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Trial by Jury in Equity Cases

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TRIAL BY JURY IN EQUITY CASES

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In England and in most of the American jurisdictions, there is no right to a trial by jury on the issues of fact historically dealt with in courts of equity. Normally, such issues are determined by the judge, without a jury. Usually, however, the judge may, in his discretion, submit particular issues to a jury for an advisory verdict, "to enlighten his conscience."[1] In one state he must so submit any disputed issue of fact for an advisory verdict;[2] in others, he may not submit any issues unless there is a serious conflict of evidence;[3] while in still others, the verdict may not be disregarded, save for cause.[4]

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[1] A sampling of the authorities, often based on statutes, follows: 2 DANIELL, CHANCERY PLEADING AND PRACTICE 1071 *et. seq.*, 1147 n. 10 (4th Am. ed. 1871); THE ANNUAL PRACTICE 590-591 (Eng. 1951); R. S. C. Order 36, rule 3 and notes; FED. R. CIV. P. 39(c); 3 MOORE'S FEDERAL PRACTICE 3023, 3031 (1938), and p. 49 (1950 Supp.); Am. Lumbermen's Mut. Cas. Co. v. Timms and Howard, 108 F. 2d 497, 500 (2d Cir. 1940); Hunter v. Shell Oil Co., 198 F. 2d 485 (5th Cir. 1952); Lucas v. Scott, 247 Ala. 183, 24 So. 2d 540 (1945); Donahue v. Babbitt, 26 Ariz. 542, 227 Pac. 995 (1924); Moore v. Burritt, 106 Colo. 413, 105 P. 2d 1084 (1940); Fisher v. Burgiel, 382 Ill. 42, 46 N. E. 2d 380 (1943); Merritt v. Palmer, 289 Ky. 141, 158 S. W. 2d 163 (1942); N. H. REV. LAWS c. 370, § 14 (1942); Rubin v. Dairymen's League Coop. Ass'n., 18 N. Y. S. 2d 466, *aff'd*, 284 N. Y. 32, 29 N. E. 2d 458 (1940); Flynn v. Sharon Steel Corp., 142 Ohio St. 145, 50 N. E. 2d 319 (1943); White v. Morrow, 187 Okla. 72, 100 P. 2d 872 (1940); Johnstone v. Matthews, 183 S. C. 360, 191 S. E. 223 (1937); Jackson v. Gardner, 197 Wash. 276, 84 P. 2d 992 (1939); Powell v. Sayres, 134 W. Va. 653, 60 S. E. 2d 740, 745 (1950); *In re* Acme Brass and Metal Works, 225 Wis. 74, 272 N. W. 356 (1937).

As to common-law issues, such as damages, in equity cases, see Levin, *Equitable Clean-up and the Jury*, 100 U. of PA. L. REV. 320 (1951).

We do not know much about the actual operation of the discretionary, advisory jury trial in equity cases. How frequently is such a jury trial granted or denied, on the judge's or party's initiative, and on what criteria? What judicial controls are imposed, in respect to the admission or exclusion of evidence, the instructions, or the scope of the issues? To what extent do the trial judges adopt or reject the advisory verdict, and on what criteria? The published court opinions are largely silent on these and related matters, save for occasional observations that where oral testimony on important issues is in serious conflict it is good sense for the judge to send those issues to a jury and in most instances to abide by the verdict. Perhaps there is more jury trial in equity cases, on this basis, than one would suppose.

[2] Greer v. Gosling, 54 Ariz. 488, 97 P. 2d 218 (1940); Stukey v. Stephens, 37 Ariz. 514, 295 Pac. 973 (1931) (". . . while the court need not heed the advice of the jury it must harken to it.").

[3] Eastern Finance Co. v. Gordon, 179 Va. 674, 20 S. E. 2d 522 (1942).

[4] Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068 (1905); Dose v. Ins. Co. of State of Penn., 206 Minn. 114, 287 N. W. 866 (1939); *cf.* James v. Staples, 87 N. H. 49, 174 Atl. 59 (1934), supplanted by N. H. LAWS c. 120 (1935), now N. H. REV. LAWS c. 370, § 14 (1942) (verdict advisory); and *cf.* S. C. CODE ANN. § 593 (1942), which may be evaded by sending issues to jury for judge's aid and enlightenment by advisory verdict. Johnstone v. Matthews, 183 S. C. 360, 141 S. E. 223 (1937).

In sharp departure from this discretionary, advisory jury, thirteen states have experimented with a right to trial by jury in equity cases, with a binding verdict,[5] as at law. These are Arizona, Georgia, Indiana, Massachusetts, Michigan, New Hampshire, North Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. The procedure is widely operative today in Georgia, North Carolina, Tennessee, and Texas. This paper explores this experience.

I

Virginia initiated the experiment in 1777 through a statute[6] drafted by Thomas Jefferson.[7] This Act provided that in the new High Court of Chancery "All matters of fact, material to the determination of the cause, which in the course of the proceedings shall be affirmed by one party and denied by the other, shall be tried by a jury upon evidence given *viva voce* in the said court . . ." Six years laters, however, the legislature repealed[8] the statute, it having been found that this mode of trial in equity cases was "expensive to the parties and inconvenient to witnesses."

But another provision[9] of the 1777 statute has been continued in force to this day,[10] namely, that creating a right to a trial by jury if a plaintiff in equity takes issue upon a plea. The court is then without discretion to deny a jury trial and the verdict is binding, as at law.[11] *West Virginia* has the same statute.[12] The practice is rarely used, perhaps because any defense that could be asserted under a plea may now be more conveniently asserted under an answer and because of a liberal use, usually on the judge's initiative, of the discretionary, advisory jury on the case as a whole.

[5] The term "binding verdict" is used in this paper to distinguish it from the "discretionary, advisory verdict" contemplated by the first paragraph of the text. It is not absolutely binding but may be set aside for cause.

This paper does not deal, except incidentally, with trial by jury in particular statutory actions which are revisions of or supplements to historically equitable proceedings. See *Ex Parte* Baird, 240 Ala. 585, 200 So. 601 (1941) (quiet title); Brady v. Carteret Realty Co., 72 N. J. Eq. 904, 67 Atl. 606 (1907) (quiet title); McKenna v. Meehan, 220 App. Div. 690, 222 N. Y. S. 379 (1927) (partition); Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392 (1904) (attachment).

[6] 9 LAWS OF VIRGINIA 394 (Hening 1777), An Act for Establishing a High Court of Chancery.

[7] MALONE, JEFFERSON THE VIRGINIAN 250 (1948); 1 THE WRITINGS OF THOMAS JEFFERSON 50 (Ford ed. 1892) (the Autobiography): "In that one of the bills for organizing our judiciary system which proposed a court of chancery, I had provided for a trial by jury of all matters of fact in that as well as in courts of law."

[8] 11 LAWS OF VIRGINIA 343 (Hening 1783).

[9] 9 LAWS OF VIRGINIA 393 (Hening 1777).

[10] VA. CODE § 8-213 (Michie, 1950).

[11] Towson v. Towson, 126 Va. 640, 102 S. E. 48 (1920); Elmore v. Maryland-Virginia Milk Producers' Ass'n., 145 Va. 42, 132 S. E. 521 (1926).

[12] W. VA. CODE ANN. § 5610 (Michie 1949).

II

North Carolina undertook the experiment by statute in 1782. "In 1777, when the Superior Courts were established, equity jurisdiction was denied to the judges on the ground that all issues of fact should be tried by a jury. Session after session, lawyers combatted this view and urged that the judges should have the powers of a chancellor. . . ."[13] Equity jurisdiction was granted to the superior courts in 1782, but the legislation provided: "All matters of fact that shall come in issue between the parties shall be determined by a jury in the presence of the court, as in trials at law, . . . and the mode of proceeding by such juries shall be the same in every respect as in trial at law. . . ."[14]

This right to a trial by jury with a binding verdict in equity cases[15] was operative in the North Carolina courts for forty-one years, until 1823. During this period, the courts dealt with the jury in equity as a matter of course,[16] without procedural incident. Then came *Taylor v. Person*,[17] in 1822, reversing a decree because the facts in issue were not decided by a jury. The court remarked: "The foregoing reasoning and authorities apply with increased force to our Courts of Equity, in which the law peremptorily requires that issues of fact shall be tried by a jury."

Within a year, in 1823, the legislature changed the procedure. The new statute[18] read: "It shall be the duty of the court to direct the trial

[13] 1 ASHE, HISTORY OF NORTH CAROLINA 714 (1908).

[14] N. C. Laws 1782, c. 11, § 3. The section concluded: ". . . the same rules and methods to be observed in this case as have been practiced upon questions of fact being submitted by a court of chancery to the decision of a common-law jurisdiction." If this clause was an attempt to limit the effect of the conflicting language quoted in the text to provision for a discretionary, advisory jury, it failed until the passage of the Act of 1823. See note 18.

[15] Compare Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 78-79 (1923): "The next change made by the Senate was one which, if retained, would have completely altered the Federal judicial procedure in equity trials. As noted above, one of the chief fears as to the new Federal Government was lest it might infringe on the right to jury trial, so cherished by the American colonists and their descendants, and lest it might adopt the obnoxious equity powers of the British royal Governors. Now the Senate took the extraordinary and radical step of amending the Draft Bill, so as to require jury trials in all suits in equity. Luckily, at a later date, the Senate reversed its action."

[16] Scott v. McDonald, 3 N. C. 98 (1799); Mourning v. Davis, 3 N. C. 219 (1802); Smith v. Bowen, 3 N. C. 296 (1804) (the editor's note to this case is misleading: the statute referred to, providing for a discretionary, advisory jury, was not enacted until 1823, and the Revised Statutes cited were not published until 1837; Jackson v. Marshall's Adm'r., 5 N. C. 323 (1809); Jordan v. Black, 6 N. C. 30 (1811); Thigpen v. Balfour, 6 N. C. 242 (1813); Williams v. Howard, 7 N. C. 74 (1819); Strudwick v. Ashe, 7 N. C. 207 (1819).

[17] 9 N. C. 298, 301. See also Kirby & Grice v. Newsance & Aycock, 9 N. C. 105, 107 (1822): ". . . for the Court should not have proceeded to a decree, . . . until all the important facts were either admitted or found by a jury."

[18] N. C. Laws 1823, c. 35. The need for such a statute had been voiced in 1821 by William Gaston. In a letter to Bartlett Yancey, who was to be in the next legislature, Gaston, on July 15, 1821, outlined the conflicting views among leaders of the bar as to the application of the Act of 1782, and continued: "The courts have hitherto deemed it safest to have issues in every case. This practice is very inconvenient and exceedingly at variance with the nature and spirit of a Court of

of such issues, as to the court may appear necessary, according to the rules and practice in chancery in such cases, any law to the contrary notwithstanding." This substituted the discretionary, advisory jury[19] for the enlightenment of the judge's conscience, a practice that continued for fifty years, until 1873, when the right to a trial by jury with a binding verdict in equity cases was restored on a constitutional basis. That development is dealt with later in this paper.[20]

III

Georgia established trial by a jury as of right with a binding verdict in all equity cases by a statute[21] enacted in 1792. As slightly amended in 1797,[22] the legislation provided: ". . . and if any case or matter in dispute requires equitable interposition, . . . the judge presiding shall exercise all the powers of a court of equity competent to compel the parties . . . in a cause, to discover on oath all requisite points necessary to the investigation of truth and justice; which proofs, when obtained, shall be submitted to a special jury, whose verdict shall be final. . . ." Although for a time the practice was thought to have acquired a constitutional status[23] under a provision of the Constitution of 1798 that "trial by jury, as heretofore used in this state, shall be inviolate," it has

Equity. Where there is one great question of fact, or a few great questions of fact, controverted between the parties, there is no difficulty in making an issue or two and impanelling a jury to try them, but in the complicated and multifarious matters which a Chancery suit sometimes involves to have the matter broken up into fifty issues, and to have a dozen squabbles as to the wording of these issues and to task the patience of the court to explain them to the jury . . . and ultimately to have the findings of the jury set aside because of their not comprehending the subject is anything but useful and decorous . . . a short explanatory Act of Assembly might remove such inconveniences. It might enact that all issues of fact in every matter of equitable cognizance should be tried by a jury in the presence of the court having cognizance thereof, and that issues of fact should be made up at the discretion of the Court, and according to the usages of Chancery, to satisfy the conscience of the Chancellor concerning doubts as to facts." *Letters to Bartlett Yancey*, JAMES SPRUNT HISTORICAL PUBLICATIONS, (University of North Carolina, 1911), vol. X, no. 2, p. 29; reprinted in SCHAUINGER, WILLIAM GASTON, CAROLINIAN, 109 (Bruce, 1949).

[19] Examples of its operation are: Cooper v. Cooper, 17 N. C. 298, 299 (1832) (". . . no doubt, the court can decree upon the evidence; but the question is whether it is proper to do so in the first instance, before trying an issue. It is also true that after verdict the court is not bound to act on it, and, if it is not satisfactory, may send it back to another trial, or even decree against the verdict. Nevertheless, it seems to be more proper that it should be tried at law first . . . ."); Armsworthy v. Cheshire, 17 N. C. 456, 464 (1833) (conflict of testimony necessary); Kearney v. Harrell, 58 N. C. 199, 203 (1859) (same); Jackson v. Spivey, 63 N. C. 261, 264 (1869) (". . . the verdict of the jury is not positively binding on the court, but it will not be lightly disturbed . . . ."); Peebles v. Peebles, 63 N. C. 656, 658 (1869) (test of credibility of witnesses).

[20] See *infra*, at notes 51-57.

[21] Ga. Laws 1792, no. 475, § 4; WATKINS DIGEST OF THE LAWS OF GEORGIA 481-2 (1800).

[22] Ga. Laws 1797, no. 582, § 6; WATKINS DIGEST OF THE LAWS OF GEORGIA 621 (1800).

[23] Hargraves v. Lewis, 7 Ga. 110, 126, 134 (1849); Mounce v. Byars, 11 Ga. 180, 185-8 (1852).

long been regarded as wholly statutory[24] and is widely operative today.[25] There has been no attempt to change the system.

IV

Massachusetts and *New Hampshire* have always had substantially the same jury provision[26] in their constitutions: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to trial by jury. . . ." In a number of undocumented dicta,[27] it was persistently asserted in both states, beginning in 1828 and 1838, respectively, that this provision granted a constitutional right to a trial by jury in equity cases as well as at law. This view is traceable to confusion as to the status of equity in the colonial period, to a popular distrust of equity as administered by judges alone, and to a pervasive confidence in the values of jury trial. The course of decision,[28] however, has been otherwise, leaving the availability of jury trial in equity dependent upon the judge's discretion. It was concluded that the purpose of the constitutional provision was to preserve jury trial as it was known in common-law cases in England, except where local practice had dealt with small-claims cases without a jury, and to leave intact the English chancery practice as to trial of the facts by the judge, save as he deemed jury trial desirable on particular issues.

V

The *Texas* Constitution of 1845 provided: "In the trial of all causes in equity in the District Court, the plaintiff or defendant shall upon

[24] Mahan v. Cavendar, 77 Ga. 118, 121 (1886); Lamar v. Allen, 108 Ga. 158, 33 S. E. 958 (1899); Holton v. Lankford, 189 Ga. 506, 522, 6 S. E. 2d 304, 314 (1939). The constitutional provision was held in Mahan v. Cavendar to have had reference only to the right at common law as developed in England. In Lamar v. Allen, at page 163 of the official report, the court indicated that although this decision was erroneous in the light of the language of the constitutional provision, it had been too long accepted by the legislature and the courts to be disturbed.

[25] The present statute is GA. CODE ANN. §§ 37-1104, 24-3366, rule 6 (Harr. 1936).

[26] MASS. BILL OF RIGHTS, ART. XV; N. H. BILL OF RIGHTS, ART. XX.

[27] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 6 Pick. 376, 399 (Mass. 1828); Shaw v. Norfolk County Ry. Co., 16 Gray 407, 409 (Mass. 1860); Franklin v. Greene, 2 Allen 519, 522 (Mass. 1861); Marston v. Brackett, 9 N. H. 336, 349 (1838); Hoitt v. Burleigh, 18 N. H. 389 (1846); Bell v. Woodward, 48 N. H. 437, 442 (1869).

[28] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. 344, 364, 368-370 (Mass. 1829); Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45, 47 (1869); Parker v. Simpson, 180 Mass. 334, 62 N. E. 401, 404-409 (1902); Chase v. Revere House, 232 Mass. 88, 122 N. E. 162, 166 (1919); Bellows v. Bellows, 58 N. H. 60 (1876); Procter v. Green, 59 N. H. 350 (1879); Davis v. Dyer, 62 N. H. 231 (1882); State v. Saunders, 66 N. H. 39, 25 Atl. 588 (1889); Curtice v. Dixon, 73 N. H. 393, 62 Atl. 492 (1905); Hatch v. Hillsgrove, 83 N. H. 91, 138 Atl. 428 (1927); Dion v. Cheshire Mills, 92 N. H. 414, 32 A. 2d 605 (1943); N. H. REV. LAWS c. 370, § 14 (1942). *Cf.* Copp v. Henniker, 55 N. H. 179, 210-211 (1875); Perkins v. Scott, 57 N. H. 55, 81-84 (1876).

application made in open court, have the right of trial by jury, to be governed by the rules and regulations prescribed in trials at law."[29] The constitutional convention of that year had rejected[30] a proposal for separate courts of chancery and had granted to the district court jurisdiction of all civil cases "without regard to any distinction between law and equity. . . ."[31]

The evolution of this explicit constitutional provision for jury trial with a binding verdict in equity cases is unique. From 1836 to 1840, the courts of the Republic of Texas administered the civil law inherited from the Mexican regime, which made no distinction between common law and equity.[32] In 1840, the Congress of the Republic repealed the civil law, made the English common law the basis of decision, and provided that law cases were to be tried by the principles of law, and chancery cases by the principles of equity.[33] Then, in 1841, the Congress authorized the judges in chancery cases to submit issues of fact to a jury for an advisory verdict.[34] The Constitutional Convention of 1845 rebelled against the complications created by these legislative distinctions between law and equity and adopted the constitutional provisions quoted to restore the simplicity and flexibility of the original procedure. The Convention was further motivated by a confidence in the jury as a trier of the facts in all cases and by a belief that there would be a greater community satisfaction with the judicial process if the jury participated in all cases.[35]

This constitutional right to a trial by jury in equity cases as well as at law has been continued[36] in force through all of the successive constitutions of Texas. The procedure is widely operative and there has been no attempt to change the system. The judicial support of the policy has been consistently vigorous.[37]

[29] ART. IV, § 16.

[30] JOURNAL, TEXAS CONSTITUTIONAL CONVENTION OF 1845, 191, 198 (Weeks, 1846).

[31] ART. IV, § 10.

[32] Hemphill, in DEBATES, TEXAS CONSTITUTIONAL CONVENTION OF 1845, 256 (Weeks, 1846); Hemphill, C. J., in Smith v. Clayton, 4 Tex. 109, 113-114 (1849); Butte, *Early Development of Law and Equity in Texas*, 26 YALE L. J. 699 (1917); Stayton, *The General Issue in Texas*, 7 TEX. L. REV. 345, 379, note 136 (1929); STAYTON, CASES ON TEXAS CIVIL ACTIONS c. 1, § 2 (1952).

[33] Laws, Republic of Texas, Acts of January 20, 1840 and February 5, 1840, pp. 3, 88-92 (1840).

[34] Laws, Republic of Texas, Act of January 25, 1841, § 7, pp. 82-84 (1841).

[35] DEBATES, TEXAS CONSTITUTIONAL CONVENTION OF 1845, 254, 256, 267-269, 271, 274-275 (Weeks, 1846). And see the discussions referred to in note 32.

[36] The present provision is ART. V, § 10: "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury . . ." The blended jurisdiction of the district court, "without regard to any distinction between law and equity. . . ." is found in ART. V, § 8.

[37] Smith v. Clayton, 4 Tex. 109, 113-114 (1849); Carter v. Carter, 5 Tex. 93, 100 (1849); Wells v. Barnett, 7 Tex. 584, 586 (1852); Davis v. Davis, 34 Tex. 15, 23 (1870); Cockrill v. Cox, 65 Tex. 669, 672 (1886); *Ex parte* Allison, 99

VI

A *Tennessee* statute of 1846 provided: ". . . it shall be the duty of the chancellors of this state, upon the application of either of the parties, to empanel a jury to try and determine any issue of fact involved in any case pending in said courts, the finding of which jury shall be final and conclusive upon the chancellor so far as the facts involved in the issue are concerned. . . ."[38] The origin of this enactment has been attributed to the democratic trends initiated during the Jacksonian era and to criticism of the separate court of chancery for "its asserted power to find facts without the intervention of a jury. . . ."[39] The new policy, replacing the discretionary, advisory jury, was supported by the courts.[40] Then, in 1877, the legislature granted to the courts of chancery concurrent jurisdiction over "all civil causes of action now triable in the Circuit Court, except for injuries to person, property, or character, involving unliquidated damages. . . ."[41] The courts of chancery now exercised both equity and common-law powers.[42] In 1919, dissatisfaction on the part of some chancery lawyers and chancellors with juries in equity cases led to a repeal[43] of the legislation authorizing jury trial in the courts of chancery and to a provision for transfer to the circuit court of law cases filed under the Act of 1877 in which jury trial was demanded. Dissatisfaction with the transfer experience, however, outweighed the dissatisfaction with juries in equity cases and in 1921 the former provisions were re-enacted.[44] Today, the use of juries with binding verdicts in equity cases is widely prevalent.[45]

Tex. 455, 462, 90 S. W. 870, 871 (1906); San Jacinto Oil Co. v. Culbertson, 100 Tex. 462, 101 S. W. 197 (1907); Dallas Joint Stock Land Bank v. State *ex rel* Cobb, 133 S. W. 2d 827, 829 (Tex. Civ. App. 1939), *aff'd*, 135 Tex. 25, 137 S. W. 2d 993 (1940). And see the discussions referred to in note 32.

[38] Tenn. Acts January 20, 1846, c. 122, § 14.

[39] Williams, *History of the Courts of Chancery of Tennessee*, 2 TENN. L. REV. 6, 19-20 (1923).

[40] James v. Brooks, 53 Tenn. 150 (1871); Allen v. Saulpaw, 74 Tenn. 477, 479 (1880).

[41] Tenn. Acts 1879, c. 97, § 1.

[42] See Williams, *supra* note 39, at 19; Jackson v. Nimmo, 71 Tenn. 597 (1879); and TENN. CODE ANN. § 10377 (Williams 1934).

[43] Tenn. Acts 1919, c. 90.

[44] Tenn. Acts 1921, c. 10. See Miller v. Washington County, 143 Tenn. 488, 226 S. W. 199 (1920); Exum v. Griffin Newbern Co., 144 Tenn. 239, 230 S. W. 601 (1921; Johnston v. C. N. O. and T. P. Ry. Co., 146 Tenn. 135, 240 S. W. 429 (1922); Shepard and Gluck v. Thomas, 147 Tenn. 338, 246 S. W. 836 (1922); Bejack, *The Chancery Court*, 20 TENN. L. REV. 245, 251 (1948).

[45] The current statute is TENN. CODE ANN. §§ 10574, 10579 (Williams 1934). See State *ex rel* Mynott v. King, 137 Tenn. 17, 191 S. W. 352 (1917); Greene County Union Bank v. Miller, 18 Tenn. App. 239, 75 S. W. 2d 49 (1934); Third Natl. Bank. v. Am. Equitable Ins. Co., 27 Tenn. App. 249, 178 S. W 2d 915 (1943); Pass v. State, 181 Tenn. 613, 184 S. W. 2d 1 (1944); GIBSON'S SUITS IN CHANCERY IN TENN. §§ 548-554 (4th ed. by Higgins and Crownover, 1937).

VII

Wisconsin statutes gave a right to a jury trial in mortgage foreclosure proceedings, with a binding verdict, from 1864 to 1868.

The Act of 1864[46] provided: "Every issue of fact joined in an action brought . . . for the foreclosure or satisfaction of a mortgage on real estate, which has been . . . executed to any corporation, upon demand of either plaintiff or defendant, shall be tried by a jury, and the finding of the jury . . . shall be final and conclusive, as in other cases of trial by jury." In 1866, the court avoided a decision on "whether, under the constitution of this state, it is competent for the legislature to make the finding of a jury upon questions of fact in an equity case conclusive and final, and not merely advisory," but suggested: ". . . we do not suppose it incumbent upon the circuit court to submit in an equity case the trial of issues of fact to a jury, unless it thinks proper to do so."[47]

The next year the legislature tightened the statute so as to require all issues of fact in mortgage foreclosures to be tried by jury, unless there were a written stipulation of waiver. Moreover, the jurisdiction of the courts to decree sale or foreclosure, where there was an issue of fact, without the intervention of a jury, was abrogated, unless there were such a stipulation. And the verdict of the jury was to have the same effect as in common-law cases.[48]

In *Callanan v. Judd,*[49] this statute was held to conflict with the state constitutional provision that "the judicial power, both as to matters of law and equity, shall be vested" in certain courts. "The power to decide questions of fact, in equity cases, belonged to the Chancellor, just as much as the power to decide questions of law. It was an inherent part, and one of the constituent elements, of equitable jurisdiction . . . it would not be competent for the legislature to divest them [the courts] of any part of it and confer it upon juries." Both cases arose over efforts of farmers to obtain trial by jury as to the conditional character of the delivery of mortgage notes given to finance railway construction in 1855.

VIII

North Carolina re-established[50] a right to a trial by jury in equity cases, with a binding verdict, in 1873, by judicial construction of the Constitution of 1868.

The Constitution provided: "The distinctions between actions at law and suits in equity . . . shall be abolished; and there shall be in this State but one form of action . . . which shall be denominated a civil action

[46] Wis. Laws 1864, c. 169.
[47] Truman v. McCollum, 20 Wis. 360, 373 (1866).
[48] Wis. Laws 1867, c. 79.
[49] 23 Wis. 343, 348 (1868).
[50] For the previous experience, see text at notes 13-19.

. . . . Feigned issues shall also be abolished, and the facts at issue tried by order of court before a jury.[51] . . . In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury. . . ."[52]

In 1872, in *Goldsborough v. Turner*,[53] without reference to the Consitution, the court interpreted the Code of Civil Procedure[54] of 1868 as authorizing a discretionary, advisory jury in an equity case.

At the next term, in *Lee v. Pearce*,[55] this was overruled: "Nor is a construction admissible, which would impose on the Judge of the Superior Court the duty of trying issues of fact except when by consent of the parties, the Judge is substituted for a jury, for such a construction is opposed by the Constitution, '. . . In all issues of fact joined in any Court, the parties may waive the right to have the same determined by a jury,' etc., in the absence of such waiver 'all issues of fact' under the new system must be tried by a jury.[56] These are constitutional provisions, and the provisions of C. C. P. and all other legislative acts must be construed in reference to the Constitution."

Since then, trial by jury in equity cases, with a binding verdict, has been widely used,[57] without any attempt to change the system, save in connection with compulsory references (See notes 96-103 *infra*)

IX

Indiana had a right to a trial by jury in equity cases from 1874 to 1881, by judicial construction of an Act of 1852, an adaptation of the New York Code of Civil Procedure: "Issues of law must be tried by the court. Issues of fact must be tried by a jury, unless a jury trial is waived."[58] In 1874, the court held that the statute applied "whether the action be one which would formerly have been at law or in equity."[59]

[51] ART. IV, § 1.
[52] ART. IV, § 18, now § 13.
[53] 67 N. C. 403, 409 (1872).
[54] 224: "An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce . . . must be tried by a jury, unless a jury trial be waived, . . . or a reference be ordered . . . ." § 225: "Every other issue is triable by the court, or the judge thereof, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, . . ." These came from New York. See CLARK, CODE PLEADING 95 *et seq.* (2d ed. 1947); Kharas, *A Century of Law-Equity Merger in New York*, 1 SYR. L. REV. 186, 200 (1949).
[55] 68 N. C. 76, 82, 89 (1873). See also Chasteen v. Martin, 81 N. C. 51, 55 (1879); Worthy v. Shields, 90 N. C. 192, 194, 196 (1884).
[56] As to the judicial construction of similar statutory provisions, see *accord,* Hopkins v. Greensburg Turnpike Co., 46 Ind. 187 (1874); *contra:* Gallagher v. Basey, 1 Mont. 457, 461 (1872), *aff'd.* 20 Wall. 670, 680 (U.S. 1875); Arnold v. Sinclair, 12 Mont. 248, 277, 29 Pac. 1124, 1133 (1892).
[57] The present statute is N. C. GEN. STAT. § 1-172 (1943): "An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. . . ." See Crew v. Crew, 236 N. C. 528, 73 S. E. 2d 309 (1952).
[58] IND. REV. STAT. Vol. II, Pt. 2, § 320 (1852).
[59] Hopkins v. Greensburg Turnpike Co., 46 Ind. 187, 194 (1874). See also Edwards v. Applegate, 70 Ind. 325 (1880). *Accord:* Lee v. Pearce, 68 N. C. 76,

In 1881 the legislature restored the discretionary, advisory jury in equity cases by an act[60] which provided: "Issues of law and issues of fact in causes that, prior to the eighteenth day of June, 1852, were of exclusively equitable jurisdiction, shall be tried by the court," save as the court might send an issue of fact to a jury for the court's information.[61]

X

From 1887 to 1889, a *Michigan* statute[62] provided: "Either party to a cause in chancery shall be entitled to a jury . . . and the verdict on any question of fact shall have the same effect . . . as a verdict of a jury in an action at law." This statute was held unconstitutional in 1889 in *Brown v. Kalamazoo Circuit Judge:*[63] "The functions of judges in equity cases in dealing with [issues of fact] is as well settled a part of the judicial power . . . as the functions of jurors in common-law cases. . . . The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. . . . Any change which transfers the power that belongs to a judge to a jury . . . is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere." The statute was found to be "so imperfect and incongruous as to be void for its deficiencies." The court feared that equity cases were often too complex, with too many parties, to be determined by a jury. The difficulties in devising specific relief, as compared with verdicts for the recovery of money or property, were thought to be too formidable for a jury. General verdicts in equity cases were regarded as impractical and special verdicts as too confusing.

XI

In *Arizona,* prior to 1901, a trial by jury in an equity case was available only when the judge, in his discretion, deemed one necessary for the enlightenment of his conscience, and the verdict was wholly advisory.[64] In that year, the legislature provided:[65] "In all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury." The origin of this statute is obscure. And it was long overlooked. Instead the former practice of discretionary, advisory juries

82, 89 (1873); Chasteen v. Martin, 81 N. C. 51, 55 (1879); Worthy v. Shields, 90 N. C. 192, 194, 196 (1884). *Contra:* Gallagher v. Basey, 1 Mont. 457, 461 (1872), *aff'd,* 20 Wall. 670, 680 (U.S. 1875); Arnold v. Sinclair, 12 Mont. 248, 277, 29 Pac. 1124, 1133 (1892).

[60] IND. REV. STAT. § 409 (1881).

[61] See Hendricks v. Frank, 86 Ind. 278 (1882); Evans v. Nealis, 87 Ind. 262 (1882); Ikerd v. Beavers, 106 Ind. 483 (1886).

[62] Mich. Laws 1887, no. 267, p. 358.

[63] 75 Mich. 274, 42 N. W. 827, 830 (1889). See also Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 885 (1898).

[64] Henry v. Mayer, 6 Ariz. 103, 53 Pac. 590 (1898); Egan v. Estrada, 6 Ariz. 248, 56 Pac. 721 (1899).

[65] R. S. ARIZ. § 1389 (1901).

in equity was continued.[66] In *Brown v. Greer*,[67] the effect of this statute as creating a right to a jury trial in equity was revealed and held to be preserved inviolate by the subsequently adopted bill of rights.

However, in 1913,[68] the legislature had provided: "In all actions where equitable relief is sought the court shall, if a jury be demanded by either party, submit to the jury all controverted questions of fact. . . . In every such case the verdict shall be binding upon the court in the determination of the action, unless set aside. . . ." It has been said that this change was brought about by a member of the legislature who had an equity suit that he felt he could win if the verdict of a jury in an equity case were binding upon the court. In any event, the new statute, including its detailed regulation of the character of the interrogatories, was reluctantly enforced.[69]

In 1921, at the suggestion of one of the trial judges, the pre-1901 practice was restored:[70] ". . . the court, in its discretion, may submit written interrogatories to the jury . . . the verdict of the jury shall be deemed advisory to the court. . . ." In *Donahue v. Babbitt*,[71] the restoration was held constitutional and *Brown v. Greer*[72] was repudiated, insofar as it had attempted constitutionally to preserve the right to a jury trial created by the Act of 1901. This statute is still in force. The court, however, continues to regard jury trial in equity as mandatory unless waived,[73] though the verdict is only advisory.

XII

A *South Dakota* statute,[74] from 1917 to 1926, gave a right to a jury whose verdicts were to be binding and not advisory on issues of fact in equity proceedings *de novo* in the circuit court on appeal from the county court in probate matters. In *State v. Nieuwenhuis*,[75] this was held unconstitutional, as applied to an action to establish a lost will, in reliance on *Brown v. Kalamazoo Circuit Judge*.[76]

[66] Taggart Merc. Co. v. Clack, 8 Ariz. 295, 71 Pac. 925 (1903); Dooley v. Burlington Gold Mining Co., 12 Ariz. 332, 100 Pac. 797 (1909).
[67] 16 Ariz. 215, 141 Pac. 841 (1914).
[68] CIV. CODE ARIZ. § 542 (1913).
[69] Corbett v. Kingan, 16 Ariz. 440, 146 Pac. 922 (1915); Smith v. Mosbarger, 18 Ariz. 19, 156 Pac. 79 (1916); Costello v. Cunningham, 19 Ariz. 512, 172 Pac. 664 (1918); and see Arizona State Bank v. Crystal Ice and Cold Storage Co., 26 Ariz. 82, 222 Pac. 407 (1924).
[70] Ariz. Sess. Laws 1921, c. 125, now ARIZ. CODE ANN. § 21-1010 (1939).
[71] 26 Ariz. 542, 227 Pac. 995 (1924).
[72] 16 Ariz. 215, 141 Pac. 841 (1914).
[73] Mounce v. Wrightman, 30 Ariz. 45, 243 Pac. 916 (1926); Stukey v. Stephens, 37 Ariz. 514, 295 Pac. 973 (1931); and Greer v. Gosling, 54 Ariz. 488, 97 P. 2d 218 (1940) (". . . while the court need not heed the advice of the jury, it must harken to it.")
[74] S. D. Sess. Laws 1917, c. 182.
[75] 49 S. D. 181, 207 N. W. 77 (1926).
[76] 75 Mich. 274, 42 N. W. 827 (1889), noted herein at note 63.

XIII

The operation of trial by jury in equity cases, in the four states where it most widely prevails, namely, Georgia, North Carolina, Tennessee, and Texas, may best be examined at four strategic points:

(1) Jury trial is available only at final hearing on the issues of fact framed by the pleadings[77] or on those material to or determinative of the case,[78] and not in administrative,[79] interlocutory,[80] or contempt[81] matters.

(2) The jury does not bring in a general verdict but a special verdict, consisting of answers to specific interrogatories as to the facts. On the basis of these findings of fact by the jury and of the case as a whole the judge exercises the chancellor's discretion as to the character of the relief to be granted, if any, and upon what conditions.[82]

[77] Armfield v. Brown, 70 N. C. 27, 29-33 (1874); Ely v. Early, 94 N. C. 1, 9 (1886); State *ex rel.* Carr v. Askew, 94 N. C. 194, 211-213 (1886); Nimocks v. McIntyre, 120 N. C. 325, 26 S. E. 922 (1897); Grantham v. Nunn, 188 N. C. 239, 124 S. E. 309 (1924); Young v. Pittman, 224 N. C. 175, 29 S. E. 2d 551 (1944); Icenhour v. Bowman, 233 N. C. 434, 64 S. E. 2d 428 (1951); Town of Fremont v. Baker, 236 N. C. 253, 72 S. E. 2d 666 (1952).

[78] Hieber v. Buchanan, 202 Ga. 831, 44 S. E. 2d 647 (1947); Ragland v. Rowe, 207 Ga. 441, 62 S. E. 2d 171 (1950); McElya v. Hill, 105 Tenn. 319, 59 S. W. 1025 (1900); Madison Trust Co. v. Stahlman, 134 Tenn. 402, 183 S. W. 1012 (1916); First Nat. Bank of Ripley v. Barbee, 150 Tenn. 355, 265 S. W. 371 (1921); Hibernian Bank & Trust Co. v. Boyd, 164 Tenn. 376, 48 S. W. 2d 1084 (1932); Letellier-Phillips Paper Co. v. Fiedler, 32 Tenn. App. 137, 222 S. W. 2d 42 (1949); TENN. CODE ANN. § 10578 (Williams 1934); Sante Fe Townsite Co. v. Norvell, 55 (Tex. Civ. App. 485, 118 S. W. 762 (1909); Williams v. Tyler, 258 S. W. 886 (Tex. Civ. App. 1923); Squyres v. Rasmussen, 296 S. W. 977 (Tex. Civ. App. 1927).

[79] Beavans v. Goodrich, 98 N. C. 217, 223, 3 S. E. 516 (1887) (allotment of homestead); Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123 (1897) (partition—actual or by sale); McMillan v. McMillan, 123 N. C. 577, 31 S. E. 729 (1898) (partition—equality of shares); Cleve v. Adams, 222 N. C. 211, 22 S. E. 2d 567 (1942) (motion to set aside judgment); Coker v. Coker, 224 N. C. 450, 31 S. E. 2d 364 (1944) (motion to set aside judgment); City Nat. Bank v. Bridgers, 114 N. C. 381, 19 S. E. 642 (1894) (appointment of receiver); Holton v. Lankford, 189 Ga. 506, 6 S. E. 2d 304, 314 (1939) (appointment of receiver); Ferguson v. Ferguson, 210 S. W. 2d 268 (Tex. Civ. App. 1948) (receiver's report); McHenry v. Banker's Trust Co., 206 S. W. 2d 560, 572 (Tex. Civ. App. 1918) (rate determination by receiver of water project).

[80] Young v. Pittman, 224 N. C. 175, 29 S. E. 2d 551 (1944); Town of Fremont v. Baker, 236 N. C. 253, 72 S. E. 2d 666 (1952); GA. CODE ANN. § 37-1101 (Harr. 1936); Hieber v. Buchanan, 202 Ga. 831, 44 S. E. 2d 647 (1947); Campbell v. Peacock, 176 S. W. 774 (Tex. Civ. App. 1915); Stolte v. Karran, 191 S. W. 600 (Tex. Civ. App. 1917); Oil Lease & Royalty Syndicate v. Beeler, 217 S. W. 1054 (Tex. Civ. App. 1920).

[81] Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. 2d 577 (1947); Lewis v. Theodoro, 33 Ga. App. 355, 126 S. E. 158 (1925); Pass v. State, 181 Tenn. 11, 184 S. W. 2d 1 (1944); *Ex parte* Allison, 48 Tex. Cr. App. 634, 90 S. W. 492 (1905), 99 Tex. 455, 462, 90 S. W. 870, 871 (1906).

[82] Whitted v. Fuquay, 127 N. C. 68, 71, 37 S. E. 141 (1900); Boles v. Caudle, 133 N. C. 528, 532, 45 S. E. 835 (1903); Knott v. Cutler, 224 N. C. 427, 31 S. E. 2d 359 (1944); Mounce v. Byars, 11 Ga. 180, 185-8 (1849); Carter v. Lipsey, 70 Ga. 417, 422 (1883); Hardin v. Foster, 102 Ga. 180, 29 S. E. 174 (1897); McWhorter v. Ford, 142 Ga. 554, 83 S. E. 134 (1914); GA. CODE ANN. §§ 37-1104, 24-3366, rule 6 (Harr. 1936); Mutual Life Ins. Co. v. Burton, 167 Tenn. 606, 72 S. W. 2d 778 (1934); Third Nat. Bank v. Am. Equitable Ins. Co., 27 Tenn.

(3) In certain areas, such as parol trusts or reformation for mistake, the chancellors, to safeguard their findings, have required that the evidence amount to something more than a mere preponderance (though less than beyond a reasonable doubt), namely, that the evidence be clear, cogent (or strong), and convincing.[83] How has this standard been applied in trial by jury?

In order to get to the jury, some courts have required that the evidence comply with the higher standard.[84] Others submit the issue if there is anything more than a scintilla and let the jury determine, under appropriate instructions, whether the evidence is clear, cogent, and convincing.[85]

Texas permits jury verdicts to be based on a mere preponderance of the evidence.[86] But the court may set a verdict aside if not supported by c.c.c. evidence.[87]

Instructions to the jury have caused trouble. To impose a requirement that the jury be convinced beyond a reasonable doubt was clearly wrong.[88] So, except in Texas, was the other extreme of a mere preponderance.[89] To combine in one set of instructions both the c.c.c. test and the preponderance test was too confusing.[90] And an instruction was thought to be unduly severe on the plaintiff when it defined a preponderance as "evidence which is of greater or superior weight or that gives greater assurance and carries conviction to the minds of the jury" and then defined c.c.c. evidence as "evidence that is clearer, stronger, more cogent and convincing in its character and weight than

App. 249, 178 S. W. 2d 915, 919 (1943); Scarborough v. Isham, 29 Tenn. App. 216, 196 S. W. 2d 73 (1946); Southern Housing Co. v. Martin, 242 S. W. 2d 843 (Tenn. App. 1950); Hall v. Layton, 10 Tex. 55, 60 (1853); Henyan v. Trevino, 137 S. W. 458, 482-483 (Tex. Civ. App. 1911).

[83] Brame v. Read, 136 Va. 219, 118 S. E. 117 (1923); Shapiro v. Albany Ins. Co., 56 R. I. 18, 183 Atl. 578 (1936).

[84] Ely v. Early, 94 N. C. 1, 9 (1886); Hunt v. Hunt, 169 Tenn. 1, 80 S. W. 2d 666 (1935); Greenwood v. Maxey, 190 Tenn. 599, 231 S. W. 2d 315 (1950). See Bejack, *The Chancery Court*, 20 TENN. L. REV. 245, 251 (1948).

[85] Gillespie v. Gillespie, 187 N. C. 40, 120 S. E. 822 (1923); Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916); Highsmith v. Page, 158 N. C. 226, 73 S. E. 998 (1912); Malone, *Reformation of Writings under the Law of North Carolina*, 15 N. C. L. REV. 155, 158-159 (1937); GEORGIA CODE ANN. § 37-202 (Harr. 1936) (for equitable relief against mistake "the evidence shall be clear, unequivocal and decisive as to the mistake."); Yahlon v. Metropolitan L. I. Co., 200 Ga. 693, 705, 38 S. E. 2d 534, 541 (1946); Minor v. Fincher, 206 Ga. 721, 58 S. E. 2d 389, 394 (1950).

[86] Kraus v. Cornell, 116 S. W. 2d 882 (Tex. Civ. App. 1938).

[87] Sanders v. Harder, 148 Tex. 593, 227 S. W. 2d 206, 209 (1950).

[88] Newberry v. McCook, 146 Ga. 679, 92 S. E. 67 (1917); Lee v. Pearce, 68 N. C. 76, 89 (1873).

[89] Ely v. Early, 94 N. C. 1, 7 (1886); Gillespie v. Gillespie, 187 N. C. 40, 120 S. E. 822 (1923); Peterson v. Taylor, 203 N. C. 673, 166 S. E. 800 (1932); Fid. & Dep. Co. of Md. v. State Hwy. Dept., 174 Ga. 443, 163 S. E. 174 (1932); compare Robertson v. Rigsby, 148 Ga. 81, 95 S. E. 973 (1918).

[90] McWhirter v. McWhirter, 155 N. C. 145, 71 S. E. 59 (1911).

that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence."[91]

(4) It is with respect to compulsory references, that the picture is most interesting.

The Tennessee statute excludes from jury trial in equity: ". . . cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or the provisions of this code."[92] And exceptions to a master's report are to be tried to the judge on motion or at the hearing of the cause.[93]

The Georgia statute enables exceptions of fact to an auditor's report in an equity case to be tried by a jury if the judge approves.[94]

In Texas, the constitutional right to trial by jury in equity cases extends to the issues of fact raised by exceptions to the reports of auditors and masters.[95]

In North Carolina, a statute[96] provides: "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: . . .

"5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

"The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings,[97] but such trial shall be only upon the written evidence taken before the referee."[98]

And the North Carolina court has ruled that: "A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender

[91] McCorkle v. Beatty, 225 N. C. 178, 33 S. E. 2d 753 (1945); and see Henley v. Holt, 221 N. C. 274, 20 S. E. 2d 62 (1942). For the appropriate instructions, see Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21 (1936); McCorkle v. Beatty, 226 N. C. 338, 342, 38 S. E. 2d 102, 105 (1946).

[92] TENN. CODE ANN. § 10574 (Williams 1934). See Greene County Union Bank v. Miller, 18 Tenn. App. 239, 75 S. W. 2d 49 (1934).

[93] TENN. CODE ANN. § 10605, Rule III, § 7 (Williams 1934).

[94] GA. CODE ANN. §§ 10-402, 37-1103 (Harr. 1936). See Lamar v. Allen, 108 Ga. 158, 33 S. E. 958 (1899); Mitchell v. Turner, 190 Ga. 485, 9 S. E. 2d 621 (1940).

[95] Hamm v. J. Stone & Sons Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427 (1896); San Jacinto Oil Co. v. Culbertson, 100 Tex. 462, 101 S. W. 197 (1907). The reports are not evidence.

[96] N. C. GEN. STAT. § 1-189 (1943).

[97] As distinguished from issues of fact arising merely from exceptions to the referee's findings. State *ex rel.* Carr v. Askew, 94 N. C. 194, 211-212 (1886).

[98] These two paragraphs were added by P. L. 1897, c. 237.

appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered."[99] Otherwise, a jury trial is waived.

Does this combination of compulsory references in equity cases, of trial upon the transcript of evidence before the referee, and of waiver by easy default jeopardize jury trial in equity cases in North Carolina?

The statute limiting the jury to the transcript of the evidence before the referee has been held constitutional.[100] Even so, the jury is largely deprived of the opportunity to appraise the credibility of the witnesses. However, the court may, in its discretion, deny a motion for a compulsory reference.[101] And most have been sought or granted in cases involving accounts and boundaries;[102] relatively few have been equity cases[103] arising under the section quoted.

XIV

Is there a constitutional right in equity cases to a trial of the facts by the judge alone, assisted perhaps by an advisory jury, so as to deprive the legislature of power to establish by statute a right to trial by jury with a binding verdict? Eight courts have answered in the affirmative. The Michigan,[104] South Dakota,[105] and Wisconsin[106] cases have already been noted. The others are from Montana,[107] New Jersey,[108] the

[99] Cheshire v. First Presbyterian Church, 225 N. C. 165, 169, 33 S. E. 2d 866 (1945). For the complete formula, applicable to the various situations, see Booker v. Town of Highlands, 198 N. C. 282, 285-286, 151 S. E. 635 (1930).

[100] Chesson v. Kieckhefer Container Co., 223 N. C. 378, 26 S. E. 2d 904 (1943). The findings, conclusions, and report of the referee are excluded. Cherry v. Andrews, 231 N. C. 261, 266, 56 S. E. 2d 703 (1949).

[101] Veazey v. City of Durham, 231 N. C. 354, 707, 57 S. E. 2d 377 (1950).

[102] N. C. GEN. STAT. § 1-189, subdivisions 1-4 (1943); MCINTOSH, N. C. PRACTICE AND PROCEDURE § 522 (1929).

[103] Taylor v. Smith, 118 N. C. 127, 24 S. E. 792 (1896) (parol trust); Pinchback v. Bessemer Mining and Mfg. Co., 137 N. C. 172, 49 S. E. 106 (1904) (reformation); Murchison Nat. Bank v. McCormick, 192 N. C. 42, 133 S. E. 183 (1926) (long and complicated account); Grady v. Faison, 224 N. C. 567, 31 S. E. 2d 760 (1944) (specific performance); Pure Oil Co. v. Baars, 224 N. C. 612, 31 S. E. 2d 854 (1944) (specific performance); Cheshire v. First Presbyterian Church, 224 N. C. 165, 33 S. E. 2d 866 (1945) (trust); Veazey v. City of Durham, 231 N. C. 354, 57 S. E. 2d 377 (1950) (injunction).

[104] Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 830 (1889); see text at note 63.

[105] State v. Nieuwenhuis, 49 S. D. 181, 207 N. W. 77 (1926); see text at note 75.

[106] Callanan v. Judd, 23 Wis. 343, 348 (1868); see text at note 49.

[107] Arnold v. Sinclair, 12 Mont. 248, 277, 29 Pac. 1124, 1133 (1892) (". . . we do not find anything in that statute which indicates an intention to change, or trench upon, the equity functions of the court respecting the finding of the jury upon an issue presented to it in an equitable action. If such intention was manifest in said statute, the question would then arise whether the legislature had power, considering the organic act under which the legislature existed when said statute was passed, to make such change in the equity power of the court; and the further question whether under the provisions of our constitution such a statute could have effect.") See also Gallagher v. Basey, 1 Mont. 457 (1872), *aff'd*, 20 Wall. 670, 680 (U. S. 1875), note 118.

[108] Steiner v. Stein, 2 N. J. 367, 380, 66 A. 2d 719, 725 (1949) (the statute "was

U. S. Court of Appeals for the Seventh Circuit,[109] South Carolina,[110] and Utah.[111]

On the contrary, Arizona,[112] the U. S. Court of Appeals for the District of Columbia,[113] Indiana,[114] New York,[115] Oklahoma,[116] and West Virginia[117] have taken the position that there is no such limitation and that the legislature is free.

The Supreme Court of the United States seems now to have held in effect that the Congress has power to require the trial of the facts on an equitable issue by the jury instead of by the judge, even in a state court. Earlier, it had avoided a ruling on the issue, while expressing grave doubts.[118] But in 1952, in a 5 to 4 decision,[119] it declared that

not and could not have been intended to grant a jury trial as of right as to incidental legal issues such as money damages involved in a suit in Chancery wherein equitable remedies were sought. To have so construed this statute would have been to render it unconstitutional as an improper infringement upon the inherent jurisdiction of the Court of Chancery.") See also Van Houten v. Van Houten, 68 N. J. Eq. 358, 59 Atl. 555 (1904).

[109] Michaelson v. U. S. *ex rel.* Chicago, St. P., M. & O. Ry. Co., 291 Fed. 940, 946 (7th Cir. 1923) ("Congress cannot constitutionally deprive parties in an equity court of the right of trial by the chancellor.")

[110] Hammond v. Foreman, 43 S. C. 264, 21 S. E. 3, 4 (1895); Johnstone v. Matthews, 183 S. C. 360, 191 S. E. 223, 225 (1937) (statute depriving chancellor of discretionary, advisory jury would violate state constitution relating to equity powers of the Court of Common Pleas).

[111] Campbell v. Gowans, 35 Utah 268, 288, 100 Pac. 397, 401 (1909) (state supreme court has state constitutional duty to determine whether findings of fact in equity cases are such as were called for by the evidence).

[112] Brown v. Greer, 16 Ariz. 215, 141 Pac. 841, 843 (1914) ("That the legislature had the power to enact the statute is not questioned.") See text at notes 67 and 71.

[113] Hurwitz v. Hurwitz, 136 F. 2d 796, 798 (D.C. Cir. 1927) ("a defendant [in equity] has no constitutional right to a trial by the court without a jury.")

[114] Hopkins v. Greensburg Turnpike Co., 46 Ind. 187, 194 (1874) (the legislature may extend jury trial beyond the minimum guaranteed by the constitution). See text at note 59.

[115] Susquehanna S. S. Co. v. Andersen, 239 N. Y. 285, 146 N. E. 381, 385 (1925) (statutory jury trial in equitable defenses: "The question was one not of constitutional privilege, but of the meaning of legislation."); Phillips v. Gorham, 17 N. Y. 270, 273 (1858) ("But there was nothing in either constitution which prevented the legislature from imposing the necessity of jury trial in all cases.")

[116] White v. Morrow, 187 Okla. 72, 100 P. 2d 872, 873 (1940) ("There is no constitutional guarantee as to the right of trial exclusively by the court without the intervention of a jury . . . ." in equity cases.)

[117] Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 402 (1904) ("That it is competent for the legislature to require jury trial in equity proceedings cannot be doubted.")

[118] Basey v. Gallagher, 20 Wall. 670, 680 (U.S. 1875) (". . . the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. . . . This discretion to disregard the findings of the jury may undoubtedly be qualified by statute . . ."); Michaelson v. U. S., 266 U. S. 42, 65 (1924) (". . . we are at once relieved of the doubt which might otherwise arise in respect of the authority of Congress to set aside the settled rule that a suit in equity is to be tried by the chancellor without a jury unless he choose to call one as purely advisory.")

[119] Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359, 363 (1952), commented upon in 37 CORNELL L. Q. 799, 802 (1952) and 27 N. Y. U. L. REV. 369 (1952). Compare the *Susquehanna* case, *supra* note 115, and Liberty Oil Co. v. Condon Nat. Bank, 260 U. S. 235 (1922).

the Federal Employer's Liability Act requires a state court in an action for damages to try the equitable issue of fraud in the inducement of a release by jury with a binding verdict, and reversed an Ohio decision affirming a trial judge's finding that there was no fraud, notwithstanding a jury's verdict that there was.

The courts which have asserted that there is a constitutional right in equity cases to a trial of the facts by the judge alone, appear to have been motivated by (a) tradition, (b) respect for the chancellor's professional skill as a trier of facts, (c) a consciousness that the need for a court of equity had arisen in part from the limitation that jury trial had imposed upon the adequacy of various common-law actions, (d) an over-literal application of state constitutional provisions relating to the structure of state courts, (e) an unsympathetic reaction to early legislative attempts to fuse the administration of law and equity into one procedural system, and (f) an uninformed fear of how jury trial would work in equity cases.

Significantly, none of these courts seems to have been aware of the experience with trial by jury in equity cases in Arizona, Georgia, Indiana, Massachusetts, New Hampshire, North Carolina, Tennessee, Texas, Virginia, and West Virginia, outlined in this paper. It is believed that this experience tips the scales against the validity of the asserted limitation and in favor of the legislative power to experiment with this procedure.[120]

XV

This experience may be summarized thus:

It ended with judicial declarations of unconstitutionality in Michigan, South Dakota, and Wisconsin. Supposed constitutional authority was found lacking in Massachusetts and New Hampshire. The statutory authority was repealed in Arizona, Indiana, North Carolina (the earlier phase), and Virginia. And the present statute in Virginia and West Virginia, applicable only when the plaintiff takes issue upon a plea, is of negligible scope or utility.

However, a right to a trial by jury with a binding verdict in equity cases has been widely prevalent in Georgia for 160 years, in Texas for 107 years, in Tennessee for 104 years, and in North Carolina (the later phase) for 79 years. The statutory basis in Georgia and Tennessee could have permitted greater restrictions than would have been possible under the broad constitutional authority in North Carolina and Texas, but, save in the treatment of compulsory references and in one or two matters of practice, that has not occurred.

[120] See CLARK, CODE PLEADING 102 (2d ed. 1947); Levin, *Equitable Clean-up and the Jury*, 100 U. OF PA. L. REV. 320, 322 (1951).

The procedural environment for the experience in these four states has not been uniform. Tennessee, except for the overlap noted in the jurisdiction of the Court of Chancery, still maintains separate law and equity courts and procedures. North Carolina, through the Field Code of Civil Procedure, and Georgia and Texas, by their indigenous practice acts and rules, have fused the administration of law and equity into one procedural system.

In most jurisdictions, the principal obstacle[121] to the complete fusion of law and equity procedures is the necessity for differentiating between "legal" and "equitable" cases, issues, counterclaims, and defenses, under constitutional guaranties of trial by jury that apply only at law. The provision for a right of trial by jury with a binding verdict in equity as well as at law in Georgia, North Carolina, and Texas, has removed this obstacle and enabled these states to achieve the most complete fusion of law and equity in the United States.[122]

[121] See CLARK, CODE PLEADING 91-112 (2d ed. 1947); Kharas, *A Century of Law-Equity Merger in New York*, 1 SYR. L. REV. 186, 199 (1949); State Farm Mut. Auto Ins. Co. v. Mossey, 195 F. 2d 56, 59 (7th Cir. 1952).

[122] Compare Frank, J., in Bereslavsky v. Caffey, U. S. District Judge, 161 F. 2d 499, 500 (2d Cir. 1947) (jury trial in patent infringement case): "Defendant seems to suggest that the Rules have completely obliterated, for all purposes, the historic differences between 'law' and 'equity.' We cannot agree. Those who favor it should have in mind that such obliteration might deprive us of the inestimably valuable flexibility and capacity for growth and adaptation to newly emerging problems which the principles of equity have supplied in our legal system. A transplanted civilian has shown us the disadvantages of a system in which 'law' and 'equity' are fused not only in form but in substance, and another writer has pointed to the danger that, if the courts are not watchful, the procedural fusion may cause a substantive hardening of equity." Judge Frank cites Pekelis, *Legal Techniques and Political Ideologies*, 41 MICH. L. REV. 665, 689, 691 (1943); Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945); Pound, *The Decadence of Equity*, 5 COL. L. REV. 1, 25, 29 (1905).