

## EQUITABLE EJECTMENT\*

Since the New York Code of 1848<sup>1</sup> abolished the distinctions between actions at law and suits in equity and the forms of all such actions and suits, the title of this paper may seem somewhat paradoxical. Nevertheless, a few dicta to the contrary,<sup>2</sup> one who sues for the possession of realty is still objectionable if he has only an "equitable" title, because, it is said, so slight an interest will not support "ejectment." In view of the courts' use of the words, we have ventured to combine them here as a general description of the plight of the so-called equitable owner as he sues for his land in so-called ejectment.

In some jurisdictions statutes expressly provide that he may sue.<sup>4</sup> Where this legislation is not in effect, most courts answer him as crisply as did a New York judge thirty-five years ago: "The rule given by Chitty<sup>5</sup> prevails in this state. 'The lessor of the plaintiff must also have a strict legal right; a mere equitable and beneficial interest, without the legal title, will not suffice.'"<sup>6</sup> The same statement was made by the Court of Appeals so recently as last May in *Trembarth v. Berner*.<sup>7</sup>

Nor has the present benevolent attitude toward defendants holding equitable titles been of assistance to plaintiffs similarly situated. If an equitable owner once gets into possession, the legal owner cannot dislodge him; his equitable title is a defense.<sup>8</sup> But if the equitable owner has not the luck or the foresight to get possession legally<sup>9</sup> by himself he may have difficulty in getting it from the courts, for an equitable title will not support ejectment. Some courts have perceived the

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<sup>1</sup> Sec. 62; see also N. Y. Code Civ. Proc. § 3339; N. Y. C. P. A. § 8.

<sup>2</sup> This discussion is concerned with the law of code states only and has no reference to the special proceedings permitted in some states and known as equitable ejectment. See *Bouldin v. Taylor* (Tex. 1925) 275 S. W. 340.

<sup>3</sup> *Gonella v. Simmons* (1909) 10 Calif. App. 257, 101 Pac. 685; *Whitehead v. Callahan* (1908) 44 Colo. 396, 99 Pac. 57; *Brown v. Hutchinson* (1911) 155 N. C. 205, 71 S. E. 302.

<sup>4</sup> See e.g., Kan. Rev. Stat. 60-2001; *Tucker v. Immanuel Baptist Church* (Kan. 1925) 237 Pac. 654; *Johanson v. Washington* (1902) 190 U. S. 179, 23 Sup. Ct. 825, citing Ballinger's Code §§ 5500, 5508; *Laughlin v. Fariss* (1897) 7 Okla. 1, 50 Pac. 254, citing Code Civ. Proc. § 614, based on Kansas statute. see also *Knite v. Lage* (1908) 152 Mich. 638, 116 N. W. 467, construing Mich. Comp. Laws (1915) § 10949.

<sup>5</sup> Chitty, *Pleading* (16th Am. ed.) \*212.

<sup>6</sup> *Townshend v. Frommer* (1889) 25 N. Y. St. R. 358, 365.

<sup>7</sup> (1925) 240 N. Y. 617, 148 N. E. 729.

<sup>8</sup> *Crary v. Goodman* (1855) 12 N. Y. 266; *Lombard v. Cowham* (1874) 34 Wis. 486. Cf. *Kirk v. Hamilton* (1880) 102 U. S. 68. See Hinton, *Equitable Defenses under Modern Codes* (1920) 18 Mich. Law Rev. 717.

anomaly. Witness the frank language of a Missouri judge: "The general rule is that a plaintiff may not recover in a strictly legal action like ejectment on an equitable title, although a defendant in ejectment by virtue of our Code Pleading may plead an equitable defense, so that if the boot were on the other foot an entirely different case would be presented."<sup>10</sup> One may be permitted to ask why our Code Pleading imputes greater virtue to defendants than plaintiffs, and what fundamental differences there are after all between the respective boots and feet.

Apparently in the dissolution of the old procedure, which in many cases against their will<sup>11</sup> engulfed them, the courts clung to one firm and solid rock: "the rule given by Chitty." Here, at least, they seem to have said, is something which is preserved to us: an equitable title will not support ejectment. In enforcing equitable claims in personality much the same question is presented.<sup>12</sup> But ejectment has been a magic word, one justifying a return in this instance to those vanished forms and technicalities whose disappearance in other cases had been so much lamented.

The problem has the following three aspects: First, is the equitable owner the real party in interest in a suit for possession? Second, has the union of law and equity abolished a separate action of ejectment? Third, can an equitable owner sue for his land without a jury trial? The usual jury trial statutes use two methods of labeling this kind of case. One is to provide that issues of fact in actions for the possession of specific realty are to be tried to the jury.<sup>13</sup> The other is the method used in New York, where the same result is reached by saying that in an action of ejectment issues of fact must be tried by a jury and then

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<sup>9</sup> That the equitable title is not a defense if possession was secured by force, see *Schick v. Wolf* (1924) 207 App. Div. 652, 202 N. Y. Supp. 601.

<sup>10</sup> *Martin v. Kitchen* (1906) 195 Mo. 477, 93 S. W. 780. See also Pomeroy, *Code Remedies* (4th ed. 1904) 59. As to equitable defenses generally see the article by Professor Cook, *Equitable Defences* (1923) 32 Yale Law Journ. 645.

<sup>11</sup> See *Reubens v. Joel* (1856) 13 N. Y. 488; *Goulet v. Asseler* (1860) 22 N. Y. 225. Cf. *N. Y. Ice Co. v. Northwestern Ins. Co.* (1861) 23 N. Y. 357; *McArthur v. Moffett* (1910) 143 Wis. 564, 567, 128 N. W. 445. Clark, *The Union of Law and Equity* (1925) 25 Columbia Law Rev. 1.

<sup>12</sup> See *Wheeler v. Allen* (1872) 51 N. Y. 37; *Richmond Foundry Co. v. Carter* (1916) 133 Tenn. 489, 182 S. W. 240; cf. *Kingsland v. Chrisman* (1887) 28 Mo. App. 308.

<sup>13</sup> See, e.g., Calif. Code Civ. Proc. (1923) par. 592; Utah Comp. Laws (1917) par. 6781. *Grace v. Hildebrandt* (Okla. 1925) 237 Pac. 98, construing C. O. S. (1921) § 532; *Atkinson v. Crowe Coal & Mining Co.* (1909) 80 Kan. 161, 102 Pac. 50, construing Gen. Stat. (1901) § 4715. An admirable jury trial statute is that of Connecticut, Gen. Stat. (1918) § 5752, in general requiring jury trial in civil actions involving such an issue of fact as, prior to January 1, 1880, would not present a question properly cognizable in equity. See also Rules under Practice Act (1918) §§ 175, 176, 235.

defining ejectment in another section as an action to recover the immediate possession of real property.<sup>14</sup>

The majority of courts have answered all our three questions above in the negative. Hence if an equitable owner sues for the land he is first told that he is not the real party in interest because ejectment necessitates a legal title.<sup>15</sup> If he answers that he is not suing in ejectment he is told that he must be, because he is suing for the possession of land.<sup>16</sup> And even assuming that he finds a trial court favorable to him which tries the issues itself believing them of equitable cognizance his judgment will be reversed on appeal because a jury trial is a matter of right in ejectment.<sup>17</sup>

This judicial viewpoint is obviously based on the idea that there has been and can be no real union of law and equity, primarily because a certain form of trial, the jury, is required in certain actions, law actions. The thesis of this paper is that there is and can be one civil action, in which the issues, and not the similarity to some ancient declaration, determine the mode of trial, the jury being necessary on only such issues as were tried to it before the reform of procedure.

The real party in interest provision, as Professor Clark and the writer have elsewhere endeavored to show,<sup>18</sup> is simply the equitable rule that "he who has the right is the person to pursue the remedy."<sup>19</sup>

<sup>14</sup> N. Y. C. P. A. § 425 and § 7.

<sup>15</sup> *Percifull v. Platt* (1880) 36 Ark. 456, where it is held that the real party in interest provision (Gantt's Digest, § 2250) has done nothing more than abolish the fictitious plaintiff in ejectment. See also *Felger v. Coward* (1868) 35 Calif. 650; *Bailey v. Winn* (1890) 101 Mo. 649.

For the rule in the common-law jurisdictions see *Davis v. Bostic* (1919) 125 Va. 698, 100 S. E. 463, where the court after holding that an equitable title will not support ejectment says: "This fundamental principle is too well settled to call for the citation of additional authority to sustain or illustrate it."

The federal courts take the same view. See *McGrew v. Byrd* (C. C. A. 8th 1919) 257 Fed. 66, 67, where the court says, "That one cannot, in the national court, recover lands in an action of ejectment on an equitable title only is well settled. . . . And this rule prevails in the state of Missouri."

<sup>18</sup> *McDonald v. Skinner* (1925) 124 Misc. 545, 209 N. Y. Supp. 219; *Schick v. Wolf*, *supra*, footnote 9, where it is said that plaintiff's action is ejectment although he claims otherwise. Cf. *Syracuse v. Hogan* (1923) 254 N. Y. 457, 138 N. E. 406.

<sup>17</sup> In *Rubin v. City of Syracuse* (1925) 212 App. Div. 475, 208 N. Y. Supp. 732, the complaint alleged that plaintiffs owned and were possessed of realty and that a pretended transfer to the defendant gave him no title but was a cloud on plaintiff's title, and that defendant was threatening to eject plaintiffs. Plaintiffs demanded peaceable possession, an injunction, and removal of any structure erected by defendant. *Held*, defendant entitled to a jury trial since he had raised an issue of fact by alleging ownership in himself, and under N. Y. Real Prop. Law §§ 502, 503, 504 as added by Laws 1920, c. 930, the trial on this issue is like ejectment.

<sup>18</sup> Clark and Hutchins, *The Real Party in Interest* (1925) 34 Yale Law Journ. 259.

<sup>19</sup> First Report of the Commissioners on Practice and Pleadings (N. Y. 1848) 124.

To find that a plaintiff is not the real party in interest, then, requires a holding that he has no right of action. To this conclusion in the equitable ejectment cases many courts have come. These are the words of *Peck v. Newton*,<sup>20</sup> an early New York case where the vendee under a land contract was seeking to secure possession of the property which he had bought from one Parsons: "But this action being against a stranger in possession, by the plaintiff, resting not on a legal but a mere equitable title, I am unable to see on which principle he is entitled to recover. . . . Before the Code, what would have been the relative rights of these parties? Clearly no action at law could have been maintained by the plaintiff against the defendant. Neither can I see any ground on which a suit in equity could have been maintained. The rights of the parties to the alleged exchange must first have been settled by a court of equity and a specific performance of that contract enforced against Parsons, . . . before the plaintiff could have maintained any action against the defendant. Even if this could have been accomplished in a single suit by making the defendant a party to the suit against Parsons, for the specific performance, still without a decree against Parsons, none could have been had against the defendant. To allow the plaintiff to recover, then, against the defendant, in this action would be admitting a new cause of action which did not before exist, either at law or in equity . . . And if before the Code he could not have recovered, in any court, upon such a cause of action as he here seeks to establish, he can not, since the Code."

Dark as is the picture drawn by the learned judge, one ray of light is indicated. It is suggested that perhaps the plaintiff could obtain his land by suing the vendor and the defendant, receiving specific performance from the vendor and possession from the defendant. But even this hope is taken away by the case of *McDonald v. Skinner*<sup>21</sup> decided by the Supreme Court of New York last May. There the plaintiff vendee joined his vendor and a subsequent vendee in a suit for possession, damages, and other relief. The court held that an equitable title would not support ejectment.<sup>22</sup>

But had the equitable titleholder no right of action before the codes? He could have sued his vendor for specific performance, and, as incidental to that, delivery of possession.<sup>23</sup> This was a substantive (or

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<sup>20</sup> (N. Y. 1862) 46 Barb. 173, 175, 176.

<sup>21</sup> *Supra*, footnote 16.

<sup>22</sup> The case makes several other interesting statements, such as that plaintiff has an adequate remedy at law; and that damages are an adequate remedy for violation of a contract to convey real estate.

<sup>23</sup> See *Felger v. Coward*, *supra*, footnote 15; *Pomeroy, op. cit.*, footnote 10, p. 60.

at least a substantial) right. When now he asks that his vendor give him possession, what is he asking but specific performance? Surely the Code leaves this right intact. If it does, the plaintiff is the real party in interest.

Before the Code, too, the plaintiff could have joined his vendor and the occupier in a suit in equity.<sup>24</sup> The chancery rules as to joinder of parties now incorporated in the codes<sup>25</sup> were intended to prevent exactly what *McDonald v. Skinner* makes inevitable—multiplicity of suits. By joinder the plaintiff could have obtained specific performance against the vendor and possession from the other defendant; that is, he had a right of action against both defendants. This right also must remain under the codes, enabling the equitable owner to sue the legal owner and the occupier for possession as the real party in interest.<sup>26</sup> The plaintiff's right of action, or in the words of *Peck v. Newton*,<sup>27</sup> his cause of action, exists today precisely because it existed under the old practice. To say he is not the real party in interest is to make another action necessary; but there is nothing in modern practice acts to show that a circuity of action which was easily escapable under the earlier system is made inescapable by the reform of procedure.<sup>28</sup> It is interesting to note that the Appellate Division<sup>29</sup> in a case contemporary with *McDonald v. Skinner* on similar facts reached a decision contrary to that case and in accord with the view here contended for simply by using the catchword specific performance instead of the catchword ejectment used in *McDonald v. Skinner*. That a mere variation in shibboleths should produce such diverse conclusions seems unfortunate.<sup>30</sup>

The question in every case, according to the foregoing analysis, is has the plaintiff any right of action which he could have enforced before

<sup>24</sup> Pomeroy, *The Specific Performance of Contracts* (2d ed. 1897) § 493: "All persons having or claiming an interest in the land derived from the vendor after the contract and with notice thereof, are necessary defendants in a suit brought by the vendee or his representatives."

<sup>25</sup> See *Goodnight v. Goar* (1868) 30 Ind. 418; *Hellams v. Switzer* (1885) 24 S. C. 39; *Voorhis v. Child's Ex'r* (1858) 17 N. Y. 354. See also (1925) 34 Yale Law Journ. 192; (1923) 32 Yale Law Journ. 384.

<sup>26</sup> It would seem that this joinder might now be required only at the request of the plaintiff, since the purpose of it is to protect him. If he does not request it, plaintiff might be permitted to sue the occupier alone, as suggested by Pomeroy, *loc. cit.*, footnote 23. But *cf.* Pomeroy, *op. cit.*, footnote 10, p. 282.

<sup>27</sup> *Supra*, footnote 20.

<sup>28</sup> The modern trend is certainly toward greater freedom of joinder of parties. See especially the advances made by Civil Practice Act in New York. But see the comments on these changes by Professor Hinton, *An American Experiment with English Rules of Court* (1926) 20 Ill. Law Rev. 533.

<sup>29</sup> *Klapp v. Dealey* (3d Dept. 1925) 213 App. Div. 523, 211 N. Y. Supp. 22.

<sup>30</sup> See also *Neal v. Baker* (Ind. 1925) 147 N. E. 635, in which the plaintiff by amending a complaint praying specific performance of a contract and calling it a statutory action to quiet title was able to secure a jury trial.

the codes? And if it is said that while the plaintiff may have a right of action, he has not such right as may be enforced in ejectment, the answer is that if this means the old action of ejectment there is no such thing. Though issues remain, forms of action have disappeared. A litigant is not now required to bother about them. He is forbidden to plead law.<sup>31</sup> He states his facts, and on the facts the issues are determined. On the facts he receives the judgment he is entitled to, no matter what he calls his action or what he demands in his prayer for relief.<sup>32</sup>

But it may be urged that the codes admit the existence of ejectment by frequent mention of its name, and that they must mean something by it. The question then is what is ejectment? It is not the ancient action. That has been abolished. The codes say it is an action for the possession of specific real property. What then is an action for specific real property? Are bills for specific performance, cancellation, rescission, removal of cloud on title with possession, quieting title with possession, injunction against interference with assumption of possession—are all these ejectment in the sense of the New York Code because the possession of specific real property is sought?

The learned reader may find the answer easy; the courts have not found it so. Take three Oklahoma cases decided this year and last, in which the Court had to determine what an action for the recovery of possession was. In the first<sup>33</sup> plaintiff asked a receiver, a declaration that the defendant's claim was void, possession, an accounting, and quieting of title. In the second<sup>34</sup> the plaintiff demanded the rescission of a fraudulent deed and possession. In the third<sup>35</sup> the cross-petition sought possession, cancellation, and an accounting. All these cases are therefore in the lay sense of the term suits for the possession of specific real property. But the court distinguished sharply among them, and called two of them by that name, and the other merely an action for the determination of a claim in real estate.<sup>36</sup>

Some courts have attempted to find a definite connotation for the code word ejectment by stating that where title is tried the action is

<sup>31</sup> *Smith v. Dean* (1853) 19 Mo. 63; *Schofield v. Whitelegge* (1872) 49 N. Y. 259; *Leach v. Rhodes* (1874) 49 Ind. 291. See Clark, *The Complaint in Code Pleading* (1926) 35 Yale Law Journ. 259.

<sup>32</sup> *Corry v. Gaynor* (1871) 21 Ohio St. 277; *Smith v. Smith* (1903) 67 Kan. 841, 73 Pac. 56. But see *Cobb v. Smith* (1868) 23 Wis. 261. Professor Clark discusses this matter at pp. 288 *et seq.* of the article cited, *supra*, footnote 31.

<sup>33</sup> *Halsell v. Beartail* (Okla. 1924) 227 Pac. 392.

<sup>34</sup> *Warner v. Coleman* (Okla. 1924) 231 Pac. 1053.

<sup>35</sup> *Grace v. Hildebrandt*, *supra*, footnote 13.

<sup>36</sup> *Warner v. Coleman*, *supra*, footnote 34. See *Rocha v. Rocha* (Calif. 1925) 240 Pac. 1010, holding that an action to set aside and cancel a deed is one of purely equitable cognizance, and that defendants did not make it a statutory action to quiet title by praying that their title be quieted against plaintiff's claim.

one for the possession of specific real property.<sup>37</sup> In connection with ejectment, however, the code speaks of possession, and not title. But even waiving that point, we shall hardly find "title" more helpful than "possession."

Equity could examine title under certain circumstances.<sup>38</sup> Our courts, administering law and equity, may examine title under the same circumstances. Our inquiry should be not as to whether title is examined, but whether the facts of the case are such that the chancellor before the codes would have taken jurisdiction and granted complete relief. If he would, there is no reason to suppose that modern judges may not do the same thing. On this problem the word ejectment, in view of the union of law and equity, sheds no light. Nor shall we obtain much light from such vague expressions as "actions for possession," or "actions where title is tried."

If ejectment under the codes is not the action of say 1800, if "action for possession" and "action to try title" do not give us a definition, is it too much to conclude that in the code sense ejectment is not a separate action at all? When the codes speak of ejectment they are not putting back into modern procedure a form of action they have expressly erased; they are using a shorthand expression to cover the cases where possession of realty is involved, including those admittedly equitable today. So that we can make no sweeping deductions reviving forms of action from the mere use of the word. We must endeavor to discover what the legislature had in mind in using it in a particular statute.

The problem then is what did the legislature mean by using it or its equivalent in the jury trial statute? Many judges have had a ready solution. They have said: possession is the object of this action. An action for possession is an action of ejectment. An action of ejectment must be tried to the jury. Hence this action must be tried to the jury. By some such avenue Judge Cardozo reached his conclusion in the *Susquehanna* case,<sup>39</sup> decided this year. There the action was on a written contract. The defense alleged that the contract was entered into by mutual mistake, or by the fraud of the plaintiff and the mistake of the defendant. The Civil Practice Act<sup>40</sup> provides that issues of fact in an action in which the complaint demands judg-

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<sup>37</sup> See e.g., *Syracuse v. Hogan*, *supra*, footnote 16; *Atkinson v. Crowe Coal & Mining Co.*, *supra*, footnote 12; *Patchogue Land Corp. v. Long Island Comm.* (1925) 213 N. Y. Supp. 12.

<sup>38</sup> E.g., in bills to remove cloud on title, to quiet title, and in cases where the marketability of title is in question.

<sup>39</sup> *Susquehanna S. S. Co. v. Anderson & Co.* (1925) 239 N. Y. 285, 146 N. E. 381.

<sup>40</sup> Sec. 425.

ment for a sum of money only must be tried by the jury. The court held that this was an action for money only and that a jury trial was a matter of right. This construction of the statute, said to be well settled, assumes, as do the ejectment cases, that words mean exactly what they say. We know that actually they never do. Their meaning is determined by the interpretation placed upon them. Taking the exact words of the statute,<sup>41</sup> can a plaintiff deprive the other party of a jury merely by asking for something more than money? This would be contrary to the general rule that when the defendant answers the prayer for relief is immaterial.<sup>42</sup> Are actions for accounting,<sup>43</sup> cancellation,<sup>44</sup> and foreclosure<sup>45</sup> "equitable" merely because the demand for judgment mentions other incidental steps to the recovery of money? In almost all commercial transactions which reach the courts, money is the object. Is it possible that we determine which are tried to the jury merely by asking whether or not any means of getting the money is suggested in the complaint?<sup>46</sup> An over-simplified statement, such as that given in the *Susquehanna Case* emphasizes the "delusive exactness"<sup>47</sup> of the codes. The statement seems splendid, until application of it is attempted. Indeed the learned judge who wrote the opinion felt impelled to dissent in *Syracuse v. Hogan*,<sup>48</sup> which held that ejectment meant ejectment. And it has been held in his jurisdiction that in an action to enjoin a nuisance a jury is not needed,<sup>49</sup> although the same section of the

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<sup>41</sup> It should be noted that if the statute is taken literally it extends the right to jury trial beyond its former limitation to actions at law. But as is shown *infra*, the statute has not been literally construed except in a few cases.

<sup>42</sup> *Supra*, footnote 31.

<sup>43</sup> See *Mandeville v. Avery* (1889) 51 Hun 636, 3 N. Y. Supp. 745; *Pendergast v. Greenfield* (1891) 127 N. Y. 23, 27 N. E. 388.

That there is no right to a jury trial on a creditor's bill, though of course the action is in fact one for money only, see *Murtha v. Curley* (1882) 90 N. Y. 372; *Bell v. Merrifield* (1888) 109 N. Y. 202, 16 N. E. 55.

<sup>44</sup> See *Moss v. Burnham* (1st Dept. 1900) 50 App. Div. 301, 63 N. Y. Supp. 947. Cf. *Imperial Shale Brick Co. v. Jewett* (1901) 169 N. Y. 143, 62 N. E. 167, an action to reform an insurance policy and recover on it as reformed.

<sup>45</sup> See *Parker v. McGinty* (Colo. 1925) 239 Pac. 10. *Farmer's Nat. Bk. v. Houston* (N. Y. 1887) 44 Hun 567; *Matter of Hamilton Park Co.* (1st Dept. 1896) 1 App. Div. 375, 37 N. Y. Supp. 310.

<sup>46</sup> That in a suit in interpleader where rival claimants are demanding the proceeds of an insurance policy the right to jury trial does not exist, see *Union Mut. Life Ins. Co. v. Broderick* (Calif. 1925) 238 Pac. 1034.

<sup>47</sup> Clark, *The Code Cause of Action* (1924) 33 Yale Law Journ. 817.

<sup>48</sup> *Supra*, footnote 16.

<sup>49</sup> *Cogswell v. N. Y. N. H. & H. R. R.* (1887) 105 N. Y. 319, 11 N. E. 518. Cf. (1925) 25 Columbia Law Rev. 641 supporting this view with (1925) 25 Columbia Law Rev. 630 supporting the *Susquehanna Case*. It would seem that the two attitudes are inconsistent unless there should be a different form of trial when the equitable issue is raised by the defendant, as in the *Susquehanna Case*, from the form of trial when the issue is raised by the plaintiff, as in the *Cogswell Case*. The distinction, which is not mentioned in the jury trial statute, seems rather too refined, and does not appear to have occurred to the courts.

Practice Act on which he rests his decision in the *Susquehanna* case expressly requires a jury in an action for a nuisance.<sup>50</sup>

It is simpler to say that the words of the Civil Practice Act cannot mean all they seem to mean. With that premise we are able to begin a search for a workable rule. In the *Susquehanna Case* the plea of mistake could, prior to the Code, have been raised only by a bill in equity.<sup>51</sup> If the court had denied a jury trial on that issue, it would not have deprived the plaintiff of any constitutional right.<sup>52</sup> The Constitution guarantees a jury on issues tried to it under the old system, and no more. It is submitted that the only practicable test is the historical test; that is, issues which were tried to the jury before the adoption of the codes must be tried to the jury under the codes. Issues formerly tried to the court are to be tried to the court today.<sup>53</sup>

"Ejectment" and "action for the possession of specific real property," as used in codes contain no inner radiance which can illumine the requirement of jury trial. We cannot by saying this is ejectment, or this is an action for the possession of land, provide ourselves with one of the eternal verities. We must discover whether there is a question which the jury would formerly have tried; if so, it must go to the jury now. When, therefore, we find an equitable owner suing his vendor for possession, we observe that this is something which the chancellor would have tried, and deny a request for a jury. Where we find the equitable owner suing a third party in possession, we allow him to join the legal owner and sue them both without a jury; for this is what would have happened before the codes.

Any other result leads to confusion as to terminology, with consequent confusion in the decisions. To be on the safe side courts will name every action "legal" or "ejectment" and call in a jury,<sup>54</sup> thus adding to the taxpayers' burdens. The real party in interest clause,

<sup>50</sup> The Calif. Code (1923) par. 592, which states in effect that in an action for the recovery of real or personal property or for money claimed on contract an issue of fact must be tried by the jury has been construed to permit trial of equitable defenses in such actions to the court. See *Swasey v. Adair* (1891) 88 Calif. 179, 25 Pac. 1119.

See also *Kimball v. McIntyre* (1881) 3 Utah 77, 1 Pac. 167, construing the statute which is now Utah Comp. Laws (1917) par. 6781.

Apparently but few states have taken the view of the jury trial statute as to equitable defenses now announced in New York. Two only seem in entire accord with New York as to the meaning of the statute. See *King v. Internat. Lumber Co.* (Minn. 1923) 195 N. W. 450; *Citizens Trust Co. v. Going* (1921) 288 Mo. 505, 232 S. W. 996.

<sup>51</sup> See (1925) 25 Columbia Law Rev. 630, 634, note 26.

<sup>52</sup> *Ibid.* N. Y. Const. Art. 1, § 2. See also Clark, *op. cit.*, footnote 10, p. 7.

<sup>53</sup> Clark, *Union of Law and Equity and Trial by Jury under the Codes* (1923) 32 Yale Law Journ. 707, 709.

<sup>54</sup> This procedure seems to be impliedly recommended as to equitable defenses by the learned writer of the comment in (1925) 25 Columbia Law Rev. 630.

the establishment of one form of civil action, the liberal provisions as to joinder of parties, all indicate the desire of the codifiers to bring the person with the substantive right before the court and settle his claims against everyone in one proceeding. Ambiguous provisions regarding trial by jury too broadly construed and applied indiscriminately to actions rather than issues wherever the possession of land is mentioned can only add to the law's delays and to the already too numerous departures from the spirit of code pleading.<sup>55</sup>

Our conclusion is then that when the equitable owner comes into court demanding possession the answer to be made him cannot be found in any mystic words, such as equitable ejectment, but is rather to be discovered by inquiring whether before the codes he had any substantive right, if not at law, then in equity, the form of trial on the issues found remaining as it was under the old regime.

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<sup>55</sup> Costigan, *The Spirit of Code Pleading* (1917) 11 Ill. Law Rev. 517.