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THE UNION OF LAW AND EQUITY

"The inherent and fundamental difference between actions at law and suits in equity cannot be ignored." So said the New York Court of Appeals[1] nearly seventy-five years after the legislature had solemnly ordained that "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."[2]

The statement made by the Court of Appeals has been accepted even beyond its face value by lower New York courts. Not only have they *dismissed* complaints brought "in equity" which should have been brought "at law" where the defendant has appeared but has not answered,[3] but even after answer or after trial they have reversed and dismissed complaints for the same reason. In *Poth* v. *Washington Square M. E. Church,*[4] an action was brought for specific performance of a contract concerning realty. No claim for damages was made. It appeared that specific performance was not proper and that the plaintiff was entitled to the return of his deposit money. At the close of the case he moved to conform the pleadings to the proof on the subject of damages. The motion was granted and money damages were awarded. *On appeal* the Appellate Division reversed, and ordered *the complaint dismissed,* with costs to the defendant. The court held that specific performance was properly refused, and continued (p. 224):

".....Nor could the court award damages here. The suit was wholly for equitable relief and none was found to be properly awardable. The return of the deposit money was not asked in the complaint

[1] See *Jackson* v. *Strong* (1917) 222 N. Y. 149, 154, 118 N. E. 512.
[2] N. Y., Laws 1848, c. 379, § 62.
[3] *Chadbourne* v. *Mayer* (1924) 207 App. Div. 754, 202 N. Y. Supp. 805; *Robinson* v. *Whitaker* (1903) 205 App. Div. 286, 199 N. Y. Supp. 680. See (1924) 24 Columbia Law Rev. 286; (1924) 33 Yale Law Journ. 881.
[4] (1923) 207 App. Div. 219, 201 N. Y. Supp. 776.

nor was the question of its forfeiture or counterclaims against it considered. The pleading of plaintiff did not request its return, and amending the plea to conform to damages proved in an equity suit where no damages are demanded is not proper practice."

The court supports this resurrection of old law and equity practice by a quotation from the *Jackson* case, cited above, to the effect that the complaint should be dismissed. It failed, however, to note that the Court of Appeals in that case actually did not dismiss, but ordered a new trial.[5]

In *Daly* v. *Sobieski*,[6] the Supreme Court had before it a complaint seeking specific performance of an alleged oral contract to lease for a period exceeding a year. The defendant *filed his answer* and then moved for judgment on the pleadings, urging that since the contract was shown to be oral, the statute of frauds applied. The court held that the point need not be considered, because the plaintiff's failure to allege *that he had no adequate remedy at law* was fatal in an action in equity. The motion was therefore granted, with leave, however, to amend.

These cases, while perhaps somewhat extreme, seem rather typical of the present attitude of the New York courts towards the fundamental principle of the Code reform.[7] A great English judge has said:[8]

"Whether or not it could be recovered at common law,.....it is not necessary to decide.....we have to apply the general law, legal and equitable....."

So the late Professor Maitland said: "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."[9] But in New York, the birth state of the Code, there seems to be actually less fusion today than there was seventy-five years ago.

The present course of decision in New York is all the more to be regretted because the same views were advanced in the early days of the Code and were at that time rejected by the New York courts in some able decisions. ' Many of the early judges, of whom perhaps Selden was the most striking example, bitterly objected to the principles of the

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[5] *Jackson* v. *Strong, supra,* footnote 1. The case of *Saperstein* v. *Mechanics & Farmers Sav. Bank* (1920) 228 N. Y. 257, 126 N. E. 708, cited *infra,* footnote 37, was not cited.

[6] (1924) 123 Misc. 176, 204 N. Y. Supp. 546.

[7] Other recent decisions are discussed by Mr. Jay Leo Rothschild, *Simplification of Civil Practice in New York* (1923) 23 Columbia Law Rev. 618, 619; (1924) 24 Columbia Law Rev. 732, 733-742.

[8] Collins, *M. R.,* in *Bannatyne* v. *MacIver* [1906] 1 K. B. 103.

[9] Maitland, *Equity* (1910) 20; *cf. Giles* v. *Lyon* (1851) 4 N. Y. 600 (an action commenced under the Code cannot be an "equity case").

Code. Selden especially made the same assertion of the fundamental difference between law and equity as is now repeated by the court.[10] Referring to him and some of his associates, Chief Justice Winslow of Wisconsin said many years later:

"The cold, not to say inhuman, treatment which the infant Code received from the New York judges is 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."[11]

The learned Chief Justice was then referring especially to the matter of joinder of parties and of causes. His remarks that the Code was substantially nullified by its construction do not apply strictly to the fusion of law and equity, since there Selden and those who agreed with him did not prevail. In fact, their views were definitely repudiated by the Court of Appeals. Thereafter the course of decision was not entirely uniform, and from time to time there were expressions of the more illiberal doctrine.[12] But not until recently has there seemed to be a definite return to it. A little Code history in New York seems apposite.

There can be no possible doubt of the intention of the makers of the Code to make a "blended" system of law and equity. Their notes to the provisions of their draft Code, which was substantially that passed by the legislature in 1848, make this abundantly clear. At some length they point out the defects of the old system of separate courts of law and equity, and they then devote some pages to a discussion of the abolition of the distinction between actions at law and suits in equity, and then some further pages to a discussion of the abolition of forms of actions at law and suits in equity. They thought they were abolishing not only the *forms* but the "inherent" distinctions.[13] Thus Chief

[10] *Reubens* v. *Joel* (1856) 13 N. Y. 488; *Voorhis* v. *Childs' Executor* (1858) 17 N. Y. 354.

[11] See *McArthur* v. *Moffet* (1910) 143 Wis. 564, 567, 128 N. W. 445.

[12] *E. g.*, Earl, *J.*, in *Gould* v. *Cayuga Co. Nat'l Bank* (1881) 86 N. Y. 75; *Bradley* v. *Aldrich* (1869) 40 N. Y. 504. *Cf.* also the requirement, at variance with Code principles, that the pleader shall have and maintain a certain theory of the pleadings. *Goulet* v. *Asseler* (1860) 22 N. Y. 225; *Barnes* v. *Quigley* (1874) 59 N. Y. 265; *Walrath* v. *Hanover Fire Ins. Co.* (1915) 216 N. Y. 220, 110 N. E. 426. See Whitter, *The Theory of a Pleading* (1908) 8 Columbia Law Rev. 523; Albertsworth, *The Theory of the Pleading in Code States* (1922) 10 Cal. Law Rev. 202; Scott, *The Progress of Law* (1919) 33 Harvard Law Rev. 236, 238. More liberal decisions in New York are referred to hereinafter.

[13] First Report of Commissioners on Pleading and Practice (N. Y. 1848) pp. 67-87, 137-147, and elsewhere passim.

Justice Comstock, when explaining later his failure to object to Judge Selden's discussion in *Reubens* v. *Joel*,[14] of the inherent difference between law and equity said that he "hesitated in regard to the power of the legislature under the Constitution to abrogate all the distinctions between legal and equitable actions. That such was the expressed intention of the legislature in the Code of Procedure I never had any doubt. Both of these questions must now be considered at rest."[15]

The case of *Reubens* v. *Joel*, in which Selden wrote the opinion—later said to be a personal expression only[16]—was decided in 1856. In the previous year, when Selden was not on the bench, the court decided the case of *Marquat* v. *Marquat*,[17] said recently in the Columbia Law Review to represent "the overwhelming weight of authority" in New York.[18] It held that where the plaintiff asked for equitable relief but at the trial proved only a case for legal relief, the latter relief should be granted. The court, through Judge Johnson, said:

"The Code (§ 275) provides that if the defendant has answered, the court may grant the plaintiffs any relief consistent with the case made by the complaint and embraced within the issue. In case no answer has been put in, the relief granted cannot exceed that demanded in the complaint. In the former case the demand of relief in the complaint becomes immaterial. The case made by the complaint and the limits of the issue alone determine the extent of the power of the court. These expressions of the statute include the statement of the right of the plaintiffs and its infringement by the defendants. These constitute the case. The addition to these material facts of others, which neither show a right in the plaintiffs, nor a wrong thereto on the part of the defendants, do not add to or alter the legal case contained in the complaint. They may render the pleading inartistic, and perhaps subject the party to an order under § 160 striking out the irrelevant or redundant matter; or, if by means of them the pleading is so indefinite and uncertain that the precise nature of the charge is not apparent, to the necessity of amendment, but they do not limit his right to give evidence upon the trial, nor impose upon the court any restraint as to the nature or extent of the relief to be given....."[19]

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[14] *Supra*, footnote 10.

[15] See *New York Ice Co.* v. *North Western Insurance Co.* (1861) 23 N. Y. 357, 360.

[16] *Ibid.*

[17] (1855) 12 N. Y. 336.

[18] See (1924) 24 Columbia Law Rev. 286, 289.

[19] At page 341. "The Code (§ 275)" is now C. P. A. § 479. The recent cases, *supra*, footnote 3, raise the question whether a demurrer or motion to dismiss the complaint may be considered an "answer" within the meaning of this rule, so as to make the prayer for relief immaterial. It seems that the codifiers had in mind the situation where the defendant made default of appearance, but the Code was unfortunately worded. The New York cases are in conflict, some holding a demurrer or motion to dismiss sufficient, while others require a technical answer. The later Appellate Division cases above cited take

The dispute in the court finally resulted in the decision in *Phillips* v. *Gorham*[20] in 1858, Chief Justice Johnson writing the opinion, Judges Selden and Pratt dissenting. Here the court held that the constitution did not prevent the legislature from allowing, as it had done, legal and equitable grounds of claim to be united in a complaint. The court then proceeded to discuss the question before it upon the true ground, namely, fair statement of the cause of action: "If these views are correct, then the objection is reduced to one of mere variance and within the settled rules on that subject, created no bar to a recovery. The ground was clearly understood, no one was surprised or misled, the parties went to trial prepared to try, and did try, the very question on which their rights depended. If there was any defect of parties, or if the defendant was entitled to any restitution, he should have presented his claim at the trial and it would then have been, as we must presume, properly disposed of."[21] Judgment for the plaintiff was affirmed. Many other cases fully sustain the same position.[22]

It is submitted, with all deference to the present Judiciary of New York, that the theory there set forth is irreproachable. The Code united law and equity into one system of jurisprudence to be administered in the one civil action. In fact it is unfortunate to continue to speak of law and equity, since that naturally tends to preserve old distinctions. The former principles of equity jurisprudence are now a part of our one body of applicable legal rules. These rules have no place in the pleadings, which are to state "facts," *i.e.,* to state past events, to give a segment of private history between the litigants. The complaint is to state the *facts constituting* the cause of action. The demand for relief is no part of the cause of action and, where "the answer is filed," is to be disregarded. It is for the court, not the parties, to apply the law to the case; hence a theory of the pleadings, or a characterization of the action as legal or equitable or tort or contract should be disregarded. The only duty on the pleader is to give a fair and sufficient statement

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the stricter view. See (1924) 24 Columbia Law Rev. 286; (1924) 33 Yale Law Journ. 881. In Connecticut, unlike code states, the prayer for relief remains important throughout, in form at least, since it must be formally amended at the trial to correspond to the relief given. Conn. Gen. Stat. (1918) §§ 5672, 5673.

[20] (1858) 17 N. Y. 270.

[21] At page 275.

[22] See, *e. g., New York Ice Co.* v. *North Western Insurance Co., supra,* footnote 15; *Barlow* v. *Scott* (1861) 24 N. Y. 40; *Emery* v. *Pease* (1859) 20 N. Y. 62; *Lattin* v. *McCarty* (1869) 41 N. Y. 107; *Williams* v. *Slote* (1877) 70 N. Y. 601; *DiMenna* v. *Copper & Evans Co.* (1917) 220 N. Y. 391, 115 N. E. 993. The case of *Hahl* v. *Sugo* (1901) 169 N. Y. 109, 62 N. E. 135 should be especially noted. An action in ejectment for possession of premises upon which the defendant has encroached is upon the *same cause of action* as an *equitable* proceeding for an injunction to secure the removal of the encroachment and the two remedies cannot be split. *Cf. City of Syracuse* v. *Hogan* (1923) 234 N. Y. 457, 138 N. E. 406.

of facts, and all the court should require of him is this. His law may be disregarded if he gives fair notice to his opponent and to the court.[23] And hence, as the New York court says in *Phillips* v. *Gorham,* the objection from the defendant "is reduced to one of mere variance." Applying this rule to the three recent cases referred to at the beginning of this article, it would seem that, disregarding the plaintiff's erroneous statements of law, in each of them fair notice was given. Certainly, in any event, an amendment should have been allowed.

It seems to have been thought by some that legal rights denote a legal cause and equitable rights denote an equitable cause, and that on claims for both legal and equitable relief there must necessarily be separate causes of action. Such a view is at variance with the whole idea of the Code. It makes the relief, which means the plaintiff's lawyer's idea of the law, the test of the cause of action. Then a cause of action, instead of being a statement of facts, of past acts and events, would be an attempted prophecy of law. The sound view is that a *single* cause of action may give rise to various rights of action, "formerly denominated" legal or equitable, as the case may be.[24]

Hence it is submitted that the statement quoted at the beginning of the article is not true. There are no inherent and fundamental objections to the giving of legal and equitable relief in a single form of civil action. It is true as well as obvious that equitable is not the same as legal relief, that an injunction is not identical with a judgment for money damages. It is likewise true and obvious that court trials and jury trials are not identical. But further, it is true that neither the ultimate remedy to be granted nor the form of fact-finding process used

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[23] These points have been developed more at length in an earlier article by the writer. See *The Code Cause of Action* (1924) 33 Yale Law Journ. 817.

[24] See *Wright* v. *Wright* (1873) 54 N. Y. 437, 442-443. "While regard is still to be had in the application of legal or equitable principles, there is not of necessity any difference in the mere form of procedure, so far as case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded, and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given the action." Perhaps the prophecy added by the court is in point at the present time. "Indeed, if some such result has not been attained by the Code of Procedure, we are still in the labyrinth of legal technicalities in practice and pleading contrived long ago, and tending to enslave the administration of justice, and from which it has been hoped we had, by legislative aid, secured comparative freedom."

For fuller development, see the writer's article, *supra,* footnote 23. See also *Emery* v. *Pease, supra,* footnote 22; *New York Ice Co.* v. *North Western Insurance Co., supra,* footnote 15; *Cahoon* v. *Bank of Utica* (1852) 7 N. Y. 486; *Lattin* v. *McCarty, supra,* footnote 22; *Crary* v. *Goodman* (1855) 12 N. Y. 266; *Stevens* v. *Mayor of N. Y.* (1881) 84 N. Y. 296; *White* v. *Lyons* (1871) 42 Cal. 279; *Leonard* v. *Rogan* (1866) 20 Wis. 540; see *McMahon* v. *Plumb* (1916) 90 Conn. 281, 285, 96 Atl. 958; *Trowbridge* v. *True* (1884) 52 Conn. 190, 197.

require the preservation and continuation of separate tribunals, of separate actions and of separate forms of action.[25]

The constitutional right of trial by jury is usually the final and ultimate argument of those who feel that old distinctions are inherent in the nature of things. This constitutional right causes sufficient bother in trials, is a sufficient hindrance to effective trial work; we ought therefore by no means to give it more scope than it actually deserves. It applies to the *form of trial, not to the form of pleading.* The constitution requires no special method of pleading and the legislature was free to choose such method as it pleased.[26] It decided upon a system of stating facts. When the pleadings are closed, and the issues formed, then comes the question of form of trial. At this point our constitution says, in effect, that either party has a right to a trial by jury (unless it is waived) on issues which were formerly decided by a jury. Broadly speaking, this includes all "law" cases and no "equity" cases of the old regime, although this is not the exact line of demarcation.[27] The pleadings settle the issues; the issues settle the form of trial. If the pleadings do not settle the issues, they should be made clearer. No serious constitutional difficulty need be had in working out these rules, and as a matter of fact, none is had in many jurisdictions. In a single case there may therefore be both jury issues and court issues, though the court may, if it chooses, send all the issues to the jury. The procedure is no more complicated than sending a case to a master or referee. No fundamentals of distinctive forms of action or tribunals are involved.[28]

The case first referred to, *Jackson* v. *Strong,*[29] may well illustrate

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[25] See Cook, *Equitable Defences* (1923) 32 Yale Law Journ. 645; *Union of Law and Equity and Trial by Jury under the Codes* (1923) 32 Yale Law Journ. 707, by the present writer.

[26] As Professor R. W. Millar's *The Formative Principles of Civil Procedure* (reprinted from 18 Ill. Law Rev. 1, 94, 150) should show, there are many methods of pleading in vogue in other countries, and there is no inherent promise of perfection in the methods employed in common law countries.

[27] Thus by statute certain "equity" cases may be triable by the jury. *Rohssler* v. *Rohssler* (1923) 120 Misc. 569, 199 N. Y. Supp. 830 (partition suit under C. P. A. § 1023), criticized in Rothschild, *op. cit.,* footnote 7, p. 741. *Cf. City of Syracuse* v. *Hogan, supra,* footnote 22; see (1923) 23 Columbia Law Rev. 590. And certain "equitable defenses" may have worked over into the law before the adoption of the Code. *Kirk* v. *Hamilton* (1880) 102 U. S. 68; see (1914) 49 L. R. A. (N. S.) 775; Hinton, *Equitable Defenses under Modern Codes* (1920) 18 Mich. Law Rev. 717, 721.

[28] See *supra,* footnote 25; also cases *supra,* footnote 24; *Roy* v. *Moore* (1912) 85 Conn. 159, 162, 82 Atl. 233; *Back* v. *People's National Fire Ins. Co.* (1922) 97 Conn. 336, 116 Atl. 603; *Bisnovich* v. *British American Assurance Co.* (1924) 100 Conn. 240, 123 Atl. 339; *Angus* v. *Craven* (1901) 130 Cal. 691, 64 Pac. 1091; *Martin* v. *Turnbaugh* (1899) 153 Mo. 172, 54 S. W. 515; *Leonard* v. *Rogan, supra,* footnote 24; *Sternberger* v. *McGovern* (1874) 56 N. Y. 12, 21.

[29] *Supra,* footnote 1.

the point. In that case the plaintiff set up a contract which he alleged created a partnership between himself and the defendant, and asked for an accounting and recovery of the amount due. The defendant answered that he had simply agreed to pay the plaintiff the reasonable value of his services. The case was referred to a referee, who found in favor of the defendant's version of the agreement, and that the plaintiff was entitled to a judgment for the value of his services. The defendant filed exceptions, but the court entered judgment in accordance with the referee's report. On appeal the court said:[30]

"We have then a case wherein the complaint sets forth a cause of action in equity which, as the finding was, the plaintiff failed to prove on the trial, and the court without any amendment of the pleadings awarded the plaintiff damages as in an action at law. Was that proper? I think not. There is some confusion in the cases bearing upon this subject, but the weight of authority is that where some ground of equitable jurisdiction is alleged in a complaint but fails of proof in its entire scope on the trial, and it appears that there never was any substantial cause for equitable interference, the court will not retain the action and grant purely legal relief, but will dismiss the complaint....."

And the court decided that "the judgment appealed from be reversed and a new trial granted, with costs to abide the event."

The case is not only opposed to the view of previous cases above referred to, but at least one case seems contra, on almost identical facts.[31] It is submitted that the ground of decision urged,—that of distinction between law and equity,—clearly is not sound. But we may look further. Has defendant suffered any harm? It appears clear that he owes the money and should eventually pay. But he may have been harmed by being deprived of trial by jury, for it seems there is a jury

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[30] Pages 153-154.

[31] *Williams* v. *Slote, supra,* footnote 22 (accounting asked on breach of contract; case referred without objection to referee; later the trial court ordered the complaint dismissed since it alleged an equitable cause while the proof showed a legal cause: *held,* error; the cause of action was the same, it was legal, the equitable prayer for relief not being conclusive, and the objection could not be first raised in an appellate court). *Accord, New York Ice Co.* v. *North Western Insurance Co., supra,* footnote 15; *White* v. *Ryan* and *Leonard* v. *Rogan, supra,* footnote 24; *Barlow* v. *Scott, supra,* footnote 22, where there was an express holding of waiver. But see *contra, Bradley* v. *Aldrich, supra,* footnote 12, explaining the *Barlow* case on the ground that the relief prayed for was in the alternative, specific performance *or damages,*—an insufficient ground in view of the fact that the relief was not a part of the complaint. *Cf. Anderson* v. *Chilson* (1895) 8 S. Dak. 64, 65 N. W. 435. The note cited in *Jackson* v. *Strong*—19 L. R. A. (N. S.) 1064—deals with the *old equity practice,* and points out, page 1075, that the effect of the code, "broadly stated" is *"to permit the retention"* of the case. (Italics the writer's).

issue involved.[32] Here, however, the question of waiver arises. Going to trial without a waiver, and consent to a reference are equally waivers of jury trial.[33] If the defendant at the time of the reference knew of the jury issue, he has waived his right.

Now it is true that the plaintiff sued on the theory that his remedy was equitable. But it is not for him to decide, and his characterization of the case, as we have seen, is of no importance. The real question in the case is, did he give fair notice in his complaint of the exact contract on which he was relying? It seems that he did. The defendant knew the contract and correctly characterized it in his answer. He has waived his right, and should not now, having speculated on the outcome, be allowed to upset the just result reached, and obtain another chance.[34]

The application of these principles to the other cases may readily be perceived.

A further point may be noted. If the complaint is not sufficiently definite the remedy is to order it made more definite, not to dismiss the complaint. Even in states where law and equity are not blended, the complaint in a case wrongly brought in equity *is not dismissed but is transferred to the law side* of the court.[35] This same rule has been applied in several cases in New York[36] and a decision of the Court of Appeals subsequent to *Jackson* v. *Strong* stated this to be the proper

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[32] In a criticism of the case in (1918) 32 Harvard Law Rev. 166, it is suggested that since the defendant in his answer admitted the contract and its breach, there was no jury issue. But there was surely a jury issue on the *amount* of the recovery.

[33] *Adams* v. *Brady* (N. Y. 1893) 67 Hun. 521, 22 N. Y. Supp. 466; *Baird* v. *Mayor* (1878) 74 N. Y. 382.

[34] *Phillips* v. *Gorham, supra,* footnote 20; Peckham, *J.,* dissenting in *Degraw* v. *Elmore* (1872) 50 N. Y. 1, 7: "Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried. "But the cases of loss and damages to suitors by some defect of pleading have been innumerable."

Under the Connecticut provisions, *supra,* footnote 19, when the prayer for relief is amended in the trial, "reasonable opportunity" to claim a jury trial must *then* be afforded the defendant. Conn. Gen. Stat. (1918) § 5673.

[35] *Birmingham Sawmill Co.* v. *Southern Ry.* (1923) 210 Ala. 126, 97 So. 78; *McGraw Co.* v. *Canta Fire & Rubber Co.* (Iowa 1922) 190 N. W. 129; *Koontz* v. *Houghton* (1923) 224 Mich. 463, 194 N. W. 1018; *Castley* v. *Smith* (Pa. 1923) 122 Atl. 280; see Federal Equity Rules (1912) 22; (1924) 24 Columbia Law Rev. 286.

[36] *Sternberger* v. *McGovern, supra,* footnote 28; *Margraf* v. *Miner* (1874) 57 N. Y. 155, 159; *Haffey* v. *Lynch* (1894) 143 N. Y. 241, 38 N. E. 298; *Everett* v. *De Fontaine* (1903) 78 App. Div. 219, 79 N. Y. Supp. 692; *Doctor* v. *Reiss* (1917) 180 App. Div. 62, 167 N. Y. Supp. 193; *Kraemer* v. *World Wide Trading Co.* (1921) 195 App. Div. 305, 183 N. Y. Supp. 16; see *Loeb* v. *Supreme Lodge, Royal Arcanum* (1910) 198 N. Y. 180, 186, 91 N. E. 547 (where the plaintiff declined to ask to go to "the law side"); C. P. A. § 111 (that the cause may be "remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts to the same extent as if the application had been in the first instant for the relief granted"); see Rothschild, *op. cit.,* footnote 7, p. 736.

procedure.[37] In spite of the ambiguous language in *Jackson* v. *Strong,* relied on by the Appellate Division, it seems that all the court there contemplated when it ordered a new trial was an amendment of the complaint, followed by a transfer to the jury calendar. The expression "motion to transfer to the law side" used in some of the New York cases[38] is unobjectionable in substance, since it means that, jury trial not having been waived, the case is to go onto the jury calendar, *i.e.,* to be transferred from "Special Term" to "General Term." But the expression is quite unfortunate in form. It indicates something inherent, a different *side* of the court, rather than merely a pure matter of convenience in arranging trials so that jury cases may be tried together.

The union of law and equity is justly considered to be the foundation principle of the Code reform.[39] The current resurrection of law and equity as distinct systems in New York can only be viewed with dismay by those interested in a simpler pleading which shall emphasize substantive rights, not procedural forms.[40]

CHARLES E. CLARK

YALE LAW SCHOOL

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[37] *Saperstein* v. *Mechanics & Farmers Sav. Bank, supra,* footnote 5, approved in *Holden* v. *Efficient Craftsman Corp.* (1923) 234 N. Y. 437, 138 N. E. 85.

[38] *Loeb* v. *Supreme Lodge, Royal Arcanum, supra,* footnote 36, and other cases cited, *supra,* footnotes 36, 37.

[39] See Pomeroy, *Code Remedies* (4th ed. 1904) §§ 4, 5; Taylor, *The Fusion of Law and Equity* (1917) 66 Univ. of Pa. Law Rev. 17; Taylor, *Law Reform* (1917) 11 Ill. Law Rev. 402; Hogg, *Law and Equity—the Test of Their Fusion* (1910) 22 Jurid. Rev. 244.

[40] Apparently the common law forms of action also are being resurrected in New York,—even the distinction between general and special assumpsit. In *Henry Glass & Co.* v. *Misroch* (1924) 206 N. Y. Supp. 373, the verdict of the jury and judgment of the court were for the sale price of goods, whereas, so the Appellate Division says, they should have been merely for damages for refusal to accept, title not having passed. The defendant had quite properly asked for a new trial. The Appellate Division, however, ordered the *complaint dismissed.*