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LAW AND EQUITY IN THE FEDERAL COURTS.

By Earl C. Arnold*

(All italics used in quotations herein are those of the writer.)

The pleading which came into vogue under the common law and equity systems has been modified gradually, following a working out of the plans originated by David Dudley Field. Not to exceed seven states now retain the pure common law system of pleading. Many jurisdictions have abolished all distinctions between law and equity. The result to the profession has been that a large part of the time of the courts has been occupied with the interpretation of statutes of technical import. To the law student it has resulted in instilling a feeling that a study of the science of pleading as our fathers understood it is a waste of time, for the next legislature may abolish all the law of pleading which he knows. The effect on both the profession and the student has been unfortunate, for it has discounted the necessity for a foundation in the study of the science of pleading which is necessary in any system. This impression may not be the fault of the code system itself as much as its sponsors who convey the idea that the code sets up a new system, unconnected with anything with which the world has yet been acquainted. The fact is that no code yet has abolished the necessity for an intricate knowledge of common law and equity pleading. While in words a state constitution may, as many do, abolish all distinctions between law and equity, the courts in construing various statutes of modern origin are compelled to resort to the musty volumes which our forefathers cited as authority. For instance, in such a state, if a petition for an injunction be filed, whether a jury trial be permitted requires a determination of the fact that it is in form an equitable action, and that in such cases no jury is authorized. Abolition of the distinction between the forms of a bill in chancery and the common law declaration has not obliterated the essential and inherent distinctions between law and equity as two separate sciences. What was an action at law before the adop-

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tion of the code is yet an action founded upon legal principles. What was a suit in equity before the code, is still an action founded upon equitable principles.¹ No criticism or defense of the code system is intended, but the mere statement of a fact, viz.: that the code system has not abolished the necessity for the study of common law and equity pleading, but it has emphasized the importance of such study. The law schools must emphasize the procedural courses more, and encourage the prospective lawyer to become rooted in the science of pleading, if they expect to impress the community by the success of their graduates.

To prevent this article from assuming the length of an encyclopedia on the subject of pleading, it will be necessary to delimit the subject. The purpose is to impress one point, namely, that neither legislation by the states or Congress, nor any rule of court, can abolish the distinction between common law and equity pleading. While the two systems can be blended partially in the state practice they remain separate and distinct in the Federal courts until the people of the states, through an amendment to the Constitution of the United States, agree otherwise. Whether the present Federal practice is wise or not is not within the purview of the present discussion. With the readjustment of all things in our reconstruction period it need not be unexpected if reformers continue to suggest, as they have in the past, that the judicial system be changed, carrying with it a reformation of pleading.²

The judicial power of the United States has been vested in one Supreme Court and such inferior courts as Congress, from time to time, has established.³ The only court in the United States which could not be abolished except by the laborious method of submitting the matter after a two-thirds vote of both houses of Congress to the various states for affirmative vote by three-fourths of them, is the Supreme Court of the United States. No Congress can affect it. It is an independent department of government, secure from

¹Sutherland's Code Pleading and Practice, Sec. 87.
²See article in the Journal of the American Judicature Society for December, 1918, by Judge Adolph J. Rodenbeck of the Supreme Court of New York, on "Principles of Modern Procedure" in which he says: "There should be no distinction in the form of an action in equity and at law."
³Article 3, Section 1, Constitution of the United States.
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encroachment by any other department. In a like manner its jurisdiction can not be enlarged or contracted from that originally authorized by the same instrument which established it. Among other things, the section dealing with the jurisdiction of the Supreme Court and inferior courts established by Congress declares that:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; ..."

In the seventh amendment, it is provided that:

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

In the eleventh amendment to the Federal Constitution it is declared that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

What was the intention of our forefathers in writing into our Constitution the sections to which reference has been made? Did they intend to maintain a distinction between the terms italicized? May Congress, by its fiat, abolish distinctions between actions at law and equity recognized when our Constitution was written? Could we have a Federal code pleading system patterned after that originated by David Dudley Field? The answer is that only the people may remove the distinctions which for one hundred and thirty years have been maintained between law and equity. In each provision of the Constitution quoted above, law and equity are distinctly and separately mentioned.

The legislative branch of our government passed, as one of its first acts, this section, which is in effect today:

*Article 3, Section 2, Constitution of the United States.*
"The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Again, in 1872, Congress enacted that:

"The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

What is the effect of the two sections last quoted in view of the codification in many states, and the general attempt to abolish all distinctions between law and equity? In states like California and New York, where the system of code pleading obtains, is it not necessary to follow the same system in the Federal courts sitting in the same state? The answer is in the negative, for which ample support is found in the opinions written by various members of the Supreme Court of the United States. No action of the state can abolish the distinction between law and equity embodied in the Constitution. However the states may blend the two systems, they can have no effect when the lawyer pleads in a Federal court.

Referring to the first of the acts above quoted, in holding that an equitable title could not be set up in defense of an action of ejectment in a Federal court, even if permissible in a similar action in a state court in the same jurisdiction, the Supreme Court of the United States approved this language a hundred years ago:

"By the laws of the United States the circuit courts have cognizance of all suits of a civil nature at common law, and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the judiciary act of 1789 it is provided that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of

\*Act September 24, 1789, Ch. 20, 1 St. at L. 92, R. S. 721.

\*Act June 1, 1872, Ch. 256, 17 St. at L. 197, R. S. 914.
May, 1792, confirms the modes of proceeding then used in suits at common law in the courts of the United States, and declares that the modes of proceeding in suits of equity shall be 'according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of common law,' except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress, by these provisions, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only, when according to such practice, a plain, adequate, and complete remedy could not be had at law. In some states in the union no court of chancery exists to administer equitable relief. In some of those states, courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities of law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that where by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is under circumstances of an equitable nature declared by such statutes to be void; the rights of the parties, in such a case, may be as fully considered in a suit at law in the courts of the United States as they would be in any state court.

Concerning section 914, supra, Chief Justice Fuller observed:

"Section 914 of the Revised Statutes in providing that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as

Robinson v. Campbell, 3 Wheaton 212.
may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as under the Constitution matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted. 8

The decisions of our highest court are uniform to the effect that the state cannot adopt any system of procedure failing to distinguish between common law and equity and thus bind the courts established under the authority of the Constitution of the United States. Lawyers have argued to that tribunal that the sections quoted authorize the adoption by the Federal courts of systems of code pleading in force in various states. In answer to this contention, Chief Justice Taney, speaking for the Supreme Court, said:

"The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity.

"Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in state courts have been adopted in the District Court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed (under the authority of the act of August 23, 1842), regulating proceedings in equity in the courts of the United States." 9

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Distinction must be made, therefore, between the substantive law of a state and its procedural law. The Federal Courts are directed to follow the laws of the several states in trials at common law unless otherwise provided. They cannot follow the particular practice of the state courts in equity suits. In law actions, Congress evidently intended the laws of the state to be followed only so far as it related to their substantive law.

Various states have adopted the code system, and the Supreme Court of the United States has had many opportunities to consider cases arising in code states. The code system did not meet with much favor from that body originally. The Federal Courts have guarded jealously against the restraint of their jurisdiction by state action. Mr. Justice Grier, in 1860, gave expression to the feelings held by the members of the early court for the code system, which sought to abolish all distinctions between law and equity. He said:

"We had occasion already to notice the consequences resulting from the introduction of this hybrid system of pleading (so called), into the administration of justice in Texas. . . . This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice, by practice under such codes."

A section of the Judiciary Act provides that:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

That this section is merely declaratory of the common law is conceded. In form it is positive and prohibitive, and prevents a modification of constitutional rights by judicial enlargement. Not only has the defendant a constitutional right to a trial by jury, but in addition this act of Congress prohibits a party aggrieved from pursuing his remedy in a court of equity if he has an adequate remedy at law. In effect it maintains those clear distinctions between the two forms which were emphasized at the time the Judiciary Act was written. But, by what standard are we to determine what is meant by "a plain, adequate, and complete remedy" at

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10Green v. Custard, 23 Howard 484.
11Act September 24, 1899, Ch. 20, 1 St. at L. 82, R. S. 723.
law? Is not this language a loophole by which the meaning may be different from that understood by the writers of the act? May not the state enlarge the meaning of an adequate remedy at law from that understood at common law? The courts have jealously guarded the provision quoted. The meaning of "a plain, adequate, and complete remedy" at law is the same as when the Constitution was written, unless since changed by acts of Congress. Neither practice of the state courts nor state legislation can affect this interpretation, for as the Supreme Court of the United States said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." 13

The statutes mentioned are but a recognition of the distinctions maintained in the Constitution of the United States. Those demarcations between law and equity must exist until the people, in the only modes by which the Constitution can be amended, see fit to change the provisions. Until the Constitution is changed, the Federal Court is the only tribunal in our country having uniformity of practice and procedure in all the states.14 The result is that no applicant is fitted for the bar until he becomes acquainted with the fundamentals of procedure at common law and equity. No practitioner can properly conduct a case in the Federal Court without a clear understanding of the difference between the two systems of pleading. The distinction confronts him from the filing of the first pleading and determines its entire course. No matter how artful the state has been to make changes which will affect proceedings of a Federal Court sitting in that state, such courts are independent, and in filing an action therein the lawyer, if he desires success to crown his efforts, must become intimate with law and equity, not only as substantive law, but also as systems of pleading as such existed at the time of the revolution.