

## UNION OF LAW AND EQUITY AND TRIAL BY JURY UNDER THE CODES

It is an interesting speculation whether an able court does not tend naturally because of its own high level of efficiency to require of others a greater facility in matters of procedure than may reasonably or practically be expected. The New York Court of Appeals now furnishes an occasion for such a speculation. That able tribunal has recently gone far to reestablish the requirement that the pleader must have and stick to one theory of his cause of action.<sup>1</sup> It has stated, in reversing a judgment because of lack of a jury trial, that "the inherent and fundamental difference between actions at law and suits in equity cannot be ignored," coupling with this some encomiums upon the necessity of exact pleading which have a distinctly antiquarian sound.<sup>2</sup> Still more recently it has expressed "a desire to preserve to litigants the forms of procedure prescribed by law and the rights flowing therefrom."<sup>3</sup> It has made doubtful the former New York law that a plaintiff who sued for specific performance knowing that he could get only damages, could nevertheless get the latter,<sup>4</sup> for it states that the weight of authority is that "the court will not retain the action and grant purely legal relief, but will dismiss the complaint."<sup>5</sup> And it has now just held in *Syracuse v. Hogan*

<sup>1</sup> *Walrath v. Hanover Fire Ins. Co.* (1915) 216 N. Y. 220, 110 N. E. 426; see also the case in note 3, *infra*. See criticism of the requirement of a theory of the pleading and discussion of the former New York rule in Albertsworth, *The Theory of the Pleadings in Code States* (1922) 10 CALIF. L. REV. 202; Whittier, *The Theory of a Pleading* (1908) 8 COL. L. REV. 523; (1911) 24 HARV. L. REV. 480; (1918) 32 HARV. L. REV. 166.

<sup>2</sup> *Jackson v. Strong* (1917) 222 N. Y. 149, 18 N. E. 512. This was brought as an action for an accounting between partners but turned out to be merely an action for breach of contract. For criticism of the case, see NOTES (1918) 32 HARV. L. REV. 166; Scott, *Progress of the Law* (1919) 33 HARV. L. REV. 236, 240; Albertsworth, *op. cit. supra* note 1. In the NOTE first cited it is said that inasmuch as the defendant admitted his breach of contract there was no question of fact at issue. It seems, however, that the defendant should be entitled to a jury trial on the issue of damages. In any event the court did not show itself astute to discover a waiver of the defendant's right to trial by jury through his failure to assert it seasonably.

<sup>3</sup> *Merry Realty Co. v. Shamokin & Hollis R. E. Co.* (1921) 230 N. Y. 316, 130 N. E. 306 (reversing 186 App. Div. 538), action to foreclose a mortgage given on exchange of real property; counterclaim for rescission of the exchange, return of the defendant's realty and damages; on the plaintiff's appeal, judgment for the defendant for money damages for deceit was held error as inconsistent with the theory of the pleadings; the pleadings were for equitable relief, the judgment was for legal relief; all the courts who heard the case were convinced of the plaintiff's gross fraud and deception; justice seems to have been done; and yet a new trial is necessary to allow full damages only if rescission cannot be had, since the action is equitable.

<sup>4</sup> *Barlow v. Scott* (1861) 24 N. Y. 40.

<sup>5</sup> *Jackson v. Strong*, *supra* note 2. Apparently, however, the court will not go so far as to dismiss the complaint. In *Saperstein v. Mechanics & Farmers' Bank* (1920) 228 N. Y. 257, 126 N. E. 708, the court says that if in addition to an equitable cause of action "the facts as stated give rise to a legal liability then there should be no dismissal; the action remains to be tried." There is a quite

(1923) 234 N. Y. 457,<sup>6</sup> that in a suit to enjoin one from maintaining a building and other encroachments on a strip of land, title to which was claimed by the plaintiff, the defendant who claimed title in himself by adverse possession is entitled as of right to a trial by jury. Judge Cardozo dissented in an able opinion, in which Judges Pound and Crane concurred.

It is submitted that in this series of cases the learned court has approached the problem of the union of equity and law under the codes from a fundamentally unsound standpoint. It ought not to be true that actions at law and suits in equity must be considered still inherently different. It would be a disgrace to our law if the ancient cumbersome methods of doing justice by two separate systems of law were still necessary. And the experience of enlightened states, such as Connecticut, shows that it is not necessary. The difficulty is the same as that discussed in Professor Cook's article earlier herein,<sup>7</sup> namely, the failure to appreciate that equity and law were not two concurrent systems of law but were to a large extent two conflicting systems and that the purpose of the makers of the code seems clearly to have been to end such conflict by providing for one system of justice. This system cannot be called either legal or equitable as these terms were anciently used. It is a combination of the two, wherein the substantive jural relation enforced by the court in the first instance is the same as would ultimately have been preserved under the old system by a roundabout method of a proceeding in equity to prevent its non-enforcement at law.<sup>8</sup>

A large part of the confusion is undoubtedly due to the fact that the state constitutions preserve inviolate the constitutional right of trial by jury as existing at the time of their adoption. This adds to the inconvenience of trial but should do no more. The jury does not determine the method of procedure except in one part thereof, namely, the ascertainment of the facts. Other parts of a lawsuit, such as the framing of issues, and proceedings after judgment, may proceed in substantially the same manner whether a jury trial is had or not.<sup>9</sup> Hence the right to a

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surprising amount of confusion generally on this point. See 19 L. R. A. (N. S.) 1064, 1075, note. See NOTES (1916) 16 COL. L. REV. 326. In the *Superstein* case the action is said to be "now an action at law"; in *McGraw Co. v. Zanta Tire & Rubber Co.* (1922, Iowa) 190 N. W. 129, the remedy is said to be by motion to transfer to the "law calendar"; in *Northern Life Ins. Co. v. Walker* (1923, Wash.) 212 Pac. 277, "there came into being by the pleadings of the parties . . . a simple law action" in what had been an action for equitable relief, or else the defendant lost his right to trial by jury. The continued use of the term "law" is unfortunate as tending to perpetuate a distinction which no longer exists.

<sup>6</sup> Reversing (1922) 201 App. Div. 874.

<sup>7</sup> Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645.

<sup>8</sup> See discussion, *ibid.*

<sup>9</sup> *Liberty Oil Co. v. Condon* (1923, U. S.) 43 Sup. Ct. 118, discussed by Cook, *op. cit. supra* note 7, at p. 656, illustrates a not uncommon distinction still preserved between equitable and legal causes, namely that the appellate court may review the

jury trial should mean merely that after the issues have been formed they should, upon motion of any party, be examined to determine whether, at the time of the adoption of the constitution, under such issues the facts had to be ascertained by a jury. Since court and jury trials were kept separate by the existence of separate tribunals until the adoption of the codes, our question is substantially therefore an historical one as to the situation which existed at the time of adoption of the codes.<sup>10</sup> Moreover, the parties should be held to have waived the raising of the question and their constitutional right by not asserting it seasonably.<sup>11</sup>

In the principal case, therefore, where the right was asserted in due fashion, the question is really whether equity would have tried a disputed title to land, before the amalgamation of equity and law. The majority try to dismiss the question more summarily by asserting that the case comes within the terms of the code action of ejectment where the parties by the code are entitled to a jury trial, and it is claimed that the plaintiff may be given complete relief therein by an award, provided for in the code, of damages and expenses for removing encroachments.<sup>12</sup> The argument seems to be that although you have tried to bring an action for "equitable" relief, yet since "legal" relief is sufficient, we will compress your action into one for "legal" relief. But as Judge Cardozo clearly demonstrates, the plaintiff in such a case should be given an injunction compelling the defendant to remove the encroachment or else the sheriff, acting for the plaintiff, is put in the position of Shylock limited exactly to his pound of flesh. The better rule, already followed in New York, gives the owner "the remedy that will place the risk and the cost upon the shoulders of the wrongdoer."<sup>13</sup> Hence the plaintiff should be held entitled to "equitable" relief.

Now there is a rule of some vogue that equity will not try a disputed title to realty but will await a decision at law before awarding permanent

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facts in the former but not in the latter cases. This is not a necessary rule. Under the Connecticut procedure findings by court or jury are equally respected. See *Meriden Trust & Safe Deposit Co. v. Miller* (1913) 88 Conn. 157, 90 Atl. 228 (action of interpleader).

<sup>10</sup> See the admirable Connecticut provision quoted by Cook, *op. cit. supra* note 7, at p. 652. The method there set forth was applied in *Roy v. Moore* (1912) 85 Conn. 159, 82 Atl. 233, a case similar to the principal case.

<sup>11</sup> Here again the Connecticut provisions seem admirable. In effect they require a party affirmatively to ask for a jury trial within a certain time or the right is waived. Conn. Gen. Sts. 1918; sec. 5752. The cumbersome New York provisions referred to by Cook, *op. cit. supra* note 7, at p. 651, require *affirmative* action in order to *wave* the right. The Connecticut provision is constitutional. *Noren v. Wood* (1899) 72 Conn. 96, 43 Atl. 649.

<sup>12</sup> Code Civ. Proc. sec. 3343, subd. 20; sec. 968, subd. 2; sec. 1496, 1497; sec. 1660-1662; sec. 1240; N. Y. C. P. A. 1920, sec. 7, subd. 8; sec. 425, subd. 2; sec. 920, 504, 505.

<sup>13</sup> Cardozo, J., *dissenting* in the principal case; *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135; *City of New York v. Rice* (1910) 198 N. Y. 124, 91 N. E. 283. See discussion by Professor G. E. Woodbine in COMMENTS (1917) 27 YALE LAW JOURNAL, 265.

relief. Some courts have thought the rule to be jurisdictional,<sup>14</sup> but equity scholars seem in the main to view it only as a rule of policy, not of power.<sup>15</sup> Even so, if the equity court did not actually and in practice try the title, the defendant now should have his jury trial on this issue only and such has been the result sometimes reached under the codes.<sup>16</sup> In some states, however, the entire rule had been repudiated,<sup>17</sup> and this, so says Judge Cardozo, was the situation in New York. The cases seem to bear him out, even though in certain of them the judges enter a caveat as though they were not entirely sure of their ground.<sup>18</sup> Nevertheless, there seems to have been clearly sufficient basis so that a decision refusing a jury trial, a result desirable as avoiding an expensive and inefficient procedure, could not have been considered as any vital attack upon the ark of the constitution.

Judge Cardozo says: "We have left far in the distance the wasteful duplication of remedies and trials. We shall set the clock back many years if we return to it to-day." Perhaps he overstates the case: for if the jury is to be considered only as one of several bodies available for determining the facts, as it is, and not as a kind of central pivot about which the whole case revolves, the only result is to require the use of this particular body as the fact-finding machinery in this case.<sup>19</sup>

<sup>14</sup> *Hermann v. Mexican Petroleum Corp.* (1915) 85 N. J. Eq. 367, 96 Atl. 492; *Freer v. Davis* (1903) 52 W. Va. 1, 43 S. E. 164.

<sup>15</sup> I Ames, *Cases in Equity Jurisprudence* (1903) 515; 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) 4355, 4356, and cases cited. The entire equitable rule has been subjected to severe criticism. See William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law* (1908) 56 U. PA. L. REV. 289; Clark, *Equity* (1920) sec. 193.

<sup>16</sup> So in *Roy v. Moore*, *supra* note 10, the court found that in Connecticut, on January 1, 1880, the equity court would not have tried the title and hence it properly concludes that the parties have rights to jury trials. Cases from other jurisdictions are therein cited.

<sup>17</sup> *Lux v. Haggin* (1886) 69 Calif. 255, 284, 10 Pac. 674; *cf. Ladd v. Osborne* (1890) 79 Iowa, 93, 44 N. W. 245; *Pohlman v. Evangelical Lutheran Trinity Church* (1900) 60 Neb. 364, 83 N. W. 201; *Williams v. Riley* (1907) 79 Neb. 554, 113 N. W. 186. See Lewis, *op. cit. supra* note 15, at p. 315, upon the rule in nuisance cases: "But, though we may observe that the rule is dying, it is unfortunately not yet a corpse; and the difficulty is that no lawyer knows when it will be galvanized into sufficient life to delay and vex his client's pursuits of justice." In some jurisdictions the rule is overthrown by statute or rule of court. See Lord Hale's Act (1862) 25 & 26 Vict. c. 42; Federal Equity Rule No. 23, 226 U. S. App'x. 6, 33 Sup. Ct. xxiv; *cf. Carpenter v. Dennison* (1919) 208 Mich. 441, 175 N. W. 419.

<sup>18</sup> See cases cited by Cardozo, J., *dissenting*, including *Hahl v. Sugo*, *supra* note 13; *Baron v. Korn* (1891) 127 N. Y. 224, 27 N. E. 804; *Hinckel v. Stevens* (1897) 17 App. Div. 279, 45 N. Y. Supp. 678, (1900) 165 N. Y. 171, 58 N. E. 879; *Olmsted v. Loomis* (1854) 9 N. Y. 423. See also *Belknap v. Trimble* (1832, N. Y.) 3 Paige Ch. 577; Kent, Ch., in *Gardner v. Newburgh* (1816, N. Y.) 2 Johns. Ch. 162.

<sup>19</sup> Historically the jury developed as only one of several methods of finding the facts. In earlier times the court determined the method of trial, whether by ordeal,

Nevertheless, the decision is unfortunate. Jurists of experience find little to say in support of the delays, the expense, and the aleatory results of trial by jury.<sup>20</sup> In England it is being more and more restricted.<sup>21</sup> Its real advantage seems to be as a kind of safety valve for the judicial system. It relieves the judges of the burden and the odium of deciding close questions of fact in cases, such as personal injury actions, where the feelings of litigants are apt to run high. Surely it is a loss to extend the field of its application by the application of the constitutional strait-jacket where not necessary.

C. E. C.

C. I. F. CONTRACTS IN AMERICAN LAW, I

That familiarity which breeds contempt has some points of advantage over the unfamiliarity which breeds confusion. Until quite recently c. i. f. contracts have been regarded as "British contracts,"<sup>21</sup> and left for full discussion to the British writers.<sup>2</sup> But the overseas trade which

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compurgation, battle, and so on. Since the jury became increasingly popular to litigants, the judges of the king's courts saw their opportunity to extend the popularity of those courts and increase the king's revenues by making use of this new fact-finding machinery. It is a later development which gave to the jury the unique position it so long occupied in English law. See Bigelow, *History of Procedure* (1880) "The Medial Judgment," 288 *et seq.*; Thayer, *Preliminary Treatise on Evidence* (1898) chs. 1 & 2.

<sup>20</sup> Judge J. C. McWhorter, *Abolish the Jury* (1923) 29 W. VA. L. QUAR. 97; Ex-Senator and Judge John D. Works, *Juridical Reform* (1919) 50.

<sup>21</sup> In England, by the Administration of Justice Act, 1920, in any action except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and certain matrimonial and probate cases, where the court or judge upon application of a party is "satisfied" that "the action or matter cannot as conveniently be tried with a jury as without," he shall have power "notwithstanding anything in any Act," to order it tried without a jury. (1920) 10 & 11 Geo. V, c. 81, sec. 2; *Annual Practice* (1923) 2155; Order 36, rules 2-6, *Annual Practice*, (1923) 580-585. This procedure has been objected to by the judges of the Court of Appeal in *Ford v. Blurton* (1922) 38 T. L. R. 801, and in various notes in (1922) 153 LAW TIMES, 196; (1922) 154 *ibid.* 37; (1923) 155 *ibid.* 45, 227, but it seems not undesirable.

<sup>1</sup> See Williston, *Sales* (1909) 408; 11 C. J. 765; (1920) 30 YALE LAW JOURNAL, 90. Recently the subject has been receiving attention. Williston, *The Progress of the Law 1919-1920, Sales* (1921) 34 HARV. L. REV. 741, 750 *et seq.*; Lucas, *Liability under C. I. F. Contracts* (1921) 41 CAN. L. T. 556; Craighill, *Sales of Goods on C. I. F. Terms* (1919) 6 VA. L. REV. 229; (1921) 21 COL. L. REV. 724; (1922) 22 *ibid.* 601; (1920) 20 *ibid.* 101; 10 A. L. R. 701, note; 20 A. L. R. 1236, note; 7 B. R. C. 956.

<sup>2</sup> Not that the references in the British writers can always be counted on for help. See Benjamin, *Sales* (6th ed. 1920) 808 *et seq.*; Blackburn, *Contract of Sale* (3d Canadian ed. 1910) 241, note; although there is scattered through each of these books a great quantity of uncorrelated material on the subject. See also 25 Hals. Laws Eng. 211. But Chalmers, *Sale of Goods Act* (8th ed. 1920) 86-88, contains an excellent brief discussion; so also Scrutton, *Charter Parties* (8th ed. 1917) 166-7.