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The Merger of Law and Equity

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lative intent is that the Fair Trade statute should receive a broad judicial construction in order to effectuate its primary purpose and to eliminate and minimize any hardship or inequity which may result from its application; that not only should the brand owner be protected but the retailer and consuming public as well; and that equitable principles and safeguards should be applied to prevent the producer from treating the retailer arbitrarily. The learned Justice then goes on to formulate certain rules which the courts should apply in settling disputes between Fair Trade litigants. Among his praiseworthy and outstanding suggestions he indicates that the statute implicitly requires that the prices fixed for resale by retailers be uniform in any one competitive area; that, between the parties, discounts and trade-in allowances are not precluded if made fairly; that manufacturer or producer should diligently seek to prevent price-cutting by means of legal process or by refusing to sell to violators of the statute; and he concludes that experience may show the need of creation of an administrative agency charged with the enforcement of the resale price-maintenance statute. It is to be noted that the Wisconsin Fair Trade Act⁶⁴ provides for such an administrative agency, but during the three years of the existence of this price review tribunal no appeal has been made by anyone affected by any price-maintenance contract and all the other Fair Trade states have had no opportunity to observe the results and achievements of such a body.

Conclusions.

Thus, to reiterate, it is submitted that the legislators were not entirely unmindful of the general public's ultimate veto power in the form of a boycott on exorbitant-priced branded products and because of this highly potent economic weapon, the power of retailers to check on each other by means of a suit for damages or a restraining injunction, and because of the application of equitable principles as a condition precedent to granting relief to Fair Trade litigants by the courts, many of the fears regarding the workableness of the resale price-maintenance acts may soon prove to be unjustified and groundless.

M. RICHARD WYNNE.

THE MERGER OF LAW AND EQUITY.

Introductory.

The common law courts chained the hands of liberal judges with iron bonds of intricate rules of procedure.¹ Adjective law became the

⁶⁴ Wis. Laws of 1935, c. 52.

¹ The system of common law pleading developed after the Norman Conquest, and was first methodically formed into a science during the reign of

master of substantive law and reason became subservient to rules of technicality, so that when a case came within its portals the common law court applied its dogmas with all the arbitrary and technical severity, often thereby frustrating the ends of justice.²

The New York Code of Procedure.

New York gave initial impetus to a crusade to emancipate the law from its barren archaisms,³ by incorporating in 1848 in the Code

Edward I. It was the system used in the three common law courts of England, the King's Bench, the Common Pleas, and the Exchequer. BALLANTINE, *SHIPMAN ON COMMON-LAW PLEADING* (3d ed. 1923) 1. It is interesting to note the similarity in the stages of development between early English common law and equity and the Roman system of jurisprudence and its *aequitas*. The periods of development of the former seem to definitely correspond with those of the latter, thus demonstrating the close relationship between both systems of law. 1 POMEROY, *EQUITY JURISP.* (4th ed. 1918) Int. Chap.; CLARK, *CODE PLEADING* (1928) 2. John Randolph Tucker, (1892) VA. ST. B. REP. 85, 89, points out the kinship between the common law system of pleading and the *legis actio* procedure of the Roman Law which too was replete with extreme formalism. Cf. Woodbine, *The Origin of the Action of Trespass* (1924) 33 YALE L. J. 812, 818.

² Originally, during the reign of Henry II, both equity and common law were administered under the same system of procedure and were quite undistinguishable from each other. But the provisions of Oxford in 1258, by forbidding the Chancellor to frame new writs without the consent of the king and Council, drew a definite line of demarcation between the two systems of law. WALSH, *EQUITY* (1930) 2; Adams, *The Origin of English Equity* (1916) 16 COL. L. REV. 87-98; Barbour, *Some Aspects of Fifteenth Century Chancery* (1918) 31 HARV. L. REV. 834-859; HEPBURN, *DEVELOPMENT OF CODE PLEADING* (1897) cc. 1, 2.

³ A suitor was often denied redress on the ground that he had chosen the wrong tribunal. He had to decide at his own peril whether to sue in equity or at law, for the rules determining as to which court one should resort in a particular case were not always clear and easy of application. If he decided to bring his action in a court of law, the suitor had further to decide which one of the forms of actions applied to his case, whereby new pitfalls threatened his cause. FIRST REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (N. Y. 1848) 67-88, 137-147. Thus if he decided on bringing a contract action he had to choose between the following: Debt, for the recovery of a sum certain; Covenant, for damages for breach of an agreement under seal; Assumpsit, for breach of a simple contract not under seal, and also for the recovery of money due; Account, for the recovery of goods or money received by another as bailiff or receiver. If on the other hand the action was in tort then it could have been an action in Trespass which lay for the recovery of damages for an injury committed with force, or Trespass on the Case, which was an action for damages for non-violent injuries in general; or it might have been Trover, which lay for damages for the conversion of specific personal property, where the plaintiff was entitled to the immediate possession thereof; or Detinue, which lay for the recovery of a specific chattel wrongfully detained, or its value, together with the damages for the wrongful detention. If, on the other hand, the action was for the recovery of real property held adversely, ejectment was the proper action. Thus we can readily see how far-reaching the Code was with its provision that all of the above intricate forms of actions should be superseded by only "one form of civil action." CODE CIV. PROC. § 3339; CIV. PRAC. ACT § 8.

of Procedure the following provision: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress and prevention of private wrongs, which shall be denominated a civil action."⁴ The ends that were uppermost in the minds of the codifiers were the amalgamation of law and equity into one blended system which was to constitute the sovereign law of the state;⁵ to abolish the prevalence of a distinct tribunal and a distinct system of pleading and practice for each; and to stamp out the anomaly of the existence of two conflicting legal propositions covering the identical controversy.

It is erroneous to propose that our legislature merely intended to alter the external forms and modes of procedure.⁶ Instead, the more significant object within their contemplation was to bring about a unification of the substantive rules of law and equity, discarding those of the former which were not in accord with the latter.⁷ Under the reformed procedure, legal and equitable causes of actions, remedies, and defenses⁸ may be united and determined, by the same judgment. No longer is it the rule that one who has an equitable defense

⁴ N. Y. Laws of 1848, c. 379, § 62; N. Y. CIV. PRAC. ACT § 8. The merger now prevails in thirty states and territories. CLARK, CODE PLEADING (1928) 19. The remaining states have separate courts of law and equity. In England the same reform was instituted in 1873 by the first JUDICATURE ACT. 36, 37, Vict. Ch. 66, § 3.

⁵ The New York State Constitution of 1846 abolished the Court of Chancery and vested its jurisdiction in the Supreme Court. CONST. OF 1846, art. VI, and § 8 of art. XIV. For the origin and development of the Supreme Court, see *Matter of Steinway*, 159 N. Y. 250, 255, 53 N. E. 1103, 1104 (1899).

⁶ Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 3.

⁷ Whenever there is an inconsistency between legal and equitable principles the latter will prevail. Thus, where an action is brought to recover possession of realty and the defendant alleges and proves that the deed to the premises was fraudulently obtained, the equitable issue will control and a judgment for the recovery of possession will be denied to the plaintiff, whereas prior to the Code this defense would not have been available in an action at law. 1 POMEROY, *op. cit. supra*, note 1, at 85-87. Some Codes expressly provide for this rule. CONN. GEN. STAT. 1918, § 5554; IDAHO COMP. STAT. 1919, § 6591; ME. REV. STAT. 1916, p. 1224, c. 87, § 22; N. M. CODE 1915, § 4259. The first to include this provision was the ENG. JUD. ACT OF 1873, § 25 (10) (11); *ibid.*, 1925, § 44, ANN. PRAC. 1928, 2159. In the states where this provision, as to the superiority of equitable principles over legal principles in case of conflict, is not expressly stated, the rule is nevertheless definitely implied. See POMEROY, CODE REMEDIES (5th ed. 1929) c. 14. The Federal Equity Rules of 1912 largely follow the Codes; Lane, *One Year Under New Federal Equity Rules* (1913-1914) 27 HARV. L. REV. 629; Bunker, *The New Federal Equity Rules* (1912-1913) 11 MICH. L. REV. 435; Wurts, *New Equity Rules of U. S. Courts* (1913) 22 YALE L. J. 241; Ilsen, *Preliminary Draft of Federal Rules of Civil Procedure* (1937) 11 ST. JOHN'S L. REV. 212.

⁸ The more important equitable defenses which were cognizable in a court of equity but unheeded in a court of law were: defenses to specialty contract; fraud in the inducement of a contract; failure of consideration; mistake; equitable mortgages; and others discussed by Prof. Cook, *Equitable Defenses* (1923) 32 YALE L. J. 1.

to an action at law must first establish his equity by filing a bill in a court of equity petitioning for a decree to enjoin the plaintiff from prosecuting the legal action.⁹ Redundancy and duplication of actions, with the accompanying expense and loss of time, were obviated,¹⁰ and form became subordinate to substance.¹¹

The foregoing sketch leads us to one inescapable conclusion, namely, that the intention of the codifiers was to free our jurisprudence from the rigorous and outmoded common law rules of procedure,¹² with its abysmal maze of formalism. The exponents of the latter school, although men of great erudition and learning, often lost sight of the fact that the true end and purpose of pleading is to serve as a medium for the determination and enforcement with reasonable speed of the substantive rights of the parties; that instead of an end in itself it is only a means for the attainment of the end.¹³ As one

⁹ Clark, *The Union of Law and Equity and Trial by Jury Under the Codes* (1923) 32 YALE L. J. 707; also, Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1.

¹⁰ One year after the new constitution of 1846 was adopted, the legislature appointed three commissioners "to provide for the abolition of the present forms of actions and pleadings in cases at common law; for a uniform course of proceeding in all cases whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as shall by them be deemed practicable, and of any form and proceeding not necessary to ascertain the rights of the parties." N. Y. Laws of 1847, c. 59, § 8. One year thereafter followed the New York Code of Procedure, also known as the Field Code because it was largely the work of David Dudley Field, one of the Commissioners, and which served as a model for all the succeeding Codes in this country. This Code was too brief and limited in scope and was followed by the Code of Civil Procedure, also known as the Throop Code, which finally culminated in the Civil Practice Act of 1921. CLARK, CODE PLEADING (1928) cc. 1, 2.

¹¹ See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235, 43 Sup. Ct. 118 (1922) (Allowing the defendant to bring in additional parties to interplead them with the plaintiff, Judge Taft writes: "Section 274b is an important step toward a consolidation of the federal courts of law and equity, and the questions presented in this union are to be solved much as they have been under the state Codes * * * Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if any issue at law remains, it is triable by a jury"). See Note (1923) 36 HARV. L. REV. 474, discussing the *Liberty Oil* case. The N. Y. Code of Procedure § 150 provided that the defendant may "set forth by answer as many defenses and counterclaims as he may have, whether they be such as have hitherto been denominated legal or equitable, or both." See CODE CIV. PROC. § 507; CIV. PRAC. ACT § 262.

¹² "The rules of procedure were often vindicated at the expense of the litigants." CLARK, CODE PLEADING (1928) 46. By requiring that the exact issue be defined by the pleading, numerous rules and refinements were of necessity concocted, resulting in the exultation of form above substance.

¹³ "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." CIV. PRAC. ACT art. 1, § 8; CODE CIV. PROC. § 3339.

writer put it,¹⁴ pleading is the "handmaid rather than the mistress" of justice.

However, it is a fallacy to conclude, as some writers have done,¹⁵ that the Code endeavored to abrogate the distinction between legal and equitable relief. No such illogical results were ever contemplated by its formulators. From the viewpoint of legal history and practical necessity these differences must remain unaltered and unchanged. What were rules of law before the Code continue to be rules of law after the Code, and what were rules of equity before the Code must also continue to be rules of equity after the Code.¹⁶ To abrogate these differences would have been nothing short of legal alchemy. The only change intended was that both legal and equitable controversies between the parties may be settled in the same action. All that is reasonably required of the plaintiff is that he allege and prove sufficient facts to constitute a cause of action, and then the court will administer the appropriate relief.¹⁷

Early Judicial Interpretation of the Code.

Such being the true aims of the Code it now remains to determine whether pragmatically these aims have been attained. While the overwhelming weight of authority is definitely in sympathy with the ideology of the Code,¹⁸ yet periodically the pendulum swings back to the pre-Code theory of practice.¹⁹ The judges who so tenaciously cling to the old order, were bred under the common law rules of pleading, and are wont to regard that system as the very perfection of logic. Hence, their cold and resentful treatment of the Code, and

¹⁴ Per Collins, M. R., in *Re Coles*, 1 (K. B. 1907) 4. Cf. Pound, *Some Principles of Procedural Reform* (1910) 4 ILL. L. REV. 388, 402.

¹⁵ See opinion of Selden, J., in *Reubens v. Joel*, 13 N. Y. 488, 491 (1856). For modern authors expressing the same view see Simes, *The Real Party in Interest* (1922) 10 KY. L. J. 60; Hinton, *Equitable Defenses Under Modern Codes* (1920) 18 MICH. L. REV. 717; Barlow, *The Right to Trial by Jury* (1922) 7 ST. LOUIS L. REV. 227.

¹⁶ "What was an action at law before the Code, is still an action founded on legal principles; and what was a bill in equity before the Code is still a civil action founded on principles of equity." Quoted by Judge Taft in the *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235, 43 Sup. Ct. 118 (1922), cited *supra*, note 11; CLARK, *CODE PLEADING* (1928) 50.

¹⁷ FIRST REP. OF COMM. ON PRAC. AND PL. (N. Y. 1848) §§ 120, 122, 127.

¹⁸ See Barlow v. Scott, 24 N. Y. 40 (1861); *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357 (1861); *Wright v. Wright*, 54 N. Y. 437 (1873); *Greentree v. Rosenstock*, 61 N. Y. 583 (1875); *Freer v. Denton*, 61 N. Y. 492 (1875); *Emery v. Pease*, 20 N. Y. 62 (1859), and numerous other decisions which hold that the prayer for relief is immaterial but that the court will administer the relief consistent with the allegations and proofs submitted by the plaintiff at the trial, be it legal or equitable.

¹⁹ Opinion by Judge Selden in *Reubens v. Joel*, 13 N. Y. 488, 491 (1856); *Goulett v. Asseler*, 22 N. Y. 225 (1860); *De Graw v. Elmore*, 50 N. Y. 1 (1872); *Ross v. Mather*, 51 N. Y. 108 (1872) and the decisions to be discussed hereafter in this article.

their attempt to bring about the resurrection of the old system of law and equity. A review of the more significant decisions is now in point:

Probably the earliest case on the subject is *Marquat v. Marquat*.²⁰ This was an action for the specific performance of an oral contract to secure a loan by a mortgage on defendant's land. The Supreme Court rendered judgment for the plaintiff for the amount of the loan with interest. From this judgment the defendant appealed to the General Term of the Supreme Court contending that the money judgment "was not consistent with the case made by the complaint or embraced within the issue." From a reversal of the judgment, the plaintiff appealed, and the Court of Appeals held that the granting of the money judgment in spite of the fact that the prayer was for equitable relief only is in full accord with Section 275 of the Code (now C. P. A. Sections 111, 479) which provides that where the defendant has interposed an answer the court may grant to the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The controlling point is not the relief asked by the plaintiff but the relief he is rightfully entitled to through his allegations and proofs.

However, only a year later, a new doctrine was promulgated by the same court in the opinion of Selden, *J.*, in the case *Reubens v. Joel*.²¹ Therein, Judge Selden, saying more than was necessary for the decision, gives "passing notice" to the issue of joinder of actions. He states: "By what process can these two modes of relief (legal and equitable) be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them * * * they cannot make trial by jury and trial by court the same thing." Accordingly, he continues, the only way we can have a homogeneous form of action for all cases "is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of actions * * *." This, admittedly, the legislature has no power to do, and he therefore concludes that "the essential distinctions between actions at law and suits in equity * * * are preserved."

Certainly there are basic differences between legal and equitable relief. A decree of specific performance differs as much from a judgment for money damages as a jury trial differs from a trial before a chancellor. But these differences of trial and remedy do not necessarily warrant differences of forms of actions and pleadings. Why cannot there be a single civil action in which the various forms of remedies and trial will be applied in accordance with the issue raised by the allegations and proofs?²² What mysterious reason is there

²⁰ 12 N. Y. 336, 341 (1855).

²¹ 13 N. Y. 488, 491 (1856).

²² "While regard is still to be had in the application of legal and equitable principles, there is not of necessity any difference in the mere form of procedure, so far as the case to be stated in the complaint is concerned. All that is

that makes it impossible for both forms of relief to be administered in the same action and by the same tribunal?²³ An answer to these questions may be found in an extract from the opinion of Judge Grier in *McFaul v. Ramsey*²⁴ which is a fitting example of the veneration of judges for the system of common law pleading. He writes: "This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts."

This encomium sung by Grier, *J.*, in honor of the common law system of pleading was chosen as typical of the sentiments of some of the early judges. However, Judges Grier and Selden did not express the views of the overwhelming majority of their contemporaries. When referring to Judge Selden's opinion in the *Reubens* case, Chief Justice Comstock writes in *New York Ice Co. v. Northwestern Ins. Co.*,²⁵ that while the whole court agreed with the decision, "whatever was said beyond this is to be taken as individual opinion only."

The conflict which had arisen in the New York Court of Appeals as a result of the irreconcilable theories in the cases of *Marquat v. Marquat* and *Reubens v. Joel*, *supra*, was settled by the case of *Phillips v. Gorham*²⁶ which finally crystallized the views of the Court in regard to the merger controversy. This was an action to recover specific real property, and the question arose whether, in the same action, the plaintiff may attack a deed under which the defendant claims title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance. In affirming the judgment for the plaintiff in the lower court, the Court of Appeals held that the constitution does not restrict the power of the legislature to provide for both legal and equitable relief in the same action, which joinder

needful is to state the facts sufficiently to show that the plaintiff is entitled to the relief demanded, and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the action." *Wright v. Wright*, 54 N. Y. 437, 443 (1873).

²³ See the strong dissenting opinion of Judge Cardozo in the *City of Syracuse v. Hogan*, 243 N. Y. 457, 138 N. E. 406 (1923).

²⁴ 20 How. 523, 525 (U. S. 1857). For such other panegyrics see STEPHEN, PLEADING (Williston ed. 1895) 136-139, 491-499; BALLANTINE, SHIPMAN HANDBOOK OF COMMON LAW PLEADING (3d ed. 1923) c. 1; REPPY, CASES ON PLEADING AT COMMON LAW (1927) c. 1. But *cf.* Dean Pound, *Some Parallels from Legal History* (1933) 19 A. B. A. REP. 204, 216, 217.

²⁵ 23 N. Y. 357 (1861).

²⁶ 17 N. Y. 270 (1858), Selden, *J.*, dissenting.

of actions was authorized by the Code. Hence, the plaintiff need not bring separate actions to set up each ground of recovery.

The liberal interpretation in *Phillips v. Gorham*, *supra*, was subsequently adopted in an almost unbroken chain of cases,²⁷ among which *Hahl v. Sugo*²⁸ is especially worthy of attention. In this case the plaintiff, in an action to recover possession of real property, obtained a judgment establishing his title and right to possession but on account of his failure to allege facts entitling him to equitable relief, he procured a naked legal judgment. He then issued execution to the sheriff which was returned with the endorsement thereon that it was impracticable to remove the encroachment. The plaintiff thereupon brought another action to obtain a decree compelling the defendant to remove the part of his wall which was on plaintiff's property. In dismissing the complaint, the court held that the judgment in the first action was a bar to the subsequent suit, for the reason that an action to recover possession of land is founded upon a single wrong and creates but one cause of action. Both legal and equitable relief may be had, depending on the facts alleged and proved, and the plaintiff cannot at first maintain an action at law to prove his title and right to possession and then bring a separate suit in equity to remove the encroachment.

Figuratively speaking, *Hahl v. Sugo*, *supra*, marks the climax in the New York drama of the merger of law and equity. Thereafter we find new clouds appearing on the legal firmament, threatening to obscure the light emanated from the Code. For only sixteen years later a contrary doctrine was proclaimed by the same court in the case of *Jackson v. Strong*.²⁹ This was an action for an accounting. The allegations set forth in the complaint are to the effect that plaintiff and defendant, both attorneys at law, had entered into a contract to prosecute a negligence action in behalf of the personal representative of a decedent against a railway company. They were both to bear equally the losses or profits arising out of the litigation. The answer was a general denial and the case was submitted to a referee, who found that there was no contract between the parties but that the plaintiff was entitled to a money judgment for the reasonable value of his services, and he ordered judgment accordingly. On appeal, the judgment was reversed and a new trial granted, with costs to abide the event. The Court of Appeals held that inasmuch as the plaintiff sued for an accounting, he was bound to sustain at the trial the cause of action alleged in the complaint. Failing to do so, his action should have been dismissed in its entirety, instead of granting him a money judgment. For, "the weight of authority is that, where some ground of equitable jurisdiction is alleged in the complaint, but

²⁷ See cases cited *supra*, note 19; Clark, *The Union of Law and Equity* (1925) COL. L. REV. 1; PRASHKER, CASES AND MATERIAL ON N. Y. PLEADING AND PRACTICE (1937) c. 5.

²⁸ 169 N. Y. 109, 62 N. E. 135 (1901).

²⁹ 222 N. Y. 149, 118 N. E. 512 (1917).

fails of proof in its entire scope on the trial, and it appears that there was never any substantial cause for equitable interference, the court will not retain the action, but will dismiss the complaint." And for the purpose of greater elucidation, Judge Cuddeback adds significantly that "the inherent and fundamental differences between action at law and suits in equity cannot be ignored."

Now, let us analyze this case and try to determine whether there is any sound legal foundation for its doctrine. Surely it could not be that the ground for the decision was that the defendant was entitled to have the issues tried by a jury, for he did not make a motion to that effect before consenting to a reference which in New York constitutes a waiver.³⁰ Neither can the ground be that the defendant was in any way harmed by the referee's findings as to the services performed by the plaintiff, for the defendant never denied, and in fact admitted, that such services were actually rendered. Hence, it must be conceded that *Jackson v. Strong, supra*, is opposed to the doctrine of *The Merger of Law and Equity*.³¹

This complete turn-about of our court of last resort gave the impetus to a group of decisions expressing a like tenor. A new era was ushered in. The field of merger became a no-man's-land, resulting in a volley of irreconcilable cases.³² The case of *Syracuse v. Hogan*,³³ is an apt example of the new tendency. This was an action in equity to remove an obstruction from a public highway, and to enjoin the defendant from making further encroachments thereon. The court held that although the plaintiff's prayer is for equitable relief, nevertheless, the main controversy to be settled is the title to the property involved. For, each one of the litigants denies the title and right to possession of the other. This being so, the defendant's motion to strike the cause from the Special Term calendar was granted, with costs in all courts, for the action took on the form of an action in ejectment with the concomitant right of trial by jury.

The Court of Appeals has thus swept away the doctrine it enunciated in *Hahl v. Sugo, supra*. The very same procedure which the

³⁰ *Adams v. Brady*, 67 Hun 521, 22 N. Y. Supp. 466, *aff'd*, 139 N. Y. 608, 35 N. E. 203 (1893); *Baird v. Mayor, etc., of the City of New York*, 74 N. Y. 382 (1878).

³¹ See *William v. Sote*, 70 N. Y. 601 (1877), in which the court held in a similar situation that the claim that the issues were legal and not equitable was too late. See (1918) 32 HARV. L. REV. 166 for a criticism of *Jackson v. Strong, supra*.

³² *Merry Realty Co. v. Shamokin & Hollis Real Estate Co.*, 230 N. Y. 316, 130 N. E. 306 (1921). In its opinion the court says: "Whatever hesitancy we have in coming to this conclusion by reason of the merits of defendant's claim and of the evidence amply sustaining the findings of fraud and deceit is overcome by a desire to preserve to litigants the form of procedure prescribed by law and the rights flowing therefrom. While it is true that substance is always more weighty than form, yet we must not forget that the preservation of our substantive law necessarily depends upon some uniformity in procedure. But *cf. Golde Clothes Shop v. Loew's Buffalo Theatres*, 236 N. Y. 465, 141 N. E. 917 (1923), discussed in (1924) 24 COL. L. REV. 428.

³³ 234 N. Y. 457, 138 N. E. 486 (1923).

one held to be a prerequisite for the obtaining of equitable relief, the other held to be a mere idle gesture. In the *Hahl* case it was held that where both forms of relief are attainable in one action the plaintiff must ask for both. His failure to do so will bar a subsequent action therefor. Whereas the *Syracuse* case held that even though the plaintiff does incidentally ask for equitable relief the action remains one at law, and only the remedy of execution is available. The facts in both cases are almost identical, but the law is separated by an enormous chasm of irreconcilability.

We are not, however, oblivious of the endeavor of certain scholarly authors³⁴ to reconcile that which conflicts, and to see accord where there is discord. As vigorous as their reasoning is, they seem to be missing the salient point involved, the doctrine of merger. The New York Constitution proclaims that "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever";³⁵ so that actions which were triable by jury before the Code, must also be tried by jury after the Code. But actions for mandatory injunctions were never triable by a jury and therefore cannot be said to be within the purview of this constitutional provision. The plaintiff in the *City of Syracuse* case, probably mindful of the decision in the *Hahl* case, attempted to comply with the requirements set forth in the latter, and therefore stated facts which ought to entitle him to both legal and equitable relief. But instead of a mandatory injunction restraining the defendant from maintaining in the future the alleged encroachment and ordering him to remove the same at his own expense all the plaintiff got was the dubious remedy of execution which in most cases is inadequate relief, for the sheriff may return it unsatisfied. It has been repeatedly held that "equity will administer such relief as the exigencies of the case demands."³⁶ Then why cannot equity also give complete relief in this case once it obtains jurisdiction thereof? Granting, but not admitting, that a jury trial must be had, why cannot the chancellor in equity call in a jury to determine the issues of fact and then after considering both legal and equitable issues render judgment accordingly? Why the duplication of actions and trials? In the potent language of Judge Cardozo, with whose dissenting opinion in the *City of Syracuse* case, *supra*, Judges Pound and Crane concurred: "This was not an action in ejectment. It is an action in equity to enjoin the obstruction of a highway. Ejectment furnishes some remedy, but not one complete and adequate * * *. Equitable remedies being necessary for the obtainment of complete relief there is no rule that a court of equity must wait until the suitor's title to the land has been first made out at law. * * * We have left in the distance the wasteful duplication of remedies and trials. We shall set the clock back many years if we return to it today."

³⁴ WALSH, EQUITY (1930) 113.

³⁵ N. Y. CONST. art. I, § 2. See also CODE CIV. PROC. § 968; CIV. PRAC. ACT § 425.

³⁶ Bloomquist v. Farson, 222 N. Y. 375, 380, 118 N. E. 855, 856 (1918).

Cases in Appellate Division on Merger.

In the case of *Johnson v. Purpura*,³⁷ the Appellate Division held that in an action to recover possession of real property and damages for withholding the same, it is error for the court to include in the judgment an order upon the defendant to remove the encroachment within a specific time. For, it is improper to either demand or receive such equitable relief in an action for ejectment. The only remedy left for the plaintiff is a judgment by execution or money damages, but no equitable decree for the removal of the encroachment. In reading this decision one is constrained to wonder whether the learned court has not at the time completely ignored *Hahl v. Sugo*, *supra*. In fact, this decision is even more at variance with the legislative policy expressed in the Civil Practice Act, Section 8,³⁸ than its antecedent, *The City of Syracuse v. Hogan*, *supra*.³⁹

Another offspring of the *City of Syracuse* case, is *Westergren v. Everett*,⁴⁰ which likewise involved a title and encroachment controversy. The plaintiff demanded an injunction and a judgment for damages suffered as a result of excavations carried on by defendant on the property in dispute. The defendant thereupon moved to dismiss the complaint on the ground that an action for a mandatory injunction will not lie where there is a question of title and that plaintiff's only remedy is an action in ejection with right to jury trial. From a judgment for defendant, the plaintiff appealed. *Held*, reversed. "When an action is brought to obtain a mandatory injunction for the removal of encroachments, and the determination of the case involves a question of title, the action may properly be sent to the law side of the court as an action of ejectment to be tried by a jury."

While the *Westergren* case is not as extreme as the case of *Purpura v. Johnson*, *supra*, it nevertheless recapitulates the doctrine that when there is a dispute of title no equitable relief may be had before an action at law is brought to establish title in the plaintiff. The issues cannot be settled in the same court. There must be a circuit of actions with all the attendant evils.

In this inextricable maze of conflicting decisions we come upon another interesting example in the case of *Poth v. Washington Square*

³⁷ 208 App. Div. 505, 203 N. Y. Supp. 581 (3d Dept. 1924).

³⁸ CODE CIV. PROC. § 3339.

³⁹ See Rothschild, *The Simplification of Civil Procedure in New York* (1924) 24 COL. L. REV. 732, 739, and in (1927) 27 COL. L. REV. 258.

⁴⁰ 218 App. Div. 172, 218 N. Y. Supp. 68 (1st Dept. 1926). This case necessarily reverses the holding of the same court in *Standard Film Service Co. v. Alexander Film Corp.*, 214 App. Div. 701, 209 N. Y. Supp. 924 (1st Dept. 1925), wherein the complaint was dismissed on the pleadings because equitable relief was demanded but only a right to legal relief was proven. The case of *Superior Brassiere Co., Inc. v. Zimetbaum*, 214 App. Div. 525, 212 N. Y. Supp. 473 (1st Dept. 1925), is in accord with the *Westergren* case, whereas *Ehrlich v. Jack Mills, Inc.*, 215 App. Div. 116, 214 N. Y. Supp. 830 (1st Dept. 1926) seems to accord with the *Standard Film* case.

M. E. Church of the City of New York.⁴¹ The plaintiff sued for specific performance of a contract to lease, but the Appellate Division dismissed his complaint and granted judgment for costs to the defendant, even though it was well apparent that plaintiff was entitled to the return of his deposit. The court relies on *Jackson v. Strong, supra*, and states as the reason for its ruling the fact that "the return of the deposit money was not asked in the complaint * * * and amending the plea to conform to damage proof in an equity suit, where no damages are demanded, is not proper practice."

With no stretch of the imagination can we conceive of the slightest harmony between the rule of *Poth v. Washington, supra*, and the merger doctrine. The function of the pleadings is to state the facts which gave rise to the controversy between the parties, but not to serve as signposts to indicate whether the form of trial is to be before a jury or before a chancellor. The name given to the action should not control the relief granted by the court. If the facts alleged and proven disclose a right to some kind of relief, the court should not withhold it merely because the pleader did not properly demand it in his complaint. Once the defendant interposes an answer, the form of relief asked for should be disregarded. The function of the plaintiff in his pleadings is to state facts with sufficient clarity and definiteness, but not to state the law applicable thereto. The latter is the function of the court. Therefore, the plaintiff's characterization of his action should be of no consequence. What form of trial is to be had, should be decided only after the pleadings are closed and the issues formed. To dismiss a complaint brought "in equity" because it should have been brought "at law" is a wasteful and redundant procedure. Not only is it contrary to sense and reason but also in contravention of legislative command and authority. We cannot therefore help but concur in the remark of Professor Maitland that "the forms of actions we have buried, but they rule us from their grave."⁴²

Recent Trends.

However, several decisions of recent origin in our Court of Appeals seem to presage the approach of a more liberal tendency in the judicial construction of Article I, Section 2, of the New York Constitution,⁴³ and Section 8 of the Civil Practice Act.⁴⁴

⁴¹ 207 App. Div. 219, 201 N. Y. Supp. 776 (1st Dept. 1923). This case went a step further than the *Jackson* case, *supra*, by dismissing the complaint entirely instead of granting a new trial.

⁴² MAITLAND, EQUITY AND THE FORMS OF ACTION (1910) 296.

⁴³ "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

⁴⁴ For the history of the Civil Practice Act, see REPORTS OF JOINT LEGIS. COMM. (1919) 5-35; Medina, *Some Phases of New York Civil Practice Act and Rules* (1921) 21 COL. L. REV. 113.

In *Ferguson v. Village of Hamburg*,⁴⁵ we have an action brought by riparian owners to obtain a decree restraining the defendant from diverting the waters of a creek into a reservoir for the use of the inhabitants of the village. In denying the plaintiffs' right to an absolute injunction, the court granted to the plaintiff relief in the form of damages, although the claim was solely for equitable relief. The court said: "Once a court of equity has jurisdiction of a cause it has the power to dispose of all the matter at issue and grant relief. Even if it is found that the parties are not entitled to equitable relief a court of equity may retain the cause and grant such relief as is proper * * *. Equity will administer such relief as the exigencies of the case demand at the close of the trial."

Of like tenor is the case of *Lonsdale v. Speyer*.⁴⁶ Therein the Appellate Division held that "the prayer for relief is no important part of the cause of action. It does not matter that the plaintiffs have asked for the wrong relief, or that they may not be entitled to all the relief they seek or to any of it, or that it is inconsistent with the cause of action stated. If the complaint states a cause of action the relief to be awarded must be left to the trial court for determination. * * * In such a case the complaint is not subject to a motion to dismiss it for insufficiency."

The *Jamaica Savings Bank v. M. S. Investing Co.*,⁴⁷ is the most recent case on this subject. This was an action to foreclose a mortgage and to receive a judgment against the defendant-guarantor for any deficiency that might accrue from the sale of the mortgaged premises. The defense interposed was a legal discharge of the guarantor as a result of an unauthorized extension of time granted to the mortgagor by the plaintiff-mortgagee. The defendant thereupon made a motion that issues be framed as to whether or not such an extension of time was granted without its consent, and since this involved a question of fact it must be submitted to a jury for the determination thereof. From an order granting defendant's motion, plaintiff appealed. *Held*, reversed. An action to foreclose a mortgage is an action in equity in which "there is no right of trial by jury." Chief Justice Crane, who wrote the majority opinion in this case and who, incidentally, had concurred with Judge Cardozo in his dissent in *City of Syracuse v. Hogan*, *supra*, repudiates the defendant's contention that since prior to 1830 only an action at law could have been brought against him, to deprive him of his right to trial by jury would be in contravention of Article I, Section 2 of the New York Constitution. Citing *Knickerbocker Life Ins. Co. v. Nelson*,⁴⁸ the court held that since this is an equitable action, even though as incidental

⁴⁵ 272 N. Y. 234, 5 N. E. (2d) 801 (1936).

⁴⁶ 249 App. Div. 133, 291 N. Y. Supp. 495, 505 (1st Dept. 1936).

⁴⁷ 274 N. Y. 215, 8 N. E. (2d) 493 (1937). Hubbs, Finch and Rippey, JJ., concurred with Chief Justice Crane, while Judges Loughran, Lehman and O'Brien dissented.

⁴⁸ 8 Hun 21 (1876).

to the main relief prayed for the complainant also asks for money damages, a separate trial by jury is not within the realm of constitutional guaranty. One wonders whether this decision does not overrule *Jackson v. Strong* and *The City of Syracuse v. Hogan*, *supra*.

In conclusion we may say that while the overwhelming majority of the earlier cases were favorable to the theory of one form of action, the later cases tended towards the revival of the old forms of action. Suits for equitable relief were dismissed,⁴⁹ even though the defendant had appeared and interposed an answer, merely because the plaintiff had failed to allege that he had no adequate remedy at law.⁵⁰ Even the traditional terminology of "actions at law" and "suits in equity" is still retained, resulting sometimes in the dismissal of actions on purely technical grounds. The question whether the New York judiciary will continue in its practice of bringing about a resurrection of the old systems of law and equity, or will follow the lead of the *Ferguson, Lonsdale, and Jamaica Savings Bank* cases, *supra*,⁵¹ is a matter which belongs to the realm of pure speculation. Judging from its previous vacillations it is unsafe to venture a prediction as to the ultimate fate of the doctrine of the Merger of Law and Equity.

AARON FRIEDBERG.

THE STATUTE OF LIMITATIONS FOR MALPRACTICE

The limitational statutes have always provided a favorite battleground for legal gladiators. The arbitrary estoppel of one's right of action has, to some, always seemed an unnecessary and harsh rule of law; while others have vigorously, and in the main, correctly, maintained that the benefits of these statutes have far outweighed many of their injustices. Like any other group of laws the statutes of limitation have proven to be defective in parts that could be quickly and

⁴⁹ *Poth v. Washington Square M. E. Church of New York*, 207 App. Div. 219, 201 N. Y. Supp. 776 (1st Dept. 1923); *Chadbourne v. Mayers*, 207 App. Div. 754, 202 N. Y. Supp. 805 (1st Dept. 1924); *Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co.*, 135 App. Div. 805, 120 N. Y. Supp. 128 (2d Dept. 1909), *aff'd*, 199 N. Y. 536, 92 N. E. 1097 (1910); *Black v. Vanderbilt*, 70 App. Div. 16, 74 N. Y. Supp. 1095 (1st Dept. 1902); *Spring v. Fidelity Mutual Life Ins. Co.*, 183 App. Div. 134, 170 N. Y. Supp. 253 (3d Dept. 1918).

⁵⁰ These cases hold that a complaint is subject to dismissal where equitable relief is prayed for, but only a right to legal relief is stated. Of course this rule is in direct conflict with Civil Practice Act § 111, which provides that the complaint may be amended at any time during trial and may be "remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for the relief granted."

⁵¹ Another liberal decision was the recent case of *Wainright & Page v. Burr & McAuley*, 272 N. Y. 130, 5 N. E. (2d) 64 (1937), wherein motion to dismiss was denied although the action, cognizable in a court of equity, was brought at law. All judges concurring.