more defendants against one or more plaintiffs or one or more defendants, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract or ascertained by the decision of a court. . . ." Ohio Rev. Code (Baldwin, 1953) §2309.16.

112 "There shall be but one form of action, to be known as a 'civil action.'" Ohio Rev. Code (Baldwin, 1953) §2307.02.

113 "The defendant may set forth in his answer as many grounds of defense or counterclaim as he has, whether such are legal or equitable, or both. . . ." Ohio Rev. Code (Baldwin, 1953) §2309.14.

114 Ill. Rev. Stat. (1955) c. 110, §44.

to the contract, judgment, or transaction limitations,[115] and without regard to the legal or equitable nature of the claim.[116] The federal rules contain the modern provisions of both Ohio and Illinois. A defendant to a civil action in a federal court may join any claims he has against an opposing party,[117] subject only to separation so as to avoid prejudice or to further convenience.[118]

No effort is herein made to point out the merits of various counter-claim rules. Whatever counter-claim rule a jurisdiction may adopt, the merger of law and equity actions into a single civil action is the logical method of accomplishing the desired result of not arbitrarily requiring separate actions at law and equity, of matters that should properly be tried at one time. All in all, thirty-five jurisdictions, most of which have the fused procedure, allow equitable counterclaims to be pleaded in an action for legal relief.[119] Michigan and twelve others have no provision authorizing the assertion of an equitable counterclaim in a law action.[120]

LIMITATIONS UPON MERGER

The Michigan Constitution does not define the extent to which it would be practicable to abolish the distinctions between law and equity proceedings. From the adoption and continued success of blended systems in the majority of American jurisdictions,[121] it would seem that a complete initial abolition is both possible and practicable. However, the history of the union of law and equity in other jurisdictions is replete with opposition based upon the

115 "Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of set-off, recoupment, cross-bill in equity, cross demand or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross demand in any action, and when so pleaded shall be called a counterclaim." Ill. Rev. Stat. (1955) c. 110, §38.

116 ". . . and subject to rules the defendant may set up in his answer any and all cross demands whatever, whether in the nature of recoupment, setoff, crossbill in equity or otherwise, which shall be designated counterclaims. . . ." Ill. Rev. Stat. (1955) c. 110, §44 (1).

117 ". . . and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. . . ." Rule 18 (a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

118 "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third party claims, or issues." Rule 42 (b), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

119 Citations of relevant statutes and rules are collected in Appendix D.

120 They are Alabama, Delaware, Massachusetts, Maryland, Michigan, Mississippi, New Hampshire, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont and West Virginia.

121 See Appendix A.

problems that might result from merger.[122] Some of this opposition was justified at the time. Many problems were encountered, and, in time, were solved. On the other hand, many of the problems visualized by the opponents to procedural merger failed to materialize with the result that some jurisdictions are unduly denied the convenience and simplicity of modern procedure.

For the most part, much of the needless opposition to the union of law and equity procedure resulted from the once understandable but unfortunate confusion of procedure with substance. Consequently, substantive distinctions have often prevented the removal of simple procedural divergencies. The source of the confusion dates back to the formative years of English jurisprudence when the chancellor first began to grant his noble relief from the harsh rigidity of the common law forms of action. In the course of time, equity matured from a procedural device, acting only when justice and conscience so warranted, into a distinct court system with a well-defined body of unique substantive law. At this point began the agitation to merge the two courts. There was no apparent reason why one judge could not preside over both—none, that is, except the obstinate belief that the two jurisdictions rested upon distinctions which were impossible to eliminate. Typical of this latter sentiment is the often quoted statement of the New York Court of Appeals as it questioned the propriety of the single cause of action: "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored."[123]

The validity of this pronouncement involves two significant questions. Are there in fact inherent differences between law and equity? And if there are, does a unified procedural system ignore them? A general analysis of certain areas of procedure provides the answers.

Commencement of Actions

A logical place to begin a search for inherent differences between law and equity is with an action's commencement. The

122 HEPBURN, DEVELOPMENT OF CODE PLEADING 162-164 (1897); Pound, "Law and Equity in the Federal Courts," 73 CENT. L.J. 204 (1911); McCormick, "The Fusion of Law and Equity in the United States Courts," 6 N.C. L. REV. 283 (1928); Clark, "The Union of Law and Equity," 25 COL. L. REV. 1 (1925); Walsh, "Merger of Law and Equity Under the Codes and Other Statutes," 6 N.Y. UNIV. L. REV. 157 (1929); Clark and Wright, "The Judicial Council and the Rule-Making Power: A Dissent and a Protest," 1 SYRACUSE L. REV. 346 (1950).

123 Jackson v. Strong, 222 N.Y. 149 at 154, 118 N.E. 512 (1917).

method by which any court must obtain personal jurisdiction over parties has traditionally been by service upon the defendant of process or notice of the action. There is no inherent difference between law and equity to preclude the same rule of commencement from governing both.

In Michigan, the style of process,[124] persons permitted to serve,[125] and the return of process,[126] are, in fact, similarly provided for by statute and court rule. However, in present practice, differences do exist between law and equity procedure for commencing actions in other respects. A law action may be commenced by issuance of an "original writ"[127] or by "declaration with notice to plead."[128] Chancery suits, on the other hand, are begun by filing a "bill of complaint."[129] In law actions, a declaration must be filed within fifteen days after service of the original writ.[130] In chancery, the bill of complaint must be filed with the court before summons will be issued.[131] In both law actions commenced by original writ and in chancery suits, the plaintiff may, as he chooses, serve a copy of the declaration or complaint on the defendant along with service of the writ or summons.[132] When a law action is commenced by declaration with notice to plead, the declaration must be filed at the time of commencement.[133]

In addition to the above differences, court rule 13 regarding original writs differs from rule 14 which governs process in chancery cases, in that the former rule contains special provisions as to the form of writs in the actions of replevin, attachment, and actions commenced by *capias ad respondendum*.[134] Other than this, the forms included within each of the two rules differ only in that they reflect the distinction between the law and equity sides of the court.

124 "The style of all process from courts of record at law and in chancery in this state shall be. . . ." Mich. Comp. Laws (1948) §613.1.

125 "All civil process at law, or in equity, issued from any court of record, except process requiring the arrest of any person, or the seizure of property, may be served by. . . ." Mich. Comp. Laws (1948) §613.22.

126 Mich. Comp. Laws (1948) §613.3, provides that all original writs in personal actions shall be made returnable according to general rule of court. Michigan Court Rule 15 regarding proof of service and return of process makes no distinction between law and chancery process. Likewise, Mich. Comp. Laws (1948) §613.38 regarding return of process makes no such distinction.

127 Michigan Court Rule 13 (1945); Mich. Comp. Laws (1948) §613.4.

128 Mich. Comp. Laws (1948) §613.4.

129 Michigan Court Rule 14 (1945); Mich. Comp. Laws (1948) §613.5.

130 Michigan Court Rule 27, §1 (1945); Mich. Comp. Laws (1948) §613.4.

131 Michigan Court Rule 14, §1 (1945); Mich. Comp. Laws (1948) §613.5.

132 Michigan Court Rule 13, §§7 and 14, §4 (1945); Mich. Comp. Laws (1948) §613.6.

133 Mich. Comp. Laws (1948) §613.4.

134 Michigan Court Rule 13, §§4, 5, and 6 (1945), respectively.

A significant difference in the range of process between law and chancery now exists in Michigan.[135] The severe consequences stemming from this difference have been previously discussed.[136]

The fundamental purpose of these provisions is identical. Arbitrary distinctions in name and formal detail are wholly superfluous and capable of elimination. It is submitted, then, that a single court rule for the commencement of civil actions, whether they are legal or equitable in nature, is possible as well as practicable. Certain actions in rem, property seizures, and arrests of the person are matters entirely apart from personal jurisdiction, and may entail special process or service by publication. However, there is no reason why they may not be commenced as civil actions and thus be subject to ordinary rules of commencement as far as applicable. Special provisions regarding such actions, may, when necessary, be based on distinctions other than that between law and equity.

Parties to Actions and Joinder of Parties

The framers of the first New York code reported:

> "The rules respecting parties in courts of law, differ from those in the courts of equity. The blending of jurisdictions makes it necessary to revise these rules, to some extent. In doing so, we have a three-fold purpose in view: first, to do away with artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such: . . . The true rule undoubtedly is, that which prevails in the courts of equity, that he who has the right, is the person to pursue the remedy. We have adopted that rule."[137]

Michigan also adopted that rule as part of the Judicature Act of 1915.[138] By doing so, an equitable rule of procedure was made applicable in law courts, for by its terms, the provision applies to "every action." A complete blending of law and equity procedure at the present time would not involve the question of who is the real party in interest, because, by continuous construction of the

135 Mich. Comp. Laws (1948) §613.27. The text of the statute is set out note 52 supra.

136 Under heading *Transfer of Actions Between Sides,* supra.

137 FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (New York) 123-124 (1848).

138 "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. . . ." Mich. Comp. Laws (1948) §612.2.

statute since 1915, there is already a substantial body of case authority available. The real party in interest under present procedure would likewise be the real party in interest under merged procedure.[139]

The law concerning joinder of plaintiffs was liberalized by the Judicature Act of 1915. Prior to that time, only plaintiffs with joint causes of action could join in one action at law.[140] In equity, each plaintiff had to have a "community of interest" and had to seek the same relief before joinder was allowed.[141] The statutory provision introduced by the act added the "convenient administration of justice" as a ground for joinder of plaintiffs.[142] It applied both to actions at law and suits in equity.[143] Since the present rule of convenience applies to either type of action, there would be no change if it were to apply to a "civil action." Furthermore, though it is not the purpose of this discussion to treat the construction given to the Michigan rule,[144] it may be said that a merger of law and equity would facilitate subsequent application of the rule of convenience. The recent trend in most American jurisdictions is toward the free joinder of plaintiffs whenever convenient.[145] If both legal and equitable claims could be joined in one action, many more situations would arise in which it would be convenient to allow plaintiffs to join their separate claims, some of which may be legal and some equitable.

139 See substantially similar provision of rule 17 (a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

140 Rogers v. Raynor, 102 Mich. 473, 60 N.W. 980 (1894).

141 Hamilton v. American Hulled Bean Co., 143 Mich. 277, 106 N.W. 731 (1906).

142 "The plaintiff may join in one action, at law or in equity, as many causes of action as he may have against the defendant, but legal and equitable causes of action shall not be joined; but when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant, the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. . . ." Mich. Comp. Laws (1948) §608.1.

143 Gilmer v. Miller, 319 Mich. 136, 29 N.W. (2d) 264 (1947).

144 See Bajorek v. Kurtz, 335 Mich. 58, 55 N.W. (2d) 727 (1952), noted in 51 MICH. L. REV. 1068 (1953). See also, 14 DETROIT LAWYER 228 (1946).

145 Blume, "Free Joinder of Parties, Claims, and Counterclaims," 2 F.R.D. 250 (1941). The federal rules allow joinder based upon convenience, viz., "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. . . ." Rule 20 (a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

Pleading

Pleading is a matter of court administration, a means to an end. While the relief sought in a particular action may well involve inherent substantive characteristics peculiar to itself, the pleading, which is no more than a device to aid in the quest for such relief, need not bear a similar distinction. No matter what the action, one purpose of all pleadings is to inform the opposite party and the court of the claim for which it stands, a concept early announced by the Michigan Supreme Court.[146] Moreover, general pleading requirements have been conspicuously influenced by the common sense liberality of equity procedure.[147] Less attention is being given to matters of technical form.

At the present time, matters of form and mechanics in respect to pleadings on either side of Michigan's courts are, for the most part, commonly prescribed by court rule.[148] Court rules 19 and 21 supposedly differentiate the form and content of declarations at law from bills in equity. However, the only distinction between the two is the requirement that causes of action at law are to be designated "counts" and those in equity "divisions." Neither rule contains an exclusive provision not contained in the other, and the two could well be combined if only for the purpose of removing duplication.

Apart from the court rules above discussed, there remains by statute a significant vestige of pleading duality regarding the classification of actions at law. Assumpsit, trespass on the case, replevin, and ejectment have been preserved as forms of action into which a pleader must fit his case.[149] The technical distinctions among these several forms, once so stringently regarded, have now been rendered of no purpose and, in view of modern pleading theory, might well be abolished entirely. Such was the view of

146 "Pleadings are required for the purpose of apprising the opposite party and the court of matters upon which the pleader relies, and to which the evidence is to be directed; and they are generally sufficient when they fully accomplish this purpose." Cooley, J., People ex rel. Benoit v. Miller, 15 Mich. 354 at 357 (1867). For similar statements as to declarations in particular see Merkle v. Township of Bennington, 68 Mich. 133, 35 N.W. 846 (1888); and as to chancery pleadings, Anderson v. Mollitor, 223 Mich. 159, 193 N.W. 851 (1923). Blume, "Theory of Pleading," 47 MICH. L. REV. 297 (1949).

147 See Michigan Court Rules 17 and 23 generally. Most of the provisions contained therein originated in early equity practice. See generally MAITLAND, EQUITY (1910).

148 Caption, Rule 7; General Rules of Pleading, Rule 17; Answer and Reply, Rules 23-24; Amendment of Pleadings, Rules 25-26; Filing, Rule 27.

149 Mich. Comp. Laws (1948) §611.1.

the New York commissioners as early as 1848.[150] The Judicature Act of 1915 had reduced the number of these forms in Michigan to the four mentioned above. The reason why all were not abolished was stated by Professor Sunderland in his comment on the act:

> "The attempted retention of assumpsit and case was doubtless a concession to the prejudice of a conservative profession. There has always been a strong antipathy among lawyers of this State to Code Pleading, and nothing which too clearly resembled that much distrusted system could have passed the legislature. 'Assumpsit' and 'trespass on the case' sounded entirely orthodox and respectable, and exorcised the bogy of a 'Code' defection."[151]

Therefore, in view of these considerations, it is submitted that the four remaining ordinary forms of action be abolished in order to complete the process of simplification already begun by the 1915 act. Indeed, the distinctions between actions themselves cannot be removed if the distinctions between their forms are not also abolished.

It should be noted that in addition to the ordinary forms of action, the Judicature Act also preserves the extraordinary actions of certiorari, mandamus, and quo warranto.[152] However, these actions, together with other special proceedings such as habeas corpus, divorce, and appeals from administrative boards and commissions are matters requiring special provisions because of the inherent distinctions which they involve. Such distinctions, however, are not based upon differences between law and equity. The unification of procedure would in no way prevent special provision from governing these areas of extraordinary procedure.

150 "From the period of which we have been speaking—a period comparatively benighted and ignorant, in all that is valuable in science—to the present, these forms have been adhered to with a sort of bigoted devotion. While the principles of legal science have expanded and adapted themselves to the exigencies of each successive age, through which they have passed, we find ourselves met with the standing argument against improvement, that the time honored institutions of ages must be held sacred, and that these forms, which may have been well suited to the age in which they originated, must be left untouched. Is there, in truth, any soundness in such a doctrine? Can it be possible, that the progress which has characterized almost every age since that period, and which is the distinguishing feature of the present day, must stop in its application to the machinery by which rights are to be vindicated and wrongs redressed?" FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (New York) 87 (1848).

151 14 MICH. L. REV. 383 at 385 (1916).

152 Mich. Comp. Laws (1948) §611.1.

Nature of Relief

A fundamental distinction between law and equity exists with respect to the nature of relief historically obtainable within each.[153] As a general proposition, courts of law render judgments for money damages, or for recovery of specific real and personal property. Equity has power, in certain cases to award specific relief of many kinds. It is most clear that there is differentiation and demarcation between legal and equitable remedies. The differences involved are differences of substantive law which concern the existence of rights and remedies available.

The goal of procedural merger is to provide a single unified procedure for the purpose of invoking the appropriate legal and equitable remedy, depending only upon the substantive differences. The precise nature and extent of substantive distinctions between legal and equitable remedies is immaterial from this point of view, since merger does not affect substantive law. This principle of the scope of merger has often been stated by federal courts, which, since 1938, have operated under a single form of action and a complete joinder of law and equity procedure. For example, Judge Holtzoff for the District Court of the District of Columbia has stated:

> "The distinction between equitable and legal rights, and between equitable and legal remedies, still exists in the Federal courts in full force. While the new Federal Rules of Civil Procedure . . . have done away with the separation between actions at law and suits in equity, and have substituted one form of action, known as 'civil action', this merger does not reach beyond an abolition of procedural distinctions between law and equity. This differentiation between equitable and legal doctrines, and between equitable and legal remedies, is part of the warp and woof of Anglo-American jurisprudence and is deeply embedded in our system of law. It has not been abrogated or affected by the commendable simplification of procedure. Consequently, in determining whether an injunction should be granted, the basic doctrines of equity come in to play."[154]

And in the District Court for New Jersey, the following is a statement by Judge Smith:

> "The Rules of Civil Procedure established a uniform sys-

[153] POMEROY, CODE REMEDIES, 5th ed., 14 (1941).

[154] Byram v. Vaughn, (D.C. D.C. 1946) 68 F. Supp. 981 at 984.

tem of procedure for law and equity and eliminated only the formal distinction. The 'civil action' is a mere procedural unit and the joinder, as in this case, of legal and equitable causes of action, which the rules permit, does not require or even warrant their being considered as a unit for purpose of trial. While the rules affect a unity of procedure they do not effect a merger of remedies. Legal and equitable remedies, while they may be administered in the same proceeding, must be administered separately as heretofore. It is not intended that the remedies shall be either jointly or interchangeably administered at the will or demand of the litigants. The rights and remedies of the respective parties remain unaffected."[155]

Right to Jury Trial

By far the most significant difference between trials at law and those in chancery involves the right to trial by jury. The distinction is fundamental; and is made so by the constitutional guarantee that the right to jury trial shall remain.[156] This means that it must remain as it was at common law when the constitution was adopted, a right then cognizable at law but not available in chancery.[157] How then, is it possible to preserve this right if the distinction between actions at law and suits in chancery is abolished? Every combined court jurisdiction has faced this question, for a similar constitutional guarantee is common to all of them.[158]

First of all, it is necessary to determine the nature of the right to jury. At common law the jury right was cognizable in law cases, but there was no right to have a jury try the entire case. Only the issues or questions of fact which comprised a case at law were the proper subject of jury determination, while the judge determined the issues or questions of law.[159] So it may be said that the jury right preserved by the constitution was a right to have questions of fact on legal issues tried by a jury. Therefore, the distinction between actions at law and suits in equity can be abolished if the fundamental right to a jury method of trial can be preserved on

155 Fitzpatrick v. Sun Life Assur. Co. of Canada, (D.C. N.J. 1941) 1 F.R.D. 713 at 715.

156 "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law." MICH. CONST., art. II, §13.

157 Bielby v. Allender, 330 Mich. 12, 46 N.W. (2d) 445 (1951); Swart v. Kimball, 41 Mich. 443, 5 N.W. 645 (1880).

158 BLUME, AMERICAN CIVIL PROCEDURE §9.01 (1955); Colorado has no constitutional right to jury in civil cases. COLO. CONST., art. II, §23.

159 Peoples Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170 (1930).

each and every fact issue where that right presently exists on the law side of the court. In other words, all other distinctions between actions can be eliminated, if the distinction between fact issues is kept, thus allowing fact issues in what are presently law actions to be tried to the jury when demanded. Survey of those jurisdictions already employing a combined procedure shows that the jury right is preserved by one of three general types of statutes.

The oldest of the three is the Field-type statute. In New York and those jurisdictions with similar provisions, the legal or equitable character of the fact issues does not determine the right to jury trial of those issues. Rather, there has been an attempt to classify "actions" in which a jury determination of fact can be had. Thus a demand for jury must be granted in the following instances:

> "1. An action in which the complaint demands judgment for a sum of money only.
>
> 2. An action of ejectment; for dower; for waste; for a nuisance; to recover a chattel; or for determination of a claim to real property under article fifteen of the real property law."[160]

The intention of the creators of this provision was to modify the common law right to jury by making the right applicable to both legal and equitable actions involving the subject matter enumerated.[161] In this way, they thought, the jury right would be preserved—in fact expanded—while the distinction between law and equity would be abolished. But the New York courts have held this statute to be declaratory of the common law thereby refusing to implement the intended expansion of the jury right.[162] This resulted in the application of a historical test whenever a jury was demanded in one of the enumerated actions, so that it could be determined whether the right to jury had ever existed in that kind of action at common law, i.e., was the action legal or equitable in nature? The consequences of this approach to the

160 N.Y. Civil Practice Act (Cahill-Parsons, 1955) §425.

161 FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (New York) 176-185 (1848).

162 See Kharas, "A Century of Law-Equity Merger in New York," 1 SYRACUSE L. REV. 186 (1949). The author cites New York cases to show that, in spite of the statute, there is no jury right in an action in the nature of a creditor's bill even though it is for a money judgment only, nor in an equitable action to redeem a chattel, nor in an action to enjoin a continuing nuisance, nor in a fraud action to recover the value for an inchoate dower right.

jury problem in New York procedure have been widely attacked.[163] When legal and equitable issues are joined in the same action, as the New York code allows them to be, the decisions have resulted in all sorts of anomalies and narrow distinctions regarding when a jury may decide the fact issues. In vigorous opposition to the New York approach, Judge Clark summarized:

> ". . . [T]he assumed rigidity between actions at law and suits in equity has led to a fundamentally erroneous approach to the question of the form of trial now appropriate in New York. It is still assumed that a case is either one all at law or all in equity, instead of the more correct approach, as shown by the code practice generally, that it is the form of separate issues which determines the jury-trial right."[164]

Thus when a case is considered all law or all equity, as it is in New York, the historical law-equity dichotomy is resurrected—a result which the statute was designed and intended to avoid in the first place. The criticism of the Field-type statute and the result obtained under it in New York is considered valid.

An improvement is found in the second type of provision, which governs the jury right in Connecticut. This type of statute is basically more effective in preserving the right to jury, as history has defined it, by granting jury demands in ". . . civil actions involving such an issue of fact as, prior to January 1, 1880, would not present a question properly cognizable in equity."[165]

By this provision, a clear-cut test is provided, and a rational historical investigation becomes necessary, a result which preserves the original constitutional right to jury without replacing it with a new one. Even more significantly, this statute narrows the determinative unit to the "issue" involved, thus avoiding the pleading entrapment inherent in characterization of actions as all-legal or all-equitable under the Field-type statute.

However, because of the peculiar language of the Connecticut statute, there is possibility that the constitutional right to jury may

[163] Clark, "The Union of Law and Equity," 25 COL. L. REV. 1 (1925); note, 55 YALE L.J. 826 (1946); Kharas, "A Century of Law-Equity Merger in New York," 1 SYRACUSE L. REV. 186 (1949); Clark and Wright, "The Judicial Council and the Rule-Making Power: A Dissent and a Protest," 1 SYRACUSE L. REV. 346 at 354 (1950); Clark, "Trial of Actions Under the Code," 11 CORN. L.Q. 482 (1926); Rothschild, "New York Civil Practice Simplified," 26 COL. L. REV. 30 (1926); McKenna, "Trial by Jury Under the Federal Rules," 29 GEO. L.J. 88 (1940).

[164] Clark and Wright, "The Judicial Council and the Rule-Making Power: A Dissent and a Protest," 1 SYRACUSE L. REV. 346 at 354 (1950).

[165] Conn. Gen. Stat. (1949) §7936.

be enlarged upon. A new right of action created by statute after January 1, 1880 would fall outside that class which "would not present a question properly cognizable in equity" before that date and, therefore, subsequently-created actions would apparently be triable to a jury. States with this type of jury statute have so held.[166] It would seem unwise for a state to adopt such a statute. A previous attempt by the Michigan legislature to extend jury trials to cases in equity has, in fact, been held unconstitutional.[167]

The federal rules provide: "The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."[168]

The former character of each issue involved in a civil action is made, by this provision, the determinative unit upon which the court must base its ruling whenever a demand for jury is made. The right to jury is preserved as of the time the Constitution was adopted, just as the framers intended it to be; and enlargement and diminution if any, will not by implication be inferred from any definition of the right to jury.

Of the three types of jury provisions—Field, Connecticut, and Federal—the last is the only one which preserves the jury right under combined procedure exactly as it was when separate courts existed. Therefore, it is submitted that federal rules 38 and 39 should serve as models for the preservation of the jury right in any new amalgamated procedure. The provision of federal rule 38 (a), if made referable to the state constitution, would involve a historical consideration of constitutional right whenever a jury is demanded. This process would be the same as is now required when a Michigan court is requested to rule on a motion to transfer a claim to the opposite side of the court, for in such an event a historical investigation of the nature of the claim must now be made. The adoption of the jury demand and waiver provisions as contained in federal rule 38 would not change existing Michigan jury right,[169] nor would federal rule 39 alter existing provisions for advisory juries in chancery.[170]

166 Standard Co. v. Young, 90 Conn. 133, 96 A. 932 (1916); Trittipo v. Morgan, 99 Ind. 269 (1884); Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1885).

167 Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N.W. 827 (1889).

168 Rule 38, Fed. Rules Civ. Proc., 28 U.S.C. (1952).

169 MICH. CONST., art II, §13; Michigan Court Rule 33 (1945); Mich. Comp. Laws (1948) §615.12.

170 Mich. Comp. Laws (1948) §§618.12 and 618.21.

Judicial Marshaling of the Trial

Once the two sides of the court have been combined by means of provisions preserving the right to jury trial, the next consideration is one of marshaling the trial in cases embracing both legal and equitable issues.[171] A jury once impaneled cannot be made to wait idly by for long periods while the court determines matters of equitable nature. It is likewise inexpedient for the court to launch into complex equitable considerations when a jury determination of a basic legal issue would preclude the use of equity. So practical necessity requires the court to fix the order of trial at an early stage so that the legal issues involved in the action may be tried at a time when the jury is in the box. Such a determination by the court, made after the court has notice of all the claims asserted, in all probability will result in a more intelligent and expedient trial of claims. No longer will the order of trial be determined by the fortuitous circumstance of which claim first reaches the trial calendar.

Consideration should be given to the frequency of situations in which a demand for jury might possibly complicate the marshaling of trials under blended procedure. Most cases are tried to the judge. For example, in 1954 there were 7,458 civil actions tried in Michigan courts.[172] Juries were impaneled in 646 of the cases docketed on the law side of the court. Therefore, in that year, Michigan judges ordered a jury impaneled in but 8.6 percent of the cases actually tried. In the four years preceding 1954, the number of times juries were impaneled has not exceeded 9 percent of the total cases tried in any one year.

In civil actions comprising issues all-legal or all-equitable, there is no problem as to which of the issues are to be tried to jury and which to the court. If Michigan were to merge law and equity procedure, most civil actions would fall into this classification because of the large volume of automobile negligence and divorce cases now appearing on court dockets. Rarely would such cases entail a joinder of legal and equitable issues. When legal and equitable issues do become joined in a single action, it has been

171 See Morris, "Jury Trial Under the Federal Fusion of Law and Equity," 20 TEX. L. REV. 427 (1942); Pike and Fischer, "Pleadings and Jury Rights in the New Federal Procedure," 88 UNIV. PA. L. REV. 645 (1940); McCaskill, "Jury Demands in the New Federal Procedure," 88 UNIV. PA. L. REV. 315 (1940); James, "Trial by Jury and the New Federal Rules of Procedure," 45 YALE L.J. 1022 (1936).

172 Twenty-first—Twenty-fifth Annual Report of the Judicial Council of Michigan (1950-1954). Includes cases in all circuit courts and the superior court in Grand Rapids.

said that no complications arise unless "(a) one party will desire a trial by jury, (b) the other party will not, and (c) the court cannot decide fairly between them. Unless all three conditions exist there is no difficulty."[173]

In considering the effect of procedural merger on the method of trial, it is important to distinguish the constitutional right to jury, which the courts are charged to preserve as a matter of fundamental law,[174] from the judicial discretion involved in marshaling the trial in order to obtain a sensible presentation of the issues in dispute. Regarding the latter, the court must be given wide latitude to determine the sequence of issues to be tried so that convenient trial methods and efficient use of jury time may result. But because the jury right must be constitutionally preserved, a court must be denied the ability to modify it through unlimited exercise of judicial discretion. To this end, the following addition to federal rule 39 is suggested:

> (c) Sequence of Trial. When certain of the issues are to be tried by jury and others by the court, or when a number of claims, cross-claims, defenses, counterclaims, or third-party claims involve a common issue, the court may determine the sequence in which such issues are to be tried, preserving at all times the constitutional right to trial by jury according to the basic nature of every issue to which a demand for jury as provided by rule has been served and filed.

Separate Law and Equity Issues Arising From Concurrent Claims

When certain issues relate only to an equitable claim, and others relate only to a legal claim, there is little difficulty in ascertaining which of the issues are to be tried by jury and which to the court. When a plaintiff joins a claim for specific performance with a separate claim for damages for breach of contract, it is clear that a jury may be demanded to determine the amount of damages, while only the court may try fact issues bearing upon the right to specific performance. But if the damages sought are incidental to the equitable relief, the court may decree specific performance and then proceed to determine the amount of incidental relief without a jury.[175] When specific relief is denied a plaintiff claim-

173 CLARK, CODE PLEADING, 2d ed., §16 (1947).

174 See *Right to Jury Trial*, supra.

175 There is no right to jury determination of the amount of incidental damages under present law, since equity has the power to render money judgments so as to grant full relief. See Flanagan v. Harder, 270 Mich. 288, 258 N.W. 633 (1935); Latimer v. Piper, 261 Mich. 123, 246 N.W. 65 (1933).

ing both specific performance and incidental damages, the plaintiff can amend to claim damages in lieu of specific performance. Both parties may then demand a jury since all the issues would be legal in nature.[176] When a defendant to an action for specific performance counterclaims for damages, both parties could demand a jury to fix the amount of damages in the event the defendant prevailed, while a counterclaim for equitable relief would not alter the parties' right to jury on the plaintiff's successful claim for damages.[177]

Thus, whenever legal and equitable claims are joined in such manner that both kinds of relief are sought, and each issue in dispute relates exclusively to one claim or the other, the court can order the issues tried in any manner convenient without fear of depriving the parties of the right to a jury trial. In all probability, the situations above outlined would be most conveniently disposed of if the court were to try all the issues except the amount of damages, and then at the conclusion of the trial, impanel a jury to fix the amount of damages if any were found to be recoverable. However, the court has discretion to determine and order the most convenient sequence of trial in light of the exigencies of the particular case before it.

Separate Law and Equity Issues Arising From Alternative Claims

Present Michigan practice allows parties to plead alternative claims or defenses.[178] Under merged procedure this would mean that a plaintiff could seek equitable relief, such as specific performance, or, in the alternative, legal relief, such as damages for breach of contract. Unlike the above situations where both kinds of relief are desired, the jury right will depend entirely upon which of the alternate claims, if either, the court decrees. The results obtained under a divided system, indicate that both parties have the right to a jury in regard to the damage claim and neither party has such a

176 Under present Michigan practice, a denial of equitable relief requires plaintiff, if he wishes to continue, to transfer his cause to the law side of the court, unless it appears that the plaintiff acted in good faith and would have been entitled to equitable relief but for some act of the defendant making such relief impossible. Wisper v. Dix-Ferndale Land Co., 241 Mich. 91, 216 N.W. 393 (1927). That a plaintiff cannot deprive defendant of a right to jury trial by alleging unfounded grounds for equitable relief, see Michigan Bean Co. v. Burrell Engineering and Construction Co., 306 Mich. 420, 11 N.W. (2d) 12 (1943).

177 Under present practice, the damage claim would be tried on the law side of the court no matter which party claimed damages. In any case where the right to damages prevailed over a claim for equitable relief by the opposite party, the amount of damages could be tried by jury just as any legal claim.

178 Michigan Court Rule 17 (1945).

right in regard to the specific performance claim. The plaintiff has complete power to control the trial by jury in that he may choose his remedy, and thus the method of trial, while the defendant has a jury right only if the legal remedy is sought. The problem of marshaling the trial, then, is one of trying both of the alternative claims in the most convenient way while preserving the currently recognized right to jury trial. Separate trials of the facts relative to each claim may prove costly in terms of time and effort. If a jury is impaneled and specific performance is decreed, the jury's presence was unnecessary.

This problem was well handled in *Ford v. C. E. Wilson & Co.*[179] by Judge Hinks of the District Court of Connecticut. In that case the plaintiff alleged a sale and delivery of merchandise for which no payment had been received. The remedy sought was damages. Alternatively, the plaintiff alleged facts constituting interference with contract based upon misrepresentation and fraud by the co-defendant bank, and prayed that certain assignments be set aside and a constructive trust declared. If the plaintiff recovered from the defendant on the alleged contract there would be no recovery from co-defendant bank. After holding the first count was a claim for damages based on breach of contract, and the second count was a claim for fraud involving both legal and equitable issues, the court disposed of the sequence of trial as follows:

> ". . . I rule that all issues which are common to the legal causes of action (in either count) and to the equitable cause stated in the second count shall be tried together, the legal issues, of course, to the jury and the equitable issues to the court; and that all equitable issues which do not pertain to the legal causes shall be tried to the court immediately following the jury trial.
>
> "This ruling will have practical application as follows: On the day of trial . . . the parties will proceed precisely as though trying to the jury both the first count and the second count viewed as charging actionable fraud, and the rulings on the evidence will be made as though no other issues were before the court. The court, however, will accept all evidence which is received in the jury trial for any proper bearing it may have upon the second count viewed as a cause of action in equity. After the jury has been charged and has retired to deliberate, the court will proceed to hear additional evidence

[179] (D.C. Conn. 1939) 30 F. Supp. 163.

on the equitable cause stated in the second count. There will be neither need nor permission to reiterate evidence already received in the jury trial; but any evidence theretofore offered and excluded in the jury trial may again be offered for its bearing on the second count viewed as a cause of action in equity.

"The presiding judge will of course have discretion to await the verdict of the jury before embarking upon a further hearing of evidence on the equitable issues. As we have seen, a verdict against the Bank might make it unnecessary to decide the equitable issues. However, the parties should be in readiness to proceed forthwith when the jury retires. For a defendant's verdict would apparently still leave open equitable issues, and the judge may feel it better to take any additional evidence thereon forthwith, while the parties and witnesses are in attendance, rather than to wait for the verdict of the jury."[180]

The *Ford* case dealt with the legal claim before it considered the equitable claim. When a plaintiff prefers specific performance, and wants damages only in the event that the equitable relief is denied, a question arises as to plaintiff's right to a jury trial on the legal claims when because of failure of the equitable claims only the legal claims are left. It is the position of Professor Moore, in his original treatise,[181] that whenever a plaintiff, in his pleading, sets forth his equitable claim before his alternative claim for damages, the right to jury on the damage claim is waived, although the waiver does not affect defendant's jury rights. In applying the doctrine of waiver, as a rule of thumb, a plaintiff who in reality prefers equitable relief, but who also wants a jury if he cannot obtain equitable relief, is deprived of a jury trial of the legal claim. It has been suggested that this deprivation is a violation of constitutional right to jury.[182] This suggestion would appear valid under the present Michigan practice in which a plaintiff cannot plead legal and equitable claims in the alternative. A plaintiff who commences an action on the chancery side of the court and finds his claim fails because of an equitable weakness must permit the action to be transferred to the law side of the court in order to

[180] Id. at 165-166.

[181] 3 MOORE, FEDERAL PRACTICE 3018 (1938). See also Pike and Fischer, "Pleadings and Jury Rights in the New Federal Procedure," 88 UNIV. PA. L. REV. 315 (1940).

[182] See Morris, "Jury Trial Under the New Federal Fusion of Law and Equity," 20 TEX. L. REV. 427 (1942); Fraser v. Geist, (E.D. Pa. 1940) 1 F.R.D. 267.

obtain any alternative legal relief.[183] In the recent case of *Christian v. Porter,*[184] the Michigan court construed the effect of such transfer upon the jury rights of the parties. The trial court denied a motion to transfer the case from equity to law and, after so ruling, proceeded to decree damages to plaintiff. Although the plaintiff was not demanding a jury trial, on appeal the court quoted with approval from an earlier decision[185] construing the transfer statute as follows:

> " 'The right of trial by jury is secured to plaintiff by the Constitution of this State. Article 2, §13. This statute in no way attempts to deprive the plaintiff of such right, nor should such a construction be given it as would even tend to work out such a result in violation of the constitutional provision.' "[186]

Thus it was held that the transfer provision did not alter the right to jury trial under the previous procedure, wherein a plaintiff was allowed to commence a new action at law upon dismissal of his cause of action in equity. It is submitted that the constitutional provision would be violated if a plaintiff were forced to waive his right to jury by the mere fact that he pleaded his defective equitable claim for relief before his alternative claim for legal relief.

The constitutional question is acknowledged in the second edition of Moore's treatise.[187] It is there stated that the federal rules allow a plaintiff the freedom to join legal and equitable claims in the alternative, which under the former practice was not possible. And further, "Whether this advantage warrants applying the rule of the thumb stated in the [original] Treatise or whether plaintiff is entitled to the more tender rule . . . is largely a question of values."

In view of the present law in Michigan, it would seem that this question of values must be resolved in favor of preserving to plaintiff his right to jury trial of the legal issues after his preferred equitable remedy has failed. This can be done, as is suggested in the Treatise, by requiring the plaintiff to amend his complaint to eliminate any pleading of an equitable claim after the court has

183 See *Transfer of Actions Between Sides,* supra.

184 340 Mich. 300, 65 N.W. (2d) 779 (1954).

185 Lake Superior Brass Foundry Co. v. Houghton Circuit Judge, 209 Mich. 380 at 383, 176 N.W. 409 (1920).

186 340 Mich. 300 at 303.

187 5 MOORE, FEDERAL PRACTICE, 2d ed., 158-162 (1951).

ruled that no equitable remedy is available.[188] However, amendment destroys the advantage of alternative pleading. The right to jury should not be made to turn upon the technical form of the pleading. If the distinction between the right to jury trial and the judicial discretion to marshal the trial is kept in mind, there is no dilemma. The simultaneous trial of both the legal and equitable issues, as was done in the *Ford* case, may be the practical solution and the trial judge may use his discretion to adapt this procedure to fit the circumstances of the case before him. But, as was previously pointed out, an equitable decree may result in the jury being called unnecessarily. Such a result will not occur if the judge exercises his discretion wisely. Whenever a plaintiff pleads alternatively, and demands a jury trial on the legal issues, the court can require him to state which of the alternative remedies he prefers. If the plaintiff prefers the damage remedy, a jury should be called at the beginning of the trial, and the issues tried as if no others were before the court. A verdict for plaintiff will end the case. An adverse verdict will permit the court to dismiss the jury; and if there exist any grounds for the alternative equitable remedy, the court may proceed to consider those issues not tried previously to the jury. If the plaintiff prefers specific performance, but wants a jury trial in the event he loses on the equity claim, the court can order the equitable issues tried first to the court. From the fact that he has pleaded alternatively, it is apparent that the plaintiff has doubts in regard to the strength of his preferred equitable claim. When the issues are being framed at pre-trial, the court, with full perspective of all the issues to be tried, can order the doubtful equitable issues to be tried first, just as the court sitting in equity now tests the strength of a bill of complaint in order to determine whether a plaintiff has stated a cause of action in equity. At trial, if these issues are resolved in the plaintiff's favor, there will be no need to call a jury. If they show that plaintiff is not entitled to equitable relief, a jury may then be impaneled to try the legal issues. It may even be that the court will as a matter of discretion decide to take proof on both issues at the same time. When a plaintiff fails to cooperate in

[188] After an excellent discussion of the question, the author concludes, "With deference, we believe, however, that until the plaintiff amends his complaint to strip it of his first demand for equitable relief, he must be held to be pressing for that relief, and he (plaintiff) is not entitled to demand jury trial. And we believe that the weight of authority is in accord." Id., p. 162.

stating his preferred remedy so that the court has no guide as to how the trial ought to be marshaled, it is not unfair, in that case, to rule that the plaintiff has waived his right to jury. He should not, however, be forced to waive the jury just because he prefers the equitable remedy.

Issues Common to Law and Equity Claims

When legal and equitable claims are joined, the issues involved may not be all legal or all equitable in every case.[189] It is possible, in view of such joinder, that certain issues will be common to both claims. The question arises as to which claim the court should try first, since the original ruling on the common issue will be the law of the case. Whether that issue is tried to the court or to the jury will depend on whether the court orders the equitable or the legal claim tried first.[190]

In the federal case of *Orenstein v. United States*,[191] there existed an issue common to the legal and equitable claims that had been joined. Plaintiff had commenced a suit for treble damages joined with a claim for injunction against future overcharge under the Rent Control Act. The court treated the treble damage claim as legal in nature, and a jury right existed to determine the amount of damages. The issue of whether there was, in fact, an overcharge was an issue common to the damage claim and the claim for injunction. The opinion stated that the court has discretion to try the equitable claim first, and any determination of the issues involved in that claim would be binding on the defendant, and could not be relitigated in the jury trial for treble damages.

A contrary view was expressed in the Eighth Circuit, in *Leimer v. Woods*,[192] which involved substantially the same fact situation. Upon review of the trial court's denial of trial by jury, the court stated:

> "In summary, a federal court may not under the Rules of Civil Procedure, in a situation of joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, deprive either party of a properly de-

189 Id., pp. 148-158.

190 BLUME, AMERICAN CIVIL PROCEDURE 373-390 (1955), wherein the author classifies the various cases according to the relief sought, and sets forth the method of trial necessary in each to preserve the right to jury.

191 (1st Cir. 1951) 191 F. (2d) 184.

192 (8th Cir. 1952) 196 F. (2d) 828.

> manded jury trial upon that question, by proceeding to a previous disposition of the equitable cause of action and so causing the fact to become res judicata, unless there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation."[193]

The court states no example of a special reason or impelling consideration of the type to which it refers.

Without passing on the doctrine as set out in the *Orenstein* case, it would appear that the absolute discretion in the trial court to marshal the trial produces an improvement over the present situation in Michigan. Whenever, under divided practice, a plaintiff has alternate or cumulative legal and equitable remedies, he must seek his relief separately.[194] The plaintiff has the power to select his remedy, and thus the power to decide the method of trial. When a law claim by the plaintiff is subject to defeat by an equitable claim or defense,[195] the trial of common issues depends upon which party first gets his claim to trial. If the plaintiff prosecutes his law action to judgment, the common issues will be tried by jury if demanded. If the defendant succeeds in commencing a chancery suit by way of defense, and succeeds in restraining further prosecution of the law action before the common issue has been resolved, the issue will be tried to the court. In other words, whenever a number of claims, cross-claims, defenses, counterclaims, or third-party claims involve an issue that is both legal and equitable, because it is common to both a legal and equitable claim, the method by which that issue is tried is now governed by which party happens to get his claim tried first. Whether or not a prior determination of a common issue is binding on the parties is governed by the doctrine of res judicata. The view stated in the *Orenstein* case allows the trial court absolute discretion to order which claim shall be tried first, and thus cause the common issue to become res judicata. Under present Michigan practice, the order in which claims are presented, and thus the order in which common issues are tried is governed by accident. In all probability a more sensible result will obtain in the situation where the court has discretion to order the trial of claims after it has notice of all the issues in dispute, including the common

193 Id. at 836.
194 See *Joinder of Legal and Equitable Causes of Action*, supra.
195 See *Equitable Defenses to Actions at Law*, supra.

issue, than is the case where the question of jury *vel non* depends upon happenstance.[196]

Professor Moore states that the right to jury trial on a particular issue of fact ought to turn upon the basic nature of that issue.[197] Indeed, if the distinction between actions at law and suits in equity is to be eliminated, no other approach can be taken.[198] It is submitted that when an issue is common to both a legal and an equitable claim, it has but one basic nature.[199] It should be regarded not as a legal *and* equitable issue, but as a legal *or* equitable issue. Such a concept would protect the right to jury trial. The res judicata effect of findings on common issues will not be modified by such a proposal. If a common issue were to be regarded as basically equitable, it would not be triable by jury for the reason that there would be no right to have it so tried. If regarded as basically legal, jury trial of the common issue would be mandatory upon proper demand, and the discretion of the trial court could not be used to avoid it. In this way, the constitutional right to trial by jury can be kept distinct from the trial court's discretion to marshal the trial in the furtherance of convenient trial administration. An error by the trial judge in granting or denying a jury trial will be reviewable on appeal. Denial of a claim to jury trial would not be within the judge's discretion, as would appear to be the situation in the *Orenstein* case.

Once an issue which is common to joined legal and equitable claims is regarded as having a single basic nature, it becomes neces-

196 An example in point is the situation set forth in JUDGMENTS RESTATEMENT §68, comment *j*, illus. 4 (1942). "On the same day A and B make two contracts, by one of which B agrees to sell Blackacre to A and by the other he agrees to sell a horse to A. A brings a suit in equity for the specific performance of the first contract. B alleges he was an infant when the agreement was made. Verdict and judgment for B. Thereafter A brings an action at law against B for damages for breach of the contract to sell him the horse. The judgment in the prior suit is conclusive that the defendant was an infant when the contract was made." Thus, under present practice, the facts involved in the common issue of infancy would be tried to the court, because the plaintiff sought his equitable remedy first. This could be because the plaintiff intentionally wanted a trial to the court, but more than likely this factor did not even enter his mind when he decided which claim he would first proceed with. If the time of performance of each contract differed, plaintiff would probably sue upon whichever contract happened to be the first one breached. Upon joinder of the two claims under merged procedure, the trial court would have full perspective of both claims and the common issue. The court could decide what method of trial *ought* to be employed. How this latter question should be resolved is discussed infra.

197 5 MOORE, FEDERAL PRACTICE, 2d ed., §38.16 (1951).

198 See *Right to Jury Trial*, supra.

199 It is unrealistic to say that an issue common to both a legal and an equitable claim may be tried by jury in one instance, and tried to the court in another with different results. In any event the issue will be tried by only one of the methods. See note 196 and text supra.

sary to decide whether its nature is legal or equitable. This decision is part and parcel of the definition of the constitutional right to trial by jury. It is because of the constitutional guarantee that its nature must be ascertained. The question must therefore be determined by constitutional law.

The right to jury trial is not defined or delineated in the constitution; that document simply states that the right shall remain.[200] It is well settled that the right shall remain as it was at common law previous to the adoption of the constitution.[201] By unavoidable implication, the constitution has directed that the courts shall define the right by judicial process. Procedure at present is not the same as it was before the constitution was adopted, and during the long history of changes in procedural statutes and rules, the Michigan courts have many times been called upon to define the right to jury trial in terms of the changes. And so ought the courts to decide the single nature of an issue in a particular case under the procedural merger of law and equity. The definition is one to be obtained by the judicial process. It cannot be set forth in rules of court, which are properly limited to those matters connected with the orderly dispatch of judicial business.[202] Under present procedure, trial by jury of an issue common to legal and equitable actions is a matter of fortuitous circumstances in most instances. Procedural merger, and regard of such issues as having a single basic nature would remove the element of chance from the right to jury, which, in view of the constitutional provision should be regarded as too important and fundamental a right to be governed in such a fortuitous manner.

The Pre-Trial Conference

The pre-trial conference was devised to expedite the progress and lessen the cost of litigation.[203] The hearing itself requires the attendance of the pre-trial judge and opposing counsel, the three of whom meet together informally to discuss the formulation and simplification of issues, the possibility of agreeing to matters which will simplify or avoid proof at trial, and any other matters which

200 MICH. CONST., art. II, §13.

201 State Conservation Dept. v. Brown, 335 Mich. 343, 55 N.W. (2d) 859 (1952); Bielby v. Allender, 330 Mich. 12, 46 N.W. (2d) 445 (1951); Swart v. Kimball, 43 Mich. 443, 5 N.W. 635 (1880).

202 Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 MICH. L. REV. 623 (1957).

203 NIMS, PRE-TRIAL (1950).

might aid in the disposition of the action.[204] The conference results in a pre-trial order entered by the judge, and, subject to modification either before or during trial, the order governs the subsequent course of the action.[205]

It is readily apparent that the right to a jury and the problem of marshaling the trial are matters to which attention should be directed at the pre-trial conference. The process of narrowing the issues is aimed at avoiding trial on any issue not material to the rights of the parties. Often what began as complex issues are reduced to simple propositions of law or fact, or perhaps eliminated entirely from further consideration. Admissions of fact and documents not in dispute reduce the number of issues to be considered at trial.[206] The pre-trial judge, with the power to make rulings on issues of law and on the admissibility of evidence can limit the burden of the trial court to the extent that issues decided and evidence ruled inadmissible become settled before trial.[207] Thus, as a result of the pre-trial activity, the trial judge will have fewer and simpler issues with which to contend. In a jurisdiction of combined law and equity procedures, such a result is especially welcome, since the entire process of arriving at and stating the issues at pre-trial tends to point up the sequence in which those issues ought to be tried. Marshaling a trial constituting both legal and equitable issues, therefore, may be accomplished in an efficient businesslike manner, with considerable saving in time and expense.

In addition to reducing the number of issues involved in an action, the pre-trial conference provides an excellent point at which to obtain a ruling on the right to jury trial.[208] After such

204 Sunderland, "The Theory and Practice of Pre-Trial Procedure," 36 MICH. L. REV. 215 (1938); Cooper, "Pre-Trial Procedure in the Wayne County Circuit Court," SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 61 (1936).

205 "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Rule 16, Fed. Rules Civ. Proc., 28 U.S.C. (1952).

206 See Rule 36, Fed. Rules Civ. Proc., 28 U.S.C. (1952).

207 See American Machine & Metals, Inc. v. De Bothezat Impeller Co., Inc., (S.D. N.Y. 1949) 82 F. Supp. 556, affd. (2d Cir. 1949) 180 F. (2d) 342, cert. den. 339 U.S. 979 (1950) (ruling at pre-trial on the legal sufficiency of a defense); Schram v. Kolowich, (E.D. Mich. 1942) 2 F.R.D. 343 (ruling on application of the statute of limitations); Ulrich v. Ethyl Gasoline Corp., (W.D. Ky. 1942) 2 F.R.D. 357 (ruling on the admissibility of evidence, the right to jury trial, and whether a prior decree was an estoppel between the parties).

208 Ulrich v. Ethyl Gasoline Corp., note 207 supra.

a determination has been made the action can be placed in the proper channel for the jury or the non-jury trial. If a jury has been granted and there exist non-jury issues to be tried as well, a simple recitation of this fact along with a statement of the issues involved will greatly facilitate the trial judge in marshaling the trial so that the most efficient use may be made of the jury's time or the pre-trial order can provide rules for such marshaling as indicated by the conference.

Review of Fact Questions on Appeal

At present the scope of appellate review of fact questions depends upon whether the trial was at law or in equity. Generally, a jury verdict is conclusive on fact issues if there was evidence to support it, while in chancery appeals, questions of fact are reviewable. If the distinction between actions at law and suits in chancery are removed, a method must be found by which the appeal court can ascertain the proper scope of appeal on all questions of fact brought before it.

Under merged procedure, the scope of review on appeal can be made to turn upon the method of trial below. Facts tried to a jury of right would be subject to review as in actions at law under present procedure. In cases where the trial was to the court, the present chancery rules would apply. The test is as elemental as that under divided procedure where the scope of review depends on the character of the entire action. The results are similar.

Law issues which have been tried to the court should, under merged procedure, be subject to the same scope of review as are equitable issues. Such a result would not entail substantial change from present Michigan practice in this respect, since court rule 64 allows the appellant in a non-jury law action to assign as error that the judgment is against the preponderance of the evidence.[209] In an exhaustive opinion, this rule was held constitutional in *Jones v. Eastern Michigan Motorbuses.*[210] The majority of the court stated that the review of a court-tried law action was an exercise of the court's appellate jurisdiction, and that in the exercise

[209] "Upon appeal to the Supreme Court from a judgment in an action at law tried without a jury, such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered. Appellant may assign as error that the judgment is against the preponderance of the evidence. . . ." Michigan Court Rule 64 (1933).

[210] 287 Mich. 619, 283 N.W. 710 (1939).

of such power, the court may "inaugurate or utilize any appropriate writ or procedure as in its judgment may be deemed fit."[211] The opinion traced the history of statutes and rules dealing with review of law actions tried without a jury. In brief, the court found that it had been restricted to review of questions of law in such actions only during the period from 1867 to 1915. As early as 1862, the opinion states, the court had considered appeal of non-jury law cases and concluded:

> "The position of the case in this court is similar to that of a case heard in Chancery on pleadings and proofs, and appealed to this court. The facts are supposed to be all before the court, and the decision upon them [by the supreme court] disposes of the case."[212]

The *Jones* opinion further notes that present rule 64 was first adopted as rule 75 in 1931.[213] Appended to a rule which abolished special findings in court-tried law actions, and referred to by the official note to rule 75, is the following comment:

> "The trial of a law case without a jury involves exactly the same essential procedure as the trial of an equity case, and the functions performed by the court are practically identical in both cases. There is no substantial reason why both should not be tried in the same manner and be finally disposed of in the same way. The only feature of a common law action which ever made necessary a different procedure from that in equity, was the jury, and when the jury is absent the sole reason for diversity in practice disappears."[214]

Although not mentioned by the court in the *Jones* case, it would seem that *Brown v. Kalamazoo Circuit Judge,* discussed earlier,[215] is to some extent overruled. The holding in that case that there exists a constitutional right to have equitable controversies dealt with by equitable methods is inconsistent with the

211 Id. at 646.

212 Barman v. Carhartt, 10 Mich. 338 at 341 (1862).

213 "Upon appeal from a judgment rendered in an action at law tried without a jury, such judgment may be affirmed, reversed or modified, in whole or in part, and a final judgment shall be entered either by the supreme court or by the trial court, according to the practice in equity cases." Michigan Court Rule 75 (1931). It was stated by the court in Jones v. Eastern Michigan Motorbuses, note 210 supra, that there was no intention to change the scope of review in law cases tried without a jury by virtue of the 1933 rule. The only change contemplated in rule 64 being that the supreme court is not empowered to enter judgment after a modification of the judgment rendered below.

214 Notes following Michigan Court Rule 37, §11 (1931).

215 Note 5 supra.

Jones case which states that the supreme court may inaugurate any procedure it may deem fit in the exercise of its appellate jurisdiction. Clearly the *Jones* case supports *de novo* review of non-jury law actions and, to the extent that the earlier case is inconsistent, it is overruled.

Thus it is submitted that unification of legal and equitable actions would not complicate but would simplify the scope of review on appeal. The method of review would turn on the simple objective test of whether the fact issue was determined by a jury or a judge. Such a result would allow the reviewing court to dispose of an entire case at one time so that, except for errors of law in jury cases, remand to the lower court for final adjudication consistent with the appellate conclusions would not be necessary. Extension of the trial *de novo,* of course, would remain subject to the self-announced reluctance of reviewing courts to upset findings of trial judges who by presence in court are able to perceive the demeanor and determine the credibility of witnesses and the rule that findings of fact on conflicting evidence will not be set aside and a new determination made unless the conclusions below were clearly against the preponderance of evidence.[216]

CONCLUSION

The constitution of Michigan demands that the distinctions between law and equity be abolished. A merger of the two forms of action has been demonstrated to be practical and effective by twenty-eight states and the federal courts. There are many occasions of hardship in Michigan as the result of the failure to take a more forthright position in respect to the amalgamation of law and equity. Halfway measures in Michigan and elsewhere have proved ineffective. There is nothing essentially different in the commencement of the actions and the joinder of parties which would prevent complete amalgamation of law-equity procedure. There is no need to confuse the substance of law and equity with the devices used to enforce the substantive rules. The procedures can be merged and yet maintain the essential character of the sub-

216 Illustrative is the case of Collins v. Hull, 256 Mich. 507 at 511, 240 N.W. 37 (1932), in which the court stated, "while, under Court Rule No. 75 [1931], we may consider the case *de novo,* we are unwilling to determine the correctness of the amount of damages without some indication by the trial judge who has heard all of the testimony and seen the witnesses, of what the amount should be."

stantive rules of each. The preservation of the right to jury trial and in Michigan the right to a court trial in equity suits does not present insurmountable problems. The problems arising in the amalgamated practice are no different from those in the separate practice. In each case it is a constitutional problem—no more, no less. No rule or statute can change this. The only change required as a result of a merger has to do with a difference in time and method of raising the question pertaining to jury trial. Other states and the federal courts have solved this problem in a satisfactory manner. The widespread use of the pre-trial conference should substantially eliminate procedural difficulties in this respect. Properly used, the pre-trial conference can be the device through which the trial is marshaled and decisions made as to whether or not juries are to be used to hear issues in a case. There is nothing in the appeal processes of either law or equity cases that will cause problems as a result of amalgamation. Thus in order to provide the full benefit of a merged procedure five rules are needed: the first to provide for a single form of action; the second to provide for the joinder of law and equity matters; the third and fourth to preserve the right to jury trial, provide the procedure for asserting the right and for marshaling the trial; and the fifth to utilize the pre-trial conference as a device for solving the problems. The adoption of these rules, modeled after the present federal rules but amplified in important detail, will eliminate many cases from the dockets and permit one trial where now two or more are required.

Rule 1. There shall be one form of action to be known as "civil action."

Rule 2. In any pleading a pleader may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

Rule 3. (a) Right Preserved. The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the services of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Specification of Issues. In his demand for jury trial a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 4. (a) By Jury. When trial by jury has been demanded as provided in rule 3, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of the state.

(b) By the Court. Issues not demanded for trial by jury as provided in rule 3 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury as to an issue in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Sequence of Trial. When certain of the issues are to be tried by jury and others by the court, or where a number of claims, cross-claims, defenses, counterclaims, or third-party claims involve a common issue, the court may determine the sequence in which such issues are to be tried, preserving at all times the constitutional right to trial by jury according to the basic nature of every issue to which a demand for jury as provided by rule 3 has been served and filed.

(d) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its

own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 5. In every contested action the court shall direct the attorneys for the parties to appear before it for a conference to consider the consolidation of cases for trial, the separation of issues, and the order of the trial when some issues are to be tried to a jury and some to the court.

APPENDIX A

Courts Having But One "Side" for Law and Equity

Arizona, Rev. Stat. Ann. (1956) Rules of Civil Procedure, Rule 2.
Arkansas, Stat. Ann. (1947) §27-201
California, Code Civ. Proc. Ann. (Deering, 1953) §307
Colorado, Rule 2, Rules of Civil Procedure (1951)
Connecticut, Gen. Stat. (1949) §§7738, 7813, 7819
Georgia, Code Ann. (1936) §§3-104, 37-901, 37-902
Idaho, Code (1948) §5-101
Indiana, Stat. Ann. (Burns, 1946) §2-101
Kansas, Gen. Stat. Ann. (Corrick, 1949) §60-201
Kentucky, Rule 2, Rules of Civil Procedure (1953)
Minnesota, Rule 2.01, Rules of Civil Procedure for the District Courts (1952)
Missouri, Rev. Stat. (1949) §506.040
Montana, Rev. Code. Ann. (1947) §93-2301
Nebraska, Rev. Stat. (1943) §25-101
Nevada, Comp. Laws (1929) §8500
New Mexico, Rule 2, Rules of Civil Procedure for the District Courts (1953)
New York, Civil Practice Act (Cahill-Parsons, 1955) §8
North Carolina, CONST., art. 4, §1; Gen. Stat. (1953) §1-9
North Dakota, Rev. Code. (1953) §32-0109
Ohio, Rev. Code (Baldwin, 1953) §2307.02
Oklahoma, Stat. (1951) tit. 12, §10
South Carolina, Code (1952) §10-8
South Dakota, Code (1939) §33.0101
Texas, CONST., art. 5, §8
United States Courts, Rule 2, Federal Rules of Civil Procedure, 28 U.S.C. (1952)
Utah, CONST., art. 8, §19; Rule 2, Rules of Civil Procedure (1953)
Washington, Rev. Code (1951) §4.04.020
Wisconsin, Stat. (1955) §260.08
Wyoming, Comp. Stat. Ann. (1945) §3-301

Courts Having a Law "Side" and an Equity "Side"

Alabama, Code (1940) tit. 13, §§126, 129
Florida, CONST., art. 5, §11
Illinois, CONST., art. 6, §12; Rev. Stat. (1955) c. 110, §§31, 101.1
Iowa, Code (1954) §611.3
Maine, Rev. Stat. (1954) c. 107, §2
Maryland, Code Ann. (Flack, 1951) art. 16, §102; art. 75, §125
Massachusetts, Laws Ann. (1956) c. 212, §§3, 4; c. 214, §§1 to 4
Michigan, Comp. Laws. (1948) §611.1
New Hampshire, Rev. Stat. Ann. (1955) §§491.7, 498.1
New Jersey, CONST., art. 6, §3
Oregon, Rev. Stat. (1955) §§11.010, 11.020
Pennsylvania, Rules 1501, 1502, Rules of Civil Procedure (1954)
Rhode Island, Gen. Laws (1938) c. 496, §§6, 7
Virginia, Code (1950) §§8-138, 17-123
West Virginia, CONST., art. 8, §12; Code (1955) §5196

Separate Courts of Law and Equity

Delaware, CONST., art. 4; Code Ann. (1953) tit. 10, §§341, 342, 343, 541
Mississippi, CONST., §§156, 157, 159
Tennessee, Code Ann. (Williams, 1934) tit. 9, 10
Vermont, Stat. (1947) §§1277, 1278, 1400
Note: As the development in Louisiana has been completely different, no attempt has been made to include that state.

APPENDIX B

Joinder of Claims for Legal and Equitable Relief Permitted

Arizona, Rev. Stat. Ann. (1956) Rules of Civil Procedure, Rule 18 (a)
Arkansas, Stat. Ann. (1947) §27-1301
California, Code Civ. Proc. Ann. (Deering, 1953) §§307, 427
Colorado, Rule 18, Rules of Civil Procedure (1951)
Connecticut, Gen. Stat. (1949) §7819
Florida, Rule 1.8 (g), Rules of Civil Procedure (1955)
Georgia, Code Ann. (1936) §81-101
Idaho, Code (1948) §§5-101, 5-606
Illinois, Rev. Stat. (1955) c. 110, §44
Indiana, Stat. Ann. (Burns, 1946) §2-101
Iowa, Rule 22, Rules of Civil Procedure (1954)
Kansas, Gen. Stat. Ann. (Corrick, 1949) §60-601
Kentucky, Rule 18.01, Rules of Civil Procedure (1953)
Minnesota, Rule 18, Rules of Civil Procedure for the District Courts (1952)
Missouri, Rev. Stat. (1949) §509.060
Montana, Rev. Code Ann. (1947) §93.3203
Nebraska, Rev. Stat. (1943) §25.701

Nevada, Comp. Laws (1929) §§8500, 8595
New Jersey, Rule 4:31-1, Civil Practice Rules (1953)
New Mexico, Rule 18, Rules of Civil Procedure for the District Courts (1953)
New York, Civil Practice Act (Cahill-Parsons, 1955) §258
North Carolina, Gen. Stat. (1953) §1-123
North Dakota, Rev. Code (1943) §28-0703
Ohio, Rev. Code (Baldwin, 1953) §2309.05
Oklahoma, Stat. (1951) tit. 12, §265
Oregon, Rev. Stat. (1955) §16.220
South Carolina, Code (1952) §10-701
South Dakota, Code (1939) §33.0916
Texas, Rule 51, Rules of Civil Procedure (1955)
United States Courts, Rule 18, Federal Rules of Civil Procedure, 28 U.S.C. (1952)
Utah, Rule 18, Rules of Civil Procedure (1953)
Washington, Rev. Code (1951) §§4.04.020, 4.36.150
Wisconsin, Stat. (1955) §263.04
Wyoming, Comp. Stat. Ann. (1945) §3-701

APPENDIX C

Equitable Defense in Actions for Legal Relief Permitted

Alabama, Code (1940) tit. 13, §153
Arizona, Rev. Stat. Ann. (1956) Rules of Civil Procedure, Rule 8 (f)
Arkansas, Stat. Ann. (1947) §27-1121
California, Code Civ. Proc. Ann. (Deering, 1953) §§307, 441
Colorado, Rule 8, Rules of Civil Procedure (1951)
Connecticut, Gen. Stat. (1949) §7738
Florida, Rule 1.8 (g), Rules of Civil Procedure (1955)
Georgia, Code Ann. (1936) §37-905
Idaho, Code (1948) §5-616
Illinois, Rev. Stat. (1955) c. 110, §43
Indiana, Stat. Ann. (Burns, 1946) §2-1015
Iowa, Rule 72, Rules of Civil Procedure (1954)
Kansas, Gen. Stat. Ann. (Corrick, 1949) §60-710
Kentucky, Rule 8.05, Rules of Civil Procedure (1953)
Maine, Rev. Stat. (1954) c. 113, §18
Maryland, Code Ann. (Flack, 1951) art. 75, §91
Massachusetts, Laws Ann. (1955) c. 231, §31
Minnesota, Rule 8, Rules of Civil Procedure for the District Courts (1952)
Missouri, Rev. Stat. (1949) §509.110
Montana, Rev. Code Ann. (1947) §93-3410
Nebraska, Rev. Stat. (1943) §25-812

Nevada, Comp. Laws (1929) §§8500, 8602
New Jersey, Rule 4:8-5, Civil Practice Rules (1953)
New Mexico, Rule 8, Rules of Civil Procedure for the District Courts (1953)
New York, Civil Practice Act (Cahill-Parsons, 1955) §262
North Carolina, Gen. Stat. (1953) §1-138
North Dakota, Rev. Code (1943) §28.0715
Ohio, Rev. Code (Baldwin, 1953) §2309.14
Oklahoma, Stat. (1951) tit. 12, §272
Oregon, Rev. Stat. (1955) §16.460
Rhode Island, Gen. Laws (1938) c. 520, §9
South Carolina, Code (1952) §§10-703, 10-704
South Dakota, Code (1939) §33.0911
Texas, Rule 48, Rules of Civil Procedure (1955)
United States Courts, Rule 8, Federal Rules of Civil Procedure, 28 U.S.C. (1952)
Utah, Rule 8, Rules of Civil Procedure (1953)
Washington, Rev. Code (1951) §4.32.090
Wisconsin, Stat. (1955) §263.16
Wyoming, Comp. Stat. Ann. (1945) §3-1312

APPENDIX D

Equitable Counterclaim in Actions for Legal Relief Permitted

Arizona, Code Ann. (1939) §21-507
Arkansas, Rev. Stat. Ann. (1956) Rules of Civil Procedure, Rule 18 (a)
California, Code Civ. Proc. Ann. (Deering, 1953) §§307, 441
Colorado, Rule 18, Rules of Civil Procedure (1951)
Connecticut, Gen. Stat. (1949) §7818
Florida, Rule 1.8 (g), Rules of Civil Procedure (1955)
Georgia, Code Ann. (1936) §37-905
Idaho, Code (1948) §5-616
Illinois, Rev. Stat. (1955) c. 110, §44
Indiana, Stat. Ann. (Burns, 1946) §2-1015
Iowa, Rule 31, Rules of Civil Procedure (1954)
Kansas, Gen. Stat. Ann. (Corrick, 1949) §60-710
Kentucky, Rule 18.01, Rules of Civil Procedure (1953)
Maine, Rev. Stat. (1954) c. 113, §18
Minnesota, Rule 18, Rules of Civil Procedure for the District Courts (1952)
Missouri, Rev. Stat. (1949) §509.060
Montana, Rev. Code Ann. (1947) §93.3410
Nebraska, Rev. Stat. (1943) §25-812
Nevada, Comp. Laws (1929) §8606

New Jersey, Rule 4.31-1, Civil Practice Rules (1953)
New Mexico, Rule 18, Rules of Civil Procedure for the District Courts (1953)
New York, Civil Practice Act (Cahill-Parsons, 1955) §262
North Carolina, Gen. Stat. (1953) §1-138
North Dakota, Rev. Code (1943) §28-0715
Ohio, Rev. Code (Baldwin, 1953) §2309.14
Oklahoma, Stat. (1951) tit. 12, §272
Oregon, Rev. Stat. (1955) §16.460
South Carolina, Code (1952) §10-704
South Dakota, Code (1939) §33.0911
Texas, Rule 48, Rules of Civil Procedure (1955)
United States Courts, Rule 18, Federal Rules of Civil Procedure, 28 U.S.C. (1952)
Utah, Rule 18, Rules of Civil Procedure (1953)
Washington, Rev. Code (1951) §4.32.090
Wisconsin, Stat. (1955) §263.04
Wyoming, Comp. Stat. Ann. (1945) §3-1312