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PLEADINGS AND JURY RIGHTS IN THE NEW FEDERAL PROCEDURE

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In the January issue of this REVIEW Professor O. L. McCaskill discusses the interrelation of Rules 2, 10 (b) and 38 of the Federal Rules of Civil Procedure¹ and their effect upon the right of jury

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1. *FED. RULES CIV. PROC.* (1938). Rule 2: "One Form of Action. There shall be one form of action to be known as 'civil action'."

Rule 10 (b): "Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

Rule 38: "Jury Trial of Right.

"(a). Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties in violation.

"(b). Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c). Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

trial.² He criticizes the view that under the Rules law and equity, in their pleading aspects, have been "merged", rather than merely "united"; warns of the danger of "mergeritis", i. e., "the communism of legal and equitable remedies and the insidious destroyer of constitutional jury rights"; and indicates that "Members of law faculties have contracted the disease, and are passing it on to students."³

One of the authors of the present article is named as a "merger advocate".⁴ Both of us are in the class of those who have "contracted the disease" and "are passing it on to students". We enter a defense.

I. THE PERSPECTIVE

Apparently "mergeritis" refers to the view that the problem of jury trial need not be settled at the pleading or pre-trial stages of the procedure and that these steps should be freed from any restrictions of historical form in fulfilling their three functions of telling the story, narrowing the issues, and revealing the facts. Professor McCaskill warns that "We should not blind ourselves to the seriousness of the evil"⁵—mergeritis. But before considering the effect of pleading under one form of action upon the determination of the right to jury trial, let us get into its proper perspective the entire "jury-trial problem".⁶

The matter may be placed into perspective in two ways: first, quantitatively—the number of cases in which a demand for jury trial may be expected (the only cases in which a jury trial determination will be in order); and second, qualitatively—the factors which contribute to any difficulty in this determination.

Fortunately, statistics are available for the first task. In 1934 the American Law Institute completed a survey of the civil cases for over three years in thirteen district courts.⁷ In 1937 the Yale Law School published a study of the cases for almost ten years in various superior courts in Connecticut.⁸ As is indicated in the latter study, such ". . . data may not always be in the exact form desired; but it is even

"(d). Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

2. McCaskill, *Jury Demands in the New Federal Procedure* (1940) 88 U. OF PA. L. REV. 315.

3. *Id.* at 329-330.

4. *Id.* at 317, n. 6, referring to the writings of Judge Clark and Professor Moore (see p. 651 *infra*), and to PIKE, *CASES ON NEW FEDERAL AND CODE PROCEDURE* (1939).

5. *Id.* at 330.

6. "Jury-trial problem", as used throughout this article, refers to any difficulty which may exist in determining the extent of the right to jury trial in a given case under the united administration of law and equity.

7. AMERICAN LAW INSTITUTE, *A STUDY OF THE BUSINESS OF THE FEDERAL COURTS—Part II, Civil Cases* (1939).

8. This survey was under the direction of Dean (now Circuit Judge) Clark and Professor Shulman: *LAW ADMINISTRATION IN CONNECTICUT* (1937).

more true that persons with specific problems cannot always start from scratch".⁹ Because of the wide variety of conditions in the thirteen districts surveyed, the American Law Institute study is useful to gauge the percentage of jury trials under the new Federal Rules; but some adjustment may be necessary since that study covers a period during which jury waiver was not automatic in the federal courts and there was a divided administration of law and equity. But with respect to any necessary adjustment the Connecticut figures will be helpful since in that state during the period covered by the figures, there was (and is at present) a united administration of law and equity and provision for waiver of jury trial by failure to demand it¹⁰—as under Federal Rule 38 (b). Certainly any adjustment in the American Law Institute figures due to the adoption of the latter system in the federal courts should be in the direction of a reduction in the number of jury trials: the formula has been changed from inertia = jury trial, to inertia = no jury trial.¹¹

Thus, it may be concluded that the American Law Institute figures as to the extent of jury trial in the disposition of cases represent the maximum which can be expected under the present system:

*Numbers of Cases of Various Types in Which the Different Modes of Termination Were Used*¹²

(Each number under "All Cases" represents 100%)

	Percentage of Cases Filed	All Cases ¹³ 100%	Jury ¹⁴		Court ¹⁵		Other Dispositions ¹⁶	
			No.	%	No.	%	No.	%
<i>All Law Actions</i>	100.	3919	322	8.2	889	22.7	2706	68.8
Contract	22.1	867	129	14.8	125	14.3	611	70.5
Negligence	32.9	1286	148	11.5	29	2.2	1098	85.4
Other Torts	2.6	100	29	29.	4	4	77	77.
Liquor Laws	16.6	650	3	.4	380	58.4	268	41.2
Immigration Laws	3.9	151			119	78.8	32	21.2
Bankruptcy Laws	.5	20	1	4.5	5	22.7	16	72.9
Income Tax Laws	2.6	99	1	1.	22	22.3	76	76.8
Other Federal Tax Laws	4.	169	1	.6	13	7.7	155	91.7
Patents, Copyrights and Trade-mark Laws	.5	19	1	5.3	1	5.3	17	89.5
Interstate Commerce Laws	5.3	210	4	1.9	29	13.8	178	84.2
Pure Food and Drug Laws	3.9	156			116	74.3	40	38.9
Penalties for Violation of Other Laws	.1	6			4	44.4	5	55.5
Actions by or Against State	3.	118	2	1.7	6	5.	110	93.2
Miscellaneous	1.7	68	3	4.8	36	58.	23	37.1
<i>All Admiralty Actions</i>	100.	1857	2	.1	770	41.5	1085	58.5
<i>All Equity Suits</i>	100.	4076			1016	24.8	3061	75.

9. *Id.* at 201.

10. 2 CONN. GEN. STAT. (1930) § 5624.

11. The Connecticut figures are also helpful in connection with the situation as it exists in the District Court for the District of Columbia, invested as it is—unlike other federal courts—with general jurisdiction.

12. Adapted, with the permission of the publishers, from charts in AMERICAN LAW INSTITUTE, note 8 *supra*, at 59 and 76. The detailed breakdown under "All Admiralty

Of course there were no juries in the equity suits and but few in admiralty. But even on the law side only 8.2% of the cases filed were tried to a jury—322 cases out of close to 4,000. Of these 322, 55%—more than half—were cases involving negligence or other torts (no one would suggest that such actions are calculated to create a jury-trial problem¹⁷). Even assuming that under the new Rules jury-trial problems may arise in all other types of law actions, then according to these figures the ratio of actions not relating to negligence, etc., and tried by a jury to *all law actions* was but 3.7%. In relation to *all* of the actions brought in the federal courts, but approximately 1.5% of the cases are at all likely to present a jury-trial problem. And we will see, as the analysis unfolds, that under the united administration only a small number of this 1.5% will present the problem in any acute form.

The Connecticut figures likewise show a small proportion of jury cases. In one study it was found that, out of 8,745 cases under examination, only 273 had juries—approximately 3.1%.¹⁸ Again, a large number of these were negligence and similar tort actions—rarely presenting jury-trial problems. Eliminating these, at most 1.07% of the cases might present difficulty. In a later study it was found that, out of 12,839 cases under examination, 982 cases—7.6%—were tried by a jury;¹⁹ but eliminating negligence and similar tort claims, no more than 1.6% of the cases could present a jury-trial problem.

These figures indicate that the number of cases which may possibly be affected by “mergeritis” is slight indeed.

Focusing our attention upon this small group of cases and pre-scinding for the moment from any effect pleading merger may have upon the determination of the right to jury trial, let us consider some important factors which contribute to the confusion in this field. In other words, having put the entire matter of jury trial in perspective quantitatively, let us do so qualitatively.

Actions” and “All Equity Suits” has been omitted; columns in the original entitled “Reference”, “Defaults, etc.” and “Dismissals, etc.” have been here consolidated under the heading “Other Dispositions”.

13. “There are some very slight discrepancies between the figures in the first column and the totals of the other five columns. The discrepancies probably appeared in the mechanical processes employed in compilation.” *Id.* at 76, n. 3.

14. Includes directed verdict.

15. Includes non-jury cases, cases where jury was waived, formal or otherwise, and summary judgments.

16. Includes default, consent, stipulation, compromise, dismissal, discontinuance, withdrawal, non-suit, and remand to state court.

17. See note 6 *supra*.

18. CLARK AND SHULMAN, *op. cit. supra* note 8, at 209, Table A.

19. *Id.* at 28, Table X.

The most obvious—and most fundamental—factor is the existence side by side in Anglo-American jurisprudence of separate substantive systems of law and equity. Though such a development has seemed inevitable in legal history, nevertheless it is not designed to clarify our immediate problem. This is particularly so since in many respects the two systems cover the same subject-matter, often providing different remedies for the same right and sometimes providing the same remedy. Due to the origins of the two systems, jury trial was provided in one and non-jury trial in the other. To whatever extent historically this difference of treatment was influenced by practical matters of procedural expediency, such matters can no longer enter into the picture now that the dichotomy has been crystallized in the Federal Constitution and the constitutions of the various states. In fact, a plaintiff, before the introduction of code pleading, was faced with the necessity of determining the nature of his action, not merely with reference to the jury trial, but with reference to the forum in which he must enforce his rights; and consequences hinged upon that decision which were much greater than the mere possibility of losing a jury, e. g., if the running of the statute prevented pleading over. Further, the existence of the two systems often thwarted a litigant's effort to secure several types of relief in the same suit or to raise certain types of defenses. From the point of view of efficient administration, the resulting multiplicity of actions was admittedly undesirable.

A second factor which, entirely apart from pleading merger, contributes to the difficulty of the jury-trial problem is the growth of new types of statutory actions enforceable in the federal courts. These include suits for patent and trade-mark infringement, declaratory judgment,²⁰ and public and private suits for violation of federal regulatory measures, such as the Securities Act, the Anti-Trust Laws, Fair Trade Acts, and labor relations legislation. In order to determine the right to jury trial, it apparently becomes necessary for constitutional reasons to assimilate these new types of actions to traditional vehicles for relief in law or equity.

A third factor which has recently asserted itself for the first time and may well be the source of future confusion is the effect, on the jury-trial problem, of the revolution in federal jurisprudence brought about by *Erie R. R. v. Tompkins*.²¹ Certainly the minimum right to a trial

20. For a recent discussion of the jury-trial problem in declaratory judgment actions, see (1939) 13 So. CALIF. L. REV. 170. See also p. 666 *infra*.

21. 304 U. S. 64 (1938). See generally McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126; Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie R. R. v. Tompkins* (1939) 34 ILL. L. REV. 271. See also Pike and Fischer, *What Law Governs Matters of "Substance" in Federal Practice* (1940) 2 Fed. Rules Serv. 1.3.

by jury in the federal courts is based upon the Seventh Amendment to the Constitution of the United States. Thus, if a federal court should decide in a given case that under the Seventh Amendment certain claims or issues should be tried by jury, this mode of trial is proper even though state decisions do not regard a jury as appropriate under the circumstances.²² Suppose, however, that the federal judge's independent judgment convinces him that the Seventh Amendment does not require a jury trial, but the state law—statute or decision—holds that a jury trial is appropriate. Recently one decision has held that in this situation the federal court need not afford a jury trial;²³ another decision has held that it should.²⁴ If the right to jury trial upon demand is a matter of procedure,²⁵ the first decision is correct; but if it be regarded as a matter of substance,²⁶ the second is correct. If the latter position should prevail, while any federal decision requiring a jury trial in a given situation would still be of value as precedent in determining the minimum right afforded by the Seventh Amendment, a federal decision *denying* a jury trial would be of no value as precedent where the state law is contrary. There is in this factor the potentiality of a most confusing problem and one which, like the other two factors mentioned above, is unaffected by whether there is pleading merger.

Thus, in the cases presenting the jury-trial problem the fever of the patient can be traced to a number of causes other than "mergeritis".

22. *Scott v. First Nat. Bank of Morris*, 285 Fed. 832 (C. C. A. 8th, 1922); *Tannille v. Copeland*, 288 Fed. 860 (N. D. Tex. 1923).

23. *Hollingsworth v. General Petroleum Corp.*, 26 F. Supp. 917 (D. Ore. 1939). Judge McColloch felt that the Seventh Amendment as construed by the federal courts was the exclusive criterion, and doubted that the matter of jury trial was one of substantive law.

24. *Beagle v. Northern Pacific Ry. Co.*, 2 Fed. Rules Serv. 38a.9, Case 1 (W. D. Wash. 1940). Judge Bowen said: "The recent case of *Hollingsworth v. General Petroleum Corp.*, [note 23 *supra*], . . . relied upon by defendant may be distinguishable on the ground that the court was there merely applying the *established* rule of the Oregon District Court. But whether distinguishable or not, I do not think the rule of that case should be applied in this one removed here from our state court where the rule is clearly against the *Hollingsworth* case, especially in view of what I believe to be the common practice in recent years of following in the federal court here the state court practice of submitting the issue of fraudulent release to the jury.

"Furthermore, this is a typical situation where the rule of the late case of *Erie R. R. v. Tompkins*, 304 U. S. 64, should be applied and effect given to the law as announced by the state supreme court in order to avoid needless conflict between the federal and state courts as to what the law is in a given case, when that law is not declared by an act of Congress, the constitution of the United States or the decision of a federal appellate court binding on this court. My attention has not been called to any statutory or constitutional provision giving defendant the specific right to have this fraudulent release issue tried by the court without a jury. . . ."

25. Cf. *Franklin v. Minneapolis, St. Paul & S. S. M. Ry.*, 179 Minn. 480, 229 N. W. 797 (1930); *Singer v. Messina*, 312 Pa. 129, 167 Atl. 583 (1933). See 3 BEALE, *CONFLICT OF LAWS* (1935) § 594.1.

26. Cf. *Atchison, T. & S. F. Ry. v. Spencer*, 20 F. (2d) 714 (C. C. A. 9th, 1927), (1928) 12 MINN. L. REV. 291; *Jackson v. St. Louis-San Francisco R. R.*, 224 Mo. App. 601, 31 S. W. (2d) 250 (1930).

II. THE PROBLEM

Before discussing the effect of the pleadings upon the determination of the mode of trial, we must give some consideration to the extent of the constitutional right of jury trial under the united administration of law and equity. As to this matter there is not entire agreement.

Under one approach the entire controversy between the parties in a given case is broken up into its "basic issues", and then the nature of each (i. e., whether "legal" or "equitable") determines whether a jury trial is to be afforded on such issue. According to Dean Clark,

" . . . the constitutional question, where unaffected by statutes, is the simple inquiry, was the issue now to be decided one which an equity court would have decided without a jury at the time of the adoption of the state constitution or would it have been passed upon only by a jury in a court of law? ²⁷ . . . When the question of form of trial is raised by motion preliminary to the trial, it must then be decided, and it can be decided by determining how the issues presented by the pleadings would have been tried under the former practice." ²⁸

In connection with a situation presently to be discussed for illustrative purposes,²⁹ Professor Moore says:

" . . . where there is a claim and a counterclaim which is related thereto, and one is equitable and the other legal in character, the court should determine what are the basic issues, in ruling on the right to jury. Thus in an action to foreclose a mechanic's lien, if the defendant denies performance of the contract by the plaintiff and counterclaims for damages for non-performance, either party should, on demand, obtain a jury trial on the basic issues of performance and damages, with the court settling any remaining issues." ³⁰

On the other hand, Professor McCaskill insists upon the impossibility of determining the nature of "basic issues" as such, i. e., out of their historical setting:

"The right of jury trial under the Seventh Amendment attached to issues found in law actions only, never to issues in an equity suit, and it is not true that the issues in a law action were never the same as in an equity suit. On the contrary, almost any issue

27. CLARK, CODE PLEADING (1928) 53.

28. *Id.* at 54. See also Clark and Moore, *A New Federal Civil Procedure: II. Pleadings and Parties* (1935) 44 YALE L. J. 1291, 1296; James, *Trial by Jury and The New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 1022.

29. See pp. 652-654.

30. 3 MOORE AND FRIEDMAN, MOORE'S FEDERAL PRACTICE (1938) 3016.

found in a law action may also be found in an equity suit. Issues bearing upon a title to land may be found in an action of ejectment, but they are also found in bills quia timet, in injunction suits, and many other strictly equitable proceedings. At one time if an issue of title arose in an equity suit, a feigned issue was made up and sent to a law court to try and report back to the equity court, but even then the finding of the law court upon the issues was advisory only. In modern times equity courts try these issues themselves, calling in juries to aid them or not as they see fit. Issues of possession, of money due on promises, of damages to property, even of negligence resulting in personal injury, are found in equity suits as well as in law actions. Issues are colorless apart from the proceedings in which they are found. Their character, as triable with or without jury, depends upon association with other issues and remedies sought upon their determination."³¹

The application of these criteria can perhaps be better understood by an analysis of a case which has often been used as a focal point in discussions in this field: *Di Menna v. Cooper & Evans Co.*³² The plaintiff brought an action to foreclose a mechanic's lien and combined with the prayer for equitable relief an alternative claim for money judgment. The complaint alleged that the defendant undertook to make advances to the plaintiff during the progress of the work contracted for; but that after a time defendant refused to do so and discharged the plaintiff. The answer denied the material allegations of the complaint and set up a counterclaim in which a money judgment was demanded for the plaintiff's alleged abandonment of the contract. After replying, the plaintiff moved that issues be stated for trial by jury. Ultimately, two issues were so stated: (1) Was the plaintiff entitled to a money judgment, and how much? (2) Was the defendant contractor entitled to a money judgment, and how much? A special verdict was rendered by which it was found that the plaintiff was entitled to recover over \$4,000, and the defendant was entitled to recover nothing. On the trial of the remaining issues in the case the plaintiff took the position that the jury verdict was conclusive; the defendant, that it was merely advisory. The existence of the lien being disproved, the court refused equitable relief but granted the plaintiff a money judgment, finding the jury verdict conclusive. The Court of Appeals, by Judge Cardozo, decided that the verdict was merely advisory as to the plaintiff's case, but conclusive as to the counterclaim.

The status of the claims and issues is here indicated :

31. McCaskill, note 2 *supra*, at 318-319.

32. 220 N. Y. 391, 115 N. E. 993 (1917).

Di Menna v. Cooper & Evans Co.

CLAIM		COUNTERCLAIM
To foreclose mechanic's lien (Equitable)	For money judgment (Legal)	For money judgment (Legal)
<i>Existence</i>	<i>of contract (not in issue)</i>	
<i>Performance</i>	<i>or breach of terms of contract</i>	
<i>Value of materials</i>		<i>Extent of damages for abandonment</i>
<i>Existence of lien</i>		

Before the Code plaintiff's claim could have been classified in either of two ways: (1) A suit in equity to foreclose a mechanic's lien plus an action at law for money judgment, or (2) a suit in equity to foreclose a mechanic's lien, with damages as incidental relief (an "equity merger"). The option lay with the plaintiff. If the first course was followed, there would have been two suits. The suit to foreclose the mechanic's lien would have been tried to the court, and the action for money judgment tried to the jury. If the plaintiff chose the second alternative, the entire controversy normally would have been tried to the court, neither party having a right to jury trial, and there would have then been one suit.

Under Professor McCaskill's analysis, the plaintiff should still have the option of procuring an equity merger or of having separate causes tried according to the modes in equity and law, respectively. The dotted line on the chart separates the two aspects of the plaintiff's claim under this analysis; the third column represents the defendant's counterclaim. Separated by the horizontal lines are the elements of the claims. It will be seen that the existence of the contract is common to both aspects of the plaintiff's claim and to the counterclaim; but in the particular case this question was not left in issue by the pleadings. Likewise the controversy with respect to the performance or breach

of the terms of the contract by the respective parties is common to both aspects of the plaintiff's claim and to the counterclaim, and is in issue in all respects. The value of the labor and materials is in issue but is relevant only to the plaintiff's case; the issue as to the existence of damages resulting from the plaintiff's alleged abandonment of the job is relevant only to the counterclaim. Finally, the existence of the lien is relevant only to the equitable aspect of the plaintiff's claim.

Professor Moore's statement with respect to this case³³ indicates that under the "basic issue" test the common issue of performance or breach of terms of the contract would be tried by jury upon the demand of either party, even insofar as the issue relates to the equitable aspect of the plaintiff's case. Both the issue on the value of labor and materials and the extent of damages for abandonment (relating to the claim and counterclaim, respectively) would be tried to the jury; and the remaining issue, the existence of the lien (relating only to the equitable aspect of the plaintiff's claim) would be tried to the court. Professor McCaskill insists the alternative prayer for damages indicated what he believes should still be plaintiff's option to have his legal and equitable claims kept separate for the purpose of determining the right to jury trial.³⁴ Further, upon the demand of either party the counterclaim would be tried to the jury.

The *Di Menna* case illustrates the types of situations in which the jury-trial problem arises. With respect to such situations let us consider the effect of the pleadings on the determination of the right to jury trial.

III. THE PROBLEM AND PLEADING

It is not the purpose of this article to take a position as to the extent of the right to jury trial under a system providing for the one form of action; our position is that it does not follow from either analysis referred to above that pleading should be constricted into historical forms which had their development in the administration of legal and equitable claims in separate courts. But since Professor McCaskill's criticism of the "merger" theory is put in terms of his own analysis of the extent of the constitutional right, the following discussion of the effect of pleadings upon the determination of that right will be based upon an analysis similar to his. Our support for the "merger" point of view is based, first, upon the fact that cases involving jury-trial problems constitute an extremely small percentage of the actions in which pleadings will be filed, and that therefore, any difficulty attendant to these few cases does not justify what is for cases at large an undesirable form of

33. See p. 651 *supra*.

34. But see pp. 656-657 *infra*.

pleading.³⁵ But our position is also based upon the fact that even in this relatively small number of cases the retention of the historical forms of pleading will be of little or no help in solving the jury-trial problem.

We have already adverted to some of the factors which, entirely apart from pleading, play their part in complicating the picture. Let us consider what effect the requirement of traditional forms of pleading would have upon the solution of the more difficult situations.

A. *Where formerly a party had to bring two separate actions in order to secure complete relief.* One situation arises where there are involved types of claims as to which chancellors did not grant damages as incidental relief, or otherwise did not grant complete relief in the same suit. Formerly, a party would have brought a suit in equity and an action at law,³⁶ with a court trial as to the first and a jury trial as to the second (unless he and the defendant stipulated the jury away). The plaintiff never had an option as to the mode of the trial with respect to his two claims. Thus no procedural step he can take under the new Rules can be construed as the exercise of an option binding on the parties. True, if he fails to demand a jury trial on his legal claim he waives his right to a jury, but the defendant's right is still preserved. In general, this situation should not be affected by the form the pleadings take; regardless of the categorizations and labels in the pleadings, the historical modes of trial must be looked to primarily; the plaintiff having no option anyway, his pleadings are indicative of no choice controlling in the case.

A second situation involves a duplication of trials, but again these difficulties are neither decreased nor increased by the use of any particular system of pleading. This situation is presented where a plaintiff seeks equitable relief and legal relief (on the theory that the legal relief is incidental—"equity merger") and the equities fail.³⁷ It can be assumed that damages alone cannot be given without affording the parties a right to a jury trial (and adequate notice of the existence of that right). If the defendant is content to let the action proceed as an action for damages without his jury trial, it may be the plaintiff is in no position to complain; but if at this juncture the defendant insists upon his jury trial, a new trial will have to be ordered.

35. See pp. 662-665 *infra*.

36. E. g., the facts in *Decorative Stone Co. v. Building Trades Council*, 23 F. (2d) 426 (C. C. A. 2d, 1928), *cert. denied*, 277 U. S. 594 (1928) (to secure an injunction and triple damages under Anti-Trust laws, separate suits in law and equity are necessary). See also pp. 667-668 *infra*.

37. E. g., the facts in *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993 (1917) analyzed at pp. 652-654 *supra*.

As unfortunate as this result may be, it is somewhat less troublesome than the result which would have occurred before; the action would have been dismissed, and, if the statute had not run, the plaintiff would begin over again at law. Both before and under the Rules the necessity for a new trial does not arise from confusion in the pleadings or anything concerned therewith; rather it arises from a failure of proof. This is especially apparent in a variant of the situation under discussion: plaintiff asks for equitable relief only and at the trial, although his equities fail, he establishes his right to damages.³⁸ Here again, if the defendant insists, a new trial must be ordered. Formerly, at best, a new action would have to be instituted; at worst, the plaintiff would have lost his right of action by the running of the statute.

B. *Where a party had the option of enforcing his rights separately at law and in equity or in one equity suit.* Under one set of circumstances, a party could secure an injunction in equity and damages at law, or, by taking advantage of an "equity merger", could secure both in the equity court. Here practically speaking, the defendant had no right to a jury trial; he had only a *chance* of securing one—a chance which depended upon whether the plaintiff desired to take advantage of the procedural convenience of an "equity merger" or whether he was sufficiently desirous of having his damages fixed by a jury as to be willing to bring separate actions.³⁹ Now with the combined administration this situation need not be altered one whit—even as to the procedural method of articulating the plaintiff's option. He may bring two actions or one. If he brings two, and demands a jury on the action for damages he will get it; if he brings one, he should not get it; nor should the defendant.

This result is not based on what Professor McCaskill refers to as a "new waiver" unauthorized by constitution, statute, or rule. Rather the result is the same as that which occurred when the plaintiff effected a traditional "equity merger". True, just as before, to secure a jury trial on the claim for damages, plaintiff will have to bring separate suits. But since Professor McCaskill expresses as much fear of extending the right to jury trial as of curtailing it,⁴⁰ he certainly should not want the new Rules construed in such a way as to afford a jury trial where it was not heretofore available. If the court should allow a jury

38. E. g., see the facts in *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917), where a switch in theory was not allowed. (But in most code states a plaintiff could probably amend to meet the situation; under the new Rules he need not even do that if the evidence of damages is received without objection. See Rule 15 (b); Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure* (1937) 47 *YALE L. J.* 50, 66-67.)

39. E. g., the facts in *Bidwell v. Astor Mutual Ins. Co.*, 16 N. Y. 263, 276 (1857); *Back v. Peoples Nat. Fire Ins. Co.*, 97 Conn. 336, 116 Atl. 603 (1922).

40. McCaskill, note 2 *supra*, at 316-317.

trial to a plaintiff who chooses to bring but one action in the situation under discussion, it is in effect holding that under the new Federal Rules a party may have all of the procedural advantages formerly allowed in an equity merger and at the same time secure the form of trial he formerly would have obtained only by the more inconvenient method of separate actions. Yet it is surprising to find that exactly this result will follow under the rules of practice recently adopted to supplement the Illinois Civil Practice Act⁴¹ and endorsed by Professor McCaskill.⁴² It is difficult to reconcile these Rules with his desire not to extend the right to jury trial any more than to narrow it. The view that under the new Federal Rules a jury will be had on the claim for damages if two actions are brought and not if one is brought, does meet this ideal. The same right to jury trial is present, with the same mode of expressing the election; jury trial is neither encouraged nor discouraged more than formerly. On the other hand, extension of jury trials—without historical justification—will result from the Illinois Rules, though they constitute a labored attempt to preserve in the pleadings a semblance of the law-equity dichotomy.

Nor should the right to jury trial be extended in the related situation where by statute or rule a defendant is permitted to plead a legal counterclaim to an equitable claim, as under Rule 13 (b).⁴³ The defendant has the option of bringing a separate action on his claim (in which case he may have a jury if he demands it) or of "merging" his

41. ILL. PRAC. RULES (1935) Rule 10: "Issues Cognizable by Court of Equity. All matters which, prior to January 1, 1934, were within the jurisdiction of a court of equity, whether directly or as an incident to other matters before it or which the equity court could have heard so as to do complete justice between the parties, may hereafter be regarded as a single equitable cause of action, and when so treated as a single cause of action shall be pleaded without being set forth in separate counts and without the use of the term 'count' in such pleading; and shall be heard and decided in the manner heretofore practiced in courts of equity."

Rule 11: "Pleading of Equitable Matters. When actions in law and in chancery which may be prosecuted separately are joined, the party joining such actions may, if he desires to treat them as separate causes of action, plead such causes of action in distinct counts, marked respectively 'separate action at law' and 'separate action in chancery.' When so pleaded the court shall first determine whether the actions joined by the separate counts are properly severable, and, if so, whether the actions shall be tried separately and in what order, or whether the actions shall be tried together. If the court determines that the actions are severable, the issues formed on the legal counts shall be tried before a jury when a jury has been properly demanded, or by the court when a jury has not been properly demanded, and the equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity."

"The provisions of this rule as to pleadings, practice, and trial by jury when seasonably demanded, shall apply to answers, counter-claims and any other pleadings wherever legal and equitable matters are permitted to be joined under the Civil Practice Act."

"If the facts are adequately stated in one part of a pleading, or in any one pleading, they need not be repeated elsewhere in such pleading, or in other pleadings and may be incorporated elsewhere or in other pleadings by reference."

42. McCaskill, *One Form of Civil Action, But What Procedure, for the Federal Courts* (1935) 30 ILL. L. REV. 415, 442-445.

43. The problem as it arises in connection with *compulsory* counterclaims is to be discussed presently. See pp. 658-659 *infra*.

claim (in which case he will not have a jury⁴⁴). Here nothing is denied the defendant by this "new merger"; he need not "merge" if he does not want to.⁴⁵ But since to deny the plaintiff his right to jury trial in this situation would be to deny him a right of which he could in no way have been deprived prior to the Codes, he still retains the right to have a jury trial on the legal counterclaim if he demands it.⁴⁶

It is important to note in this last case that the form of the pleadings can have no bearing on the jury-trial question; it never had before—one action or two was the test; and it still is.

C. *Where the party has no option but must enforce all his rights in a particular action.* This situation results because of the development of other principles of procedure than the ones here under consideration. One instance is where rules of *res judicata* are applied in a way to reach the same result as in *Hahl v. Sugo*.⁴⁷ There, desiring to rid himself of an encroachment on his property, plaintiff sued for ejectment, and won; but finding the sheriff unwilling to assume the burden of destroying the outer wall of defendant's building, he brought another action to secure a mandatory injunction compelling the defendant to perform this task. The court held that *res judicata* barred the second action. Whether one likes this result or not, how does it affect the problem of jury trial? Although the doctrine of *Hahl v. Sugo* requires a plaintiff to bring in one action what may have been formerly severable legal and equitable claims, his doing so cannot be construed as indicating an intent to forego a jury trial on a legal claim. This is to be contrasted with the situations where the party voluntarily chooses a "merger".⁴⁸

The final problem is created by Rule 13 (a), providing that a party must raise by counterclaim any claim which he has against the opposing party "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."⁴⁹ Here the defendant by "merging" a legal claim into an otherwise equitable action cannot, in

44. *American Mills Co. v. American Surety Co.*, 260 U. S. 360 (1922); *Horwitz v. New York Life Ins. Co.*, 80 F. (2d) 295 (C. C. A. 9th, 1935).

45. In this connection see the recent case of *S. Klein, Inc. v. New Deal Bldg. Corp.*, 14 N. Y. S. (2d) 323 (Sup. Ct. 1939).

46. See *National Elec. Products Corp. v. Circle Flexible Conduit Co., Inc.*, 57 F. (2d) 219 (E. D. N. Y. 1931); *Di Menna v. Cooper & Evans*, 220 N. Y. 391, 115 N. E. 993 (1917), discussed at pp. 652-654 *supra*.

47. 169 N. Y. 109, 62 N. E. 135 (1901). Cf. *City of Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923).

48. See discussion under B., p. 656 *supra*.

49. FED. RULES CIV. PROC. (1938) Rule 13 (a): "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

doing what he was required to do, be held to have waived his right to a jury. Nor can the plaintiff by this "new merger" be denied a jury trial if he desires it.

In brief, where a party has a choice, his bringing of one or two actions, respectively, is sufficient articulation of such choice. But where a party has no choice it is the historical nature of the claims that governs, not the wishful draftsmanship of the parties.

However, it may be asked, does not the form of pleadings help in this historical determination? Professor McCaskill insists that without pleading to light the way, the jury demands of the parties will be "arrows shot in the dark".⁵⁰ In any case as difficult as the ones under discussion, the light shed by any one of the parties in his pleading will indeed be feeble. More to the point than the self-serving classifications in such pleadings is the briefing of the point and the argument thereon—if and when the question should arise. In any event the labels and classifications of the parties do not govern as to the nature of the claim, except insofar as they reflect a choice by the plaintiff. But, as has already been said, where the plaintiff *has* a choice he displays it just as he did before—by bringing two actions or one.⁵¹ As to the historical nature of the claim or claims, defenses or counterclaims, the material gathered and presented at the argument of the question will be much more helpful to the court in gaining a true grasp of the matter than the view adopted by the parties at a time when a controversy over the jury-trial problem may or may not have been envisioned.⁵²

"*Equitable defenses*". Mention should be made of the confusion as to the jury-trial problem where "equitable defenses" are involved.⁵³

Much of the conflict in this field comes from a loose use of the phrase "equitable defenses". This phrase has been used to mean three distinct things: (1) defenses to equitable claims; (2) an equitable right cognizable as a defense at law even before the one form of action; and (3) rights formerly enforceable only by an independent suit in equity. Taken in its first meaning, it is obviously triable to the court. Taken in its second meaning, the so-called "equitable defense" has

50. McCaskill, note 2 *supra*, at 329.

51. See pp. 656-658 *supra*.

52. Professor McCaskill says (note 2 *supra*, at 329): "The wishes of the parties, or the guesses of the trial judges, rather than the Constitution, will determine what is obtained." In which case will the decision of a judge be more of a guess; after an examination of the pleadings or after adequate argument and briefing of the question? As to the wishes of the parties, one of Professor McCaskill's main theses is that in the class of cases represented by the first situation under B, p. 656 *infra*, the wishes of one of the parties should be determinative of the constitutional right. McCaskill, note 2 *supra*, *passim*.

53. See generally Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645; Hinton, *Equitable Defenses under Modern Codes* (1920) 18 MICH. L. REV. 717.

really come to be a legal defense and as such is triable to the jury.⁵⁴ And in the third meaning, it is really an "equitable counterclaim"—an independent claim which may be asserted in the same action in order to dispose of the entire controversy between the parties.⁵⁵ Assuming that, judged historically, the "equitable defense" is of this type, it is easy to reach the conclusion that a non-jury trial is appropriate.

Under the united administration the primary problem is to determine of which type is a given "equitable defense". In these situations, the defendant has no option to secure a jury trial or not, as does the plaintiff in a situation where an equity merger is available. In other words, the nature of the defense is to be determined only historically, not by defendant's desire in the matter. Thus the nature of the facts asserted rather than the form in which the defendant casts his "equitable defense" is the determinative factor. Here again, it is difficult to see how the form of the pleadings is going to help or hinder in the solution of the problem. In the first place, in the nature of things such defenses are separately stated from the claim (and Professor McCaskill seems to think that separate statement is the solution with respect to unscrambling the legal and equitable aspects of the plaintiff's case). Second, insofar as the distinction between equitable and legal defenses is concerned, the self-serving classification of the defendant will not govern. Third, insofar as the distinction between equitable and legal aspects of a particular counterclaim is concerned, the discussion above as to the claim is apposite.⁵⁶

With this analysis in mind, let us examine Professor McCaskill's suggested construction of Rule 10 (b).⁵⁷ Assuming that there is an intimate connection between pleading and the determination of the right to jury trial, he urges that this Rule should be construed to require that each claim and defense—legal or equitable—be separately stated.⁵⁸ We feel that we have sufficiently shown that, whatever their form, the pleadings have little or no effect on jury-trial determination. We feel that in any event it has too little an effect to warrant scrapping the advantages which flow from "lay transaction" pleading—advantages recognized to accrue to 100% of the cases not merely to the 1 or 2% which may involve jury trial problems.⁵⁹ However, Professor McCaskill's construction is not only undesirable; in addition, the language of Rule 10 (b) will not suffer it. The last sentence of the Rule reads:

54. Compare *Radio Corporation of America v. Raytheon Mfg. Co.*, 296 U. S. 459 (1935), and *King v. International Lumber Co.*, 156 Minn. 404, 195 N. W. 450 (1923).

55. E. g., see the facts in *Susquehanna S. S. Co. v. A. O. Andersen & Co.*, 239 N. Y. 285, 146 N. E. 381 (1925).

56. See pp. 655-659 *supra*.

57. See note 1 *supra*.

58. McCaskill, note 2 *supra*, at 326 *et seq.*

59. See pp. 662-665 *infra*.

“Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.”

Professor McCaskill would make “transaction” co-terminous with “claim” and “claim” co-terminous with what would have been included in one count in an action in one court. Thus, if, as in the *Di Menna* case, the plaintiff should desire to take advantage of an equity merger, he would state in one count the facts which give rise to the right of enforcement of lien and to a money judgment. But if the plaintiff should choose to have a jury trial on the legal aspect of his case, he would state the legal and equitable aspects of the same facts in two counts. This result is reached in Illinois by a very detailed statement in the Civil Practice Rules.⁶⁰ But Rule 10 (b) is not so worded. If “claim” is to be co-terminous with “transaction or occurrence”, why the phrase “each claim founded upon a separate transaction or occurrence”? Why not just “each claim”?

Further, let us consider the effect on these Rules, of limiting “transaction or occurrence” to “claim”: 13 (a), 13 (g), 15 (c), and 20 (a).

Rule 13 (a) provides that a pleading “shall state as a counterclaim any claim, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim. . .”. Professor McCaskill’s construction (“transaction”=“claim”) would limit the compulsory counterclaim to virtually one situation: a counterclaim for declaratory relief on the same facts as the claim; but whether this type of counterclaim is even permissible under the new Rules is left in doubt by the decisions.⁶¹

Rule 13 (g) provides that “a pleading may state as a cross-claim any claim which one party has against a co-party arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim therein.” Professor McCaskill’s construction of “transaction” completely excludes the possibility of a cross-claim, be-

60. See ILL. PRAC. RULES (1935) Rules 10 and 11, quoted in note 40 *supra*.

61. Counterclaim disallowed: *Stanley Works v. C. S. Mersick & Co.*, 1 Fed. Rules Serv. 13.4, Case 2 (D. Conn. 1939); *Cheney Co. v. Cunningham*, 29 F. Supp. 847 (W. D. Pa. 1939); see also concurring opinion of Clark, C. J., in *Leach v. Ross Heater & Mfg. Co.*, 104 F. (2d) 88, 92 (C. C. A. 2d, 1939).

Counterclaim allowed: *Gregory v. Royal Typewriter Co.*, 27 F. Supp. 160 (S. D. N. Y. 1939); *Dewey & Almy Chem. Co. v. Johnson, Drake & Piper, Inc.*, 25 F. Supp. 1021 (E. D. N. Y. 1939).

See Pike and Fischer, *Counterclaim for Declaratory Relief on Matters Already in Issue* (1940) 2 Fed. Rules Serv. 13.4.

cause a second claim could not exist in any one's favor arising out of the same transaction. If it is another claim, it is another transaction.⁶²

Also, Rule 15 (c) clearly contemplates a "transaction" which is broader than "claim" by providing that "whenever the claim or defense asserted in the amended pleading arose out of the same transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." While in fact one decision has limited "transaction" in this Rule to "claim",⁶³ it clearly violates the meaning of the Rule and the very object for which it was inserted.⁶⁴ Fortunately other decisions have more carefully regarded the language of the Rule.⁶⁵

Finally, Professor McCaskill's identification of "claim" with "transaction" would tend unduly to narrow joinder of parties under Rule 20 (a), the scope of which (assuming a common question of law or fact) is "the same transaction or occurrence or series of transactions or occurrences".

It should seem clear then that "claim" and "transaction" in Rule 10 (b) cannot be made co-terminous. Even the most admirable concern over historic jury rights does not warrant complete disregard of the clear meaning of Rules 10 (b), 13 (a), 13 (g), 15 (c), and 20 (a). Furthermore, a forced construction of Rule 10 (b) is not the means of solving the admitted problem of the determination of the right to jury trial in the few difficult cases. The new Rules provide other machinery which can be utilized with much greater effectiveness for that purpose.

The Rules are the expression of a sound philosophy of procedure.⁶⁶ Trial-preparation steps under any system of procedure are designed to serve one or more of three functions: (1) issue-formulation, (2) fact-revelation, and (3) notice-giving. Under the common law system and, to a great extent, under the codes, the burden of performing all these tasks rests on pleading alone. Yet it is a matter of common experience that pleading is a very feeble instrument for the performance of the first two of these functions; exchange of written correspondence is a poor means of narrowing a dispute or of procuring facts from an adversary. And any issue-formulation that may be accomplished by

62. To much the same effect, see dissenting opinion of Vinje, C. J., in *Liebhauser v. Milwaukee Elec. R. & L. Co.*, 180 Wis. 468, 193 N. W. 522 (1923).

63. *L. E. Whitham Const. Co. v. Remer*, 105 F. (2d) 371 (C. C. A. 10th, 1939).

64. See Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure* (1937) 47 *YALE L. J.* 50, 68-69; Pike and Fischer, *Relation Back of Amendments to Pleadings after Statute of Limitations Has Run* (1939) 2 *Fed. Rules Serv.* 15c.1.

65. E. g., *Independence Shares v. Deckert*, 108 F. (2d) 51 (C. C. A. 3d, 1939); *White v. Holland Furnace Co.*, 2 *Fed. Rules Serv.* 15c.1, Case 5 (S. D. Ohio 1939).

66. See generally PIKE, *op. cit. supra* note 4, at 57-60; Simpson, *The Pleading Problem* (1939) 53 *HARV. L. REV.* 169.

the pleadings is now relatively ineffectual because of the liberal rules on variance and amendment of pleadings during the course of trial.

Insofar as fact-gathering is concerned, much more effective methods are found in the liberal discovery procedure.⁶⁷ After the parties are in possession of the facts and have had the advantage of the informal method of the pre-trial hearing, the real issues of the controversy may emerge.⁶⁸ At this point the parties and the court have a much better opportunity to give intelligent consideration to the historic nature of the issues that remain, and to the appropriateness of jury trial thereon, than is afforded by any of the preceding paper work. Further, since, as we have seen, by far the greater percentage of the cases originally filed will not go beyond the pre-trial stage and very few of them involve any really close question, it would seem that as a matter of judicial administration any consideration of the question of jury trial should be deferred until this time. If the case is one of the close ones, any party desiring a jury should of course protect himself meanwhile by making a proper and timely demand.

Professor McCaskill regards the shift of emphasis to discovery and pre-trial as the result of liberality in pleading,⁶⁹ without recognizing that liberality in pleading is made appropriate by the availability of these latter steps and that in fact these steps have been provided because of the inadequacy of even the best form of pleading to assume all the burdens allotted to it. Now the only function left for pleading to bear alone is that of notice-giving, a task for which it is admirably devised.

Professor McCaskill assumes, however, that this philosophy of procedure is only the dream of scholars and has not been applied by the federal judges. He says of notice pleading, it is "much advocated but nowhere used in courts of record in this country" and he avers that he "has been unable to discover that any of the federal courts have thus far fallen victims of 'mergeritis'." ⁷⁰ Let us consider the decisions under the new Rules to determine what view federal courts have taken toward the whole matter.

First, as to notice pleading. The most apparent incidents of this system of pleading are (1) the elimination of the supposed distinction between "ultimate facts", "evidentiary matter" and "conclusions of law", and (2) the abandonment of the "theory of the pleadings doc-

67. See Pike and Willis, *The New Federal Deposition-Discovery Procedure* (1938) 38 COL. L. REV. 1179, 1436; Pike and Willis, *Federal Discovery in Operation* (1940) 7 U. OF CHI. L. REV. 297.

68. See Sunderland, *Theory and Practice of Pre-Trial Procedure* (1937) 36 MICH. L. REV. 215.

69. McCaskill, note 2 *supra*, at 325, n. 25.

70. *Id.* at 325, n. 26 and 329.

trine". As to the first matter, Professor McCaskill did not believe that the ultimate fact distinction was abolished by leaving out of the Illinois Civil Practice Act the phrase "material facts" or "ultimate facts".⁷¹ And apparently some of the decisions have borne him out;⁷² but it should be noted that the phrase "cause of action" was left in the Illinois statute. Rule 8 (a) provides that the plaintiff shall give "a short and plain statement of the claim showing that the pleader is entitled to relief". Writers have assumed that this Rule has abolished the ultimate fact trichotomy which has resulted in so much futile litigation.⁷³ Although it involved a revolution in judicial thinking, the new approach has received support in the decisions.⁷⁴ For example, in *MacLeod v. Cohen-Erichs Corp.*,⁷⁵ Judge Hulbert compared the wording of Equity Rule 25 ("a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence") with the language of the new Federal Rule and reached the conclusion that the old distinctions no longer obtain. "Judged by these standards, the complaint appears to be sufficiently definite to give fair notice to the defendant . . ." ⁷⁶ And in *Securities and Exchange Commission v. Timetrust, Inc.*,⁷⁷ Judge St. Sure, ruling on motions directed to the complaint, said: "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required."⁷⁸ Further, from the decisions to date it would appear that "the theory of the pleadings" doctrine ⁷⁹ will find no place in the new practice.⁸⁰

Likewise the courts have given the broadest scope to discovery procedure, carrying out fully its purpose as the main machinery for

71. ILL. CIV. PRAC. ACT ANN. (1933) 64-67. Compare the view of the late Professor Hinton, quoted in Cook, "Facts" and "Statements of Facts" (1937) 4 U. OF CHI. L. REV. 233, 234-235.

72. E. g., *Knaus v. Chicago Title & Trust Co.*, 365 Ill. 588, 7 N. E. (2d) 298 (1937); *Carlton v. Smith*, 285 Ill. App. 380, 2 N. E. (2d) 116 (1936).

73. MOORE AND FRIEDMAN, *MOORE'S FEDERAL PRACTICE* (1938) § 8.07; Flory and McMahon, *The New Federal Rules and Louisiana Practice* (1938) 1 LA. L. REV. 45, 50; Gavit, *The New Federal Rules and State Procedure* (1939) 25 A. B. A. J. 367, 369-370; Note (1938) 12 Wis. L. REV. 517, 521.

74. See generally Pike and Fischer, *Status of the Ultimate Fact Test in Pleading under the New Federal Rules* (1939) 1 Fed. Rules Serv. 8a.24. In addition to the cases discussed in the text, see *Van Dyke v. Broadhurst*, 28 F. Supp. 737 (M. D. Pa. 1939); but cf. *Shultz v. Manufacturers & Traders Trust Co.*, 1 Fed. Rules Serv. 8a.25, Case 3 (W. D. N. Y. 1939).

75. 28 F. Supp. 103 (S. D. N. Y. 1939).

76. *Id.* at 105.

77. 28 F. Supp. 34 (N. D. Cal. 1939).

78. *Id.* at 41.

79. I. e., that for the purposes of testing the sufficiency of a pleading, the admissibility of evidence, or the appropriateness of a remedy, a party is limited to the legal theory displayed in his pleading.

80. See, e. g., *Gay v. E. H. Moore, Inc.*, 26 F. Supp. 749 (E. D. Okla. 1939) (equitable relief [order setting aside administrative action] held proper on complaint for damages); *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478 (S. D. Cal. 1938) (plaintiff awarded damages in contract on complaint based on tort).

fact-revelation.⁸¹ In fact, the decisions have so consistently seen the advantage of this procedure over steps to polish up the pleadings that the use of bills of particulars has been seriously curtailed,⁸² and the cases have left little factual basis for Professor McCaskill's prophecy that "Common counts [authorized by official Forms 4-8] produce bills of particulars".⁸³ Also, increasing use is being made of the pre-trial procedure under Rule 16.⁸⁴

Although this philosophy of procedure has been adopted, jury trial problems seem to have caused little difficulty in the federal courts, and even where close cases have been presented decisions have been reached which are in line with the analysis presented above—an analysis which affords to each party his traditional constitutional rights—no more, no less.

IV. THE PRACTICE

Since the effective date of the Rules there have been a number of decisions which discuss the problem at hand.

In one case Judge McColloch properly ruled that a defense of fraud should be tried to the court, even though the claim to which the defense appertained was tried to the jury.⁸⁵ In the second, the plaintiff in an action for breach of a royalty contract demanded, in addition to damages, that he be given the right to inspect the defendant's plant; and he claimed that the action was equitable for trial purposes because it included this prayer for "discovery". Judge Gibson had no difficulty in holding that since the discovery of property was properly obtainable under Rule 34 the claim was essentially legal and should be tried by the jury at the defendant's demand.⁸⁶ In a third, the plaintiff desired to recover damages for negligence against a drug store corporation which was dissolved before the institution of suit. Thus, in addition to damages, the plaintiff prayed for an order setting aside the dissolution. The court ruled that insofar as the claim sought this order it should be tried as a non-jury action, and then if the plaintiff were

81. There have been over a hundred decision on the new discovery rules. Typical of the liberality in construction are, *Fox v. House*, 29 F. Supp. 673 (E. D. Okla. 1939); *Bough v. Lee*, 29 F. Supp. 498 (S. D. N. Y. 1939); *Lewis v. United Air Lines Transport Corp.*, 27 F. Supp. 946 (D. Conn. 1939); *Nichols v. Sanborn Co.*, 24 F. Supp. 908 (D. Mass. 1938). See cases collected in Pike and Willis, note 66 *supra*, at 297.

82. Latest in a long line of decisions in point is *United States v. Schine Chain Theatres, Inc.*, 2 Fed. Rules Serv. 12e.231, Case 10 (W. D. N. Y. 1940). See also *Pearson v. Hershey Creamery Co.*, 30 F. Supp. 82 (M. D. Pa. 1939).

83. McCaskill, note 2 *supra*, at 325, n. 25.

84. In this connection see e. g., Dist. Col. Rule 22½ (1939) (compulsory); S. D. Cal. Rule 12 (1938); D. Idaho Rule 33 (1938); W. D. N. Y. Rule 10 (1938); S. D. Rule 9 (1938); M. D. Pa. Rule 16 (1938); E. D. Ark. Rule 4 (1939); W. D. Ark. Rule 4 (1939). Also see Justice Laws, *Plan for Pre-Trial Procedure under New Rules in the District of Columbia* (1939) 25 A. B. A. J. 855.

85. *Hollingsworth v. General Petroleum Corp.*, 26 F. Supp. 917 (D. Ore. 1939).

86. *United States Process Corp. v. Fort Pitt Brewing Co.*, 29 F. Supp. 37 (W. D. Pa. 1939).

successful in that respect, the claim for damages should be tried by the jury.⁸⁷

One of the cases, otherwise simple, was complicated by the fact that the normal position of the parties was reversed through the use of declaratory judgment procedure.⁸⁸ While Ted McDonald was taking Evelyn Brune for a ride, his car went off the road and they were both injured. Miss Brune sued Mr. McDonald for damages. Mr. McDonald's insurance company instituted the instant action for a declaration that it was relieved from any liability on the policy since the defendants were fraudulently conspiring to secure judgment against McDonald, and since McDonald was not cooperating in his defense, particularly with respect to a claim for contributory negligence which he did not assert. The insurance company desired the action to be tried as in equity, whereas the defendants demanded a jury. In ruling that a jury trial was proper, Judge Wilbur said, speaking for the Circuit Court of Appeals for the Ninth Circuit:

"In the absence of the insurance policy and its agreement for cooperation the insured would have a perfect right to confess judgment in favor of the injured person regardless of whether or not there was any legal liability for the injury. It follows from what we have said that we simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured or one subrogated to his rights and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived."⁸⁹

In *Bellavance v. Plastic-Craft Novelty Co.*⁹⁰ plaintiff alleged infringement of patent, seeking damages already sustained and injunctive relief against future infringement. Plaintiff demanded a jury; defendant moved to strike the case from the jury calendar. By statute a plaintiff is given two remedies for the enforcement of his patent rights: (1) an action on the case to recover damages;⁹¹ and (2) a suit for injunction "according to the course and principles of courts of equity"⁹²—one of which principles is that damages for past conduct should be

87. *Frissell v. Rateau Drug Store, Inc.*, 28 F. Supp. 816 (W. D. La. 1939).

88. *Pacific Indemnity Co. v. McDonald*, 107 F. (2d) 446 (C. C. A. 9th, 1939).

89. *Id.* at 448.

90. 30 F. Supp. 37 (D. Mass. 1939).

91. REV. STAT. § 4919 (1875), 35 U. S. C. A. § 67 (1929).

92. REV. STAT. § 4921 (1875), 35 U. S. C. A. § 70 (1929).

afforded as incidental relief. Although based on statute this is a situation where the plaintiff, to secure both an injunction and damages, has an option to bring separate actions at law and in equity or to take advantage of an "equity merger", securing an injunction and damages on the equity side.⁹³ The court held that the plaintiff, by seeking in one action both an injunction and damages "elects to resort to the statute providing injunctive relief" and "has no right to a jury trial".⁹⁴ This is not because the court is promulgating what Professor McCaskill calls a "new waiver" not authorized by the Constitution or the Rules; rather, the court is ruling just as it would have before and holds that by electing to seek all his relief in one action the plaintiff effected a traditional "equity merger". Certainly the *Bellavance* case is an admirable example of the restriction of the right to jury trial to just exactly its constitutional limits—and this under a "lay transaction" system of pleading.

An interesting contrast to this decision is afforded by *Columbia River Packers Ass'n, Inc. v. Hinton*.⁹⁵ There the plaintiff charged the defendant with violation of the Anti-Trust Laws. As in the case of patent infringement, two statutory remedies have been available; but, unlike patent infringement, it has been well settled that an "equity merger" is not possible and injunction and damages for anti-trust violation must be sought in separate actions⁹⁶—in other words, the first situation discussed above.⁹⁷ Here plaintiff's seeking of both forms of relief in one action could not possibly be construed as an election to effect an "equity merger", since historically there was no equity merger possible under these circumstances. And apparently the court resisted any temptation the form of the pleadings may have held out to violate Professor McCaskill's injunction against "new mergers" resulting from mere joinder: if plaintiff had claimed both an injunction and damages either party would have been entitled to a jury trial insofar as the claim for damages was concerned.

However, it happened in this case that the complaint was not explicit with respect to damages; therefore, when on the argument of the cause plaintiff demanded damages (supporting proof therefor having been received without objection), the defendant insisted that he had a right to a jury trial upon this claim. And the court agreed with him. In reaching this result there was no departure from the traditional situation, either as to the extent of the right to jury trial or as to the

93. See pp. 656-657 *supra*.

94. *Bellavance v. Plastic-Craft Novelty Co.*, 30 F. Supp. 37, 39 (D. Mass. 1939).

95. 1 Fed. Rules Serv. 38b.12, Case 1 (D. Ore. 1939).

96. See cases cited in note 36 *supra*.

97. See pp. 655-656 *supra*.

degree of procedural efficiency. With respect to the latter, it took two trials to adjudicate the plaintiff's rights, just as it would have before. The same result would have been reached under the Rules in the *Bellavance* case had the equities failed—at that juncture defendant would be entitled to a jury trial on the claim for damages for patent infringement.⁹⁸ But two trials would also have been necessary before.

In working out the problems incident to the pleadings of legal counterclaims to equitable claims, an auspicious beginning was made by Judge Coxe in *Union Central Life Ins. Co. v. Burger*.⁹⁹ Plaintiff sought the cancellation and rescission of a policy for false representations and warranties. In his answer the defendant counterclaimed for the benefits under the policy. Before the new Rules, this would have been the situation where defendant would have had the option of bringing a separate action at law to recover the benefits or of pleading his claim as a counterclaim to the suit for rescission—in effect an “equity merger”.¹⁰⁰ If he chose the first alternative he of course would have had the right of jury trial; if he chose the second, he would not.¹⁰¹ And the same result should follow under the new Rules insofar as the option is still left to a defendant to plead a counterclaim or institute an independent action. But under Rule 13 (a), if the defendant's claim “arises out of the transaction or occurrence that is the subject matter of the opposing party's claim”, the defendant does not have the option to bring a separate action: he must counterclaim or his right is barred by *res judicata*.¹⁰² Nevertheless, the historic option to have a jury trial or not must still be preserved. Thus, in the *Burger* case, on defendant's demand the court granted a jury trial on the counterclaim.

We have reserved for final consideration *Ford v. C. E. Wilson & Co.*¹⁰³ because it so well illustrates the fact that even where there is a complicated mixture of issues the “lay transaction” method of pleading should not prevent the court from reaching a sound result. In the first count the plaintiff alleged that he had a contract with the defendant Wilson & Co. under which he was to deliver a large quantity of rose bushes; and that after the deliveries had been completed and before plaintiff had been paid under the contract, the defendant's bank, to

98. But in *Scoville Mfg. Co. v. United States Elec. Mfg. Co.*, 2 Fed. Rules Serv. 38a.311, Case 1 (S. D. N. Y. 1940), an accounting for damages for patent infringement was ordered though the question of the right to equitable relief had become moot. It is not apparent from the opinion that the matter of jury trial was in issue.

As to the plaintiff's right to a jury trial in an analogous situation (complaint amended to change claim from equitable to legal), see *Glauber v. Agee Dep't Stores*, 2 Fed. Rules Serv. 38b.12, Case 1 (W. D. Ky. 1939).

99. 27 F. Supp. 554 (S. D. N. Y. 1939).

100. See pp. 657-658 *supra*.

101. *American Mills Co. v. American Surety Co. of New York*, 260 U. S. 360 (1922).

102. See pp. 658-659 *supra*.

103. 30 F. Supp. 163 (D. Conn. 1939).

secure loans made by it to Wilson & Co., took from it assignments, pledges, and chattel mortgages, which made it impossible for defendant to perform its contract with plaintiff. Thus the first count stated a factual picture from which there arose two claims: (1) a claim against Wilson & Co. for breach of contract, and (2) a claim against the bank for interference with contract.

In the second count certain relevant facts were incorporated from the first count and it was further alleged that the security which the bank took from Wilson & Co. and the control which was thereafter exercised over its business was kept secret for four months while plaintiff continued to extend credit, with the result that the plaintiff was deceived, defrauded and prevented from sharing in the assets—Wilson & Co. being insolvent all the while and the bank knowing it. The second count sought (1) damages against the bank for fraud, and (2) a decree setting aside the assignments as to the plaintiff, determining that the bank held the proceeds of assigned accounts receivable as trustee for the plaintiff and other creditors of Wilson & Co., and appointing a receiver.

It is important to note that here the division of subject-matter into counts was not based upon the distinction between law and equity (two legal claims being stated in the first count and one legal and one equitable claim in the second) but rather upon factual grouping and convenience of presentation—obviously the criteria intended by Rule 10 (b). Yet the court had not the slightest difficulty in working out a plan for the trial, which guaranteed to the parties their constitutional rights. The analysis of Judge Hincks is worthy of extended quotation, because it displays not only full appreciation of the exact limits of the parties' constitutional rights, but also an insight into practical trial administration:

“ . . . I rule that all issues which are common to the legal causes of action (in either count) and to the equitable cause stated in the second count shall be tried together, the legal issues, of course, to the jury and the equitable issues to the court; and that all equitable issues which do not pertain to the legal causes shall be tried to the court immediately following the jury trial.

“This ruling will have practical application as follows: On the day of trial (November 20, 1939) the parties will proceed precisely as though trying to the jury both the first count and the second count viewed as charging actionable fraud, and the rulings on the evidence will be made as though no other issues were before the court. The court, however, will accept all evidence which is received in the jury trial for any proper bearing it may have upon the second count viewed as a cause of action in equity. After the jury has been charged and has retired to deliberate, the court will proceed to hear additional evidence on the equitable cause stated

in the second count. There will be neither need nor permission to reiterate evidence already received in the jury trial; but any evidence theretofore offered and excluded in the jury trial may again be offered for its bearing on the second count viewed as a cause of action in equity.

"The presiding judge will of course have discretion to await a verdict of the jury before embarking upon a further hearing of evidence on the equitable issues. As we have seen, a verdict against the Bank might make it unnecessary to decide the equitable issues. However, the parties should be in readiness to proceed forthwith when the jury retired. For a defendant's verdict would apparently still leave open equitable issues, and the judge may feel that it is better to take any additional evidence thereon forthwith, while the parties and witnesses are in attendance, rather than to wait for the verdict of the jury."¹⁰⁴

In short:

- (1) The jury trial problem arises in but few cases.
- (2) Other factors than the form of pleading are responsible for most of the confusion in these few cases.
- (3) "Lay transaction" pleading has little or no effect on the determination of the right to jury trial—to which the federal decisions since the new Rules bear witness; and the little effect it may have in the few cases involving the jury trial problem does not warrant the adoption of what in all other cases and for all other purposes is an undesirable form of pleading.
- (4) The solution of the jury trial problem does not lie in a forced construction of Rule 10 (b) to identify "transaction" with "claim".
- (5) A solution will be found in the direction of a fuller use and a closer articulation of the various trial-preparation steps afforded by the new Rules: notice pleading, discovery, and the pre-trial hearing.

We rest our case.

104. *Id.* at 165-166.