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TRIAL OF LEGAL ISSUES IN INJUNCTION AGAINST TORT

Edgar N. Durfee

[This essay appeared in a casebook on Equitable Remedies that was used for years in mimeographed form at the University of Michigan Law School. It was never prepared for final publication by Professor Durfee himself, but the numerous changes made in his own personal copy indicate that he had given much thought to the subject. Professor John P. Dawson who had collaborated with Professor Durfee has incorporated these changes in the present text. More changes might have been made by Professor Durfee if he had planned to publish it. The editors believe that as it stands it deserves a wider audience.]

I. THE EARLY HISTORY OF INJUNCTION AGAINST TORT AND CRIME

A. Fourteenth to Seventeenth Centuries

IN LOOKING back to this early period, we must keep in view the fact that our ancestors did not distinguish sharply between crime and tort. For example, the Appeal of Felony (not an appellate but an original proceeding) has, to modern eyes, a mongrel look. It was entitled in the name of the injured party, not of the king, the management of the case was in his hands, and it might result in redress to the injured party (e.g., return of the stolen goods) but it might also result in hanging the defendant. For another example, the action of Trespass had distinct criminal aspects in its earliest stages, and they persisted to our own day in the allegations of force and arms, and in the requirement of disturbance of possession of property or direct violence to person. Of course this is but one aspect of the historical picture in which we see early lawyers viewing each form of action as distinct from every other form of action and content that each should conform to its own rules. It was a distinctly modern note when lawyers began to emphasize a classification of actions under the heads of crime, tort, contract, etc. When this note had been sounded, the forms of action were doomed to an eventual demise.

In the earliest days of the chancellor's activity, he too admin-

istered both tort law and criminal law, in the sense that he did what, from a modern point of view, amounted to this. Maitland painted the picture accurately, without intrusion of modern ideas, when he said of this early period: "The complaints that came before them [the chancellors] are in general complaints of indubitable legal wrongs, assaults, batteries, imprisonments, disseisins and so forth."¹

In the fifteenth and sixteenth centuries several important things came to pass, with more or less causal interrelation. (1) Strenuous opposition to the broad powers indicated by Maitland led to increased emphasis on what, supposedly, had always been the limits of his jurisdiction, viz., to administer extraordinary justice in cases where the common law gave unsatisfactory results. (2) The royal Council, mother of courts, gave birth to the Chancery's twin sister, the Star Chamber. The procedure of this sister court was very like that of the Chancery (both were modelled on the canon law) and the chancellor himself was its president. As Star Chamber specialized in crime, this type of business naturally tended to disappear from the Chancery docket. We need not ask whether the "adequacy" formula should or should not have taken account of remedies in the Star Chamber. The chancellor's relinquishment of this embarrassing jurisdiction is sufficiently explained by the fact that in Star Chamber he shared responsibility with a score of great lords and judges, while in Chancery he sat alone. (3) Modern groupings of crime, tort and contract were gaining recognition, though the lines of demarcation had not attained the sharpness (that is to say, the relative sharpness) which they have today.

The seventeenth century saw changes of the first magnitude. Star Chamber, which had become odious to left-wing Englishmen, was abolished on the eve of the Great Rebellion. There, one might think, was Chancery's opportunity to resume its crime-tort jurisdiction, but it was barely able to ride out the storm that sank the sister ship, and this was no time to take on more and peculiarly perilous cargo. Furthermore, the statute that abolished Star Chamber fairly indicated transfer of its jurisdiction to the common law courts. These unfavorable conditions obtained throughout the period of the Commonwealth. The restoration of the Stuarts was

¹ MAITLAND, EQUITY 6 (1910).

incidentally a restoration of the chancellor to a firm seat on the Woolsack, but it was now too late for him to claim as heir of Star Chamber, for the judges had already enjoyed twenty years' undisturbed possession.

B. *The Eighteenth Century*

This period saw the revival of the jurisdiction to enjoin tort. Fortunately there were some scattered but remembered examples of tort jurisdiction in the sixteenth and seventeenth centuries on which bold chancellors could build, and the generalization that inadequacies of the common law actions were to be remedied in chancery was an ever present help. Then, as now, there was the choice between a "hands and knees" technique of sticking closely to precedents (the technique that is sometimes described as the search for "white horse" cases) and the "flying-trapeze" technique in which we build on specific cases a much wider generalization. So a prior case of injunction against waste could be made an authority for injunction against nuisance by way of a generalization about injunction against tort or a still broader generalization that Chancery gave relief when legal remedies were inadequate.

But when we look more closely at the record, we see that the development was not symmetrical; the Chancery interfered much more freely in some parts of the tort field than in others. The most rapid advance was made in injunctions against waste. By 1800 one could have said, without undue liberty, what a Nebraska judge did say a century later, that "injunction will be granted in all cases where an action would lie . . . to recover damages."² There is only one inaccuracy in this statement. In the classical definitions of waste any alteration of the premises was sufficient, but the chancellors refused to enjoin trifling or ameliorating waste. The point was never of first importance for suit in equity would seldom be brought for trifling or ameliorating waste, and by redefinitions of waste through invoking standards of reasonableness, "meliorating waste" became a rare bird.

The eighteenth century also saw a marked development of injunction against nuisance, but the development was not as rapid

² *Hayman v. Rownd*, 82 Neb. 598 at 601, 118 N.W. 328 (1908).

as in the case of waste. Notably, nuisance cases ran into difficulties with the doctrine that the chancellor could not try questions concerning the rights of the parties, a point we shall have to examine at length but may lay on the table for the moment.

Turning to injunction against trespass, we find a strikingly different picture. Bills were filed in the eighteenth century with increasing frequency, but almost invariably failed. Again difficulty was felt with respect to trying questions of right, but that was not all. The reports reflect the notion that trespass was, in the nature of things, foreign to the jurisdiction of the chancellor. For example, in *Mogg v. Mogg*,³ where injunction against cutting of timber was denied, Lord Thurlow, distinguishing a cited case of waste, said, "In the present case the defendant had no interest; he was a mere trespasser, and being such, an action of trespass would lie against him." No other reason for the decision was suggested. His lordship did not venture to say that the action of trespass is a more adequate remedy for the cutting of timber by a trespasser than is the action of trespass on the case for cutting of timber by a tenant. It is also to be observed that what little progress was made in trespass cases was made by blurring the lines of distinction between trespass, waste, and nuisance, as when Lord Hardwicke spoke of a trespass "continued so long as to become a nuisance,"⁴ and Lord Eldon explained a case as "very near waste" where defendant had in fact committed waste by opening a mine in land of which he was tenant and had committed trespass by extending the boundary of his estate.⁵ In both instances one sees evidence of an unanalyzed notion that waste and nuisance are proper business for the chancellor but that trespass is not.

In this connection (there will be no better) it may be noted that the word "trespass" has been loosely used in equity to embrace some cases that would not have supported the action of trespass in the strict system of common law procedure. What is really meant by the term is a case distinguished from nuisance in that defendant, in person or by his servants, has entered upon plaintiff's land (that is to say, land alleged to be plaintiff's), and distinguished from waste in that defendant has no estate that entitles

³ Dick. 670, 21 Eng. Rep. 432 (1786).

⁴ *Coulson v. White*, 3 Atk. 21, 26 Eng. Rep. 816 (1743).

⁵ *Smith v. Colyer*, 8 Ves. Jr. 89, 32 Eng. Rep. 286 (1803).

him to the possession of the land (that is, is alleged to have no such estate).

Injunction against trespass lagged behind in the eighteenth century and still shows the effects of early inaction. But why was its infancy so blighted? Perhaps the mere fact that it stood in closer relation to Star Chamber history had something to do with it. Trespass cases are more likely than waste or nuisance cases to involve crime, and it may have been felt that the presence of an element of crime was prohibitory, though we have finally escaped this difficulty by sharp discrimination between tort and crime—the fact that defendant's conduct is criminal is, we say, immaterial, neither furnishing ground for equitable relief nor ground for its denial, so that the case is left to hang entirely on the tort aspect of defendant's conduct. But this approach, which is natural enough for a lawyer who habitually thinks in terms of a broad distinction between crime and tort, was not so easy for an eighteenth century lawyer.

Progress may have been impeded also by the fact that the mine run of trespass cases necessarily involved difficulties with respect to the adequacy of other remedies. Viewed in detail, the trespass cases present the factor of adequacy in all degrees, from highest to lowest, and it is impossible to say where in this scale the *typical* case falls. On the other hand, in the *typical* case of waste or nuisance, other remedies are quite inadequate and one can almost say that they are always inadequate. This, it will be observed, suggests an analysis that brings all three types of case to the same doctrinal level, viz., injunction is granted against threatened tort when other remedies are inadequate. But eighteenth century lawyers were not as accustomed as we to broad generalization in terms of "tort." They still tended to use narrower categories such as waste, nuisance, trespass and so on. So it happened that in the eighteenth century, when the injunctive remedy was being wrought from meager precedents and under the cloud of Star Chamber history, the complete adequacy of legal remedies in a considerable fraction of the trespass cases and the near-adequacy of such remedies in a still larger fraction of those cases might be felt, without being consciously analyzed, and so might constitute an undefined drag on the development of the injunction.

Note that all that was said in the preceding paragraph lies in the realm of speculation. It represents an attempt to identify factors in the history of injunction that were not formulated in con-

temporary legal literature; factors of such a nature that contemporary lawyers could not see them any more than they could see the circumambient air. Now let us consider what these lawyers did see and what they did say.

We need not dwell upon occasional arguments based on the cost and inefficiency of trial by deposition, or the inconvenience of bringing local causes to London. These were but solemn efforts to justify things as they were, rationalization in the worst sense, since they set up one bad rule to justify another. But there was another reason given and on this we must dwell at some length—the objection raised to trial in equity of disputed questions of legal right. This objection is one that the chancellors of the eighteenth and nineteenth centuries struggled with constantly. It is not wholly disposed of today. The confusion found in the cases, both early and late, may well have been due to the fact that the problem was never clearly identified. Let's start then by defining the problem.

The proposition that emerged in eighteenth century decisions went beyond an assertion that the chancellor could not entertain a suit the *sole purpose* of which was to determine title.⁶ It was much more drastic than that; even when legal remedies were inadequate and injunction was proper in every other respect, if the dispute on the merits was a dispute as to title to land, this ousted the chancellor's jurisdiction. But in specific performance of contract, where tradition was continuous from the fifteenth century on, it was never held that the legal rights of the parties must be determined by an action at law.⁷ Indeed, the idea was ludicrous. In the name of trust or mortgage or fraud, the chancellor could take the legal title from one who, under the rules of the common law,

⁶ For example, in a suit to remove cloud on title. *Welby v. Duke of Rutland*, 2 Bro. P.C. 39, 1 Eng. Rep. 778 (1773), concluded that a bill for this purpose was unnecessary and the legal remedy adequate, even though the plaintiff was in possession so that he could not bring ejectment and the defendant had not entered so that trespass would not lie. Jurisdiction to remove cloud from title came later.

⁷ Story in his chapter on Specific Performance said: ". . . before Lord Somers's time the practice used to be . . . to send the party to law; and if he recovered anything by way of damages, the court entertained the suit; otherwise the bill was dismissed." Eq. Jur. §738 (1836). But his authorities are talk merely and most of the talk was addressed to cases of other types. I find no decisions whatever to support this statement. What it all comes to is simply another manifestation of the urge to make the law symmetrical, consistent with itself, by extending the rule concerning trial of the right. In the realm of injunction against tort, this urge produced decisions; in the field of specific performance of contract it merely produced talk.

was absolute owner. In the name of equitable waste he could enjoin the exercise of the privileges which the common law attached to a legal estate. These few examples of the chancellor's unquestioned power to *abrogate* common law rules are quite enough to show the absurdity of denying him power to *apply* common law rules. American statutes commonly deny to the justice of the peace power to try title to land, even when it is incident to the ten-dollar suit which is within his competence. This too must be connected with the idea we are about to consider, for property in stocks and bonds, rather than property in land, is now the significant factor in our social (and shall we say our political?) order. It is only in musty legal lore that land tenure is still a subject of paramount concern. Perhaps the survival of these musty ideas will explain the limited powers of the modern American justice of the peace, the humblest officer in the judicial hierarchy. But the chancellor was not the humblest; he was the most exalted of all judicial officers.

The question then is: how did this absurd idea arise? The initial confusion and the changes that occurred from generation to generation were chiefly due to conflict, three cornered conflict, between tradition, logic and justice.

II. TRIAL OF DISPUTED RIGHT

A. *Tradition: The Historical Source of the Rule*

In feudal England, not only was land the principal form of wealth, but land holding was at the heart of the social and political structure of the realm. Tenure meant personal status and quasi-sovereign power as well as enjoyment of the possession and fruits of the land. These conditions were reflected in scrupulous attention to the remedies concerning land. Of the long list of actions represented in the register of writs, the larger part involved land law. This meant royal concern about these matters and particularly meant concern about getting them into the royal courts. The Council also ventured into the field of tenure but it did not get very far. Hostility to this use of prerogative jurisdiction was particularly bitter, and it soon had its way. The Council was barred from issues of freehold tenure.⁸ The chancellor, who was so closely

⁸ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 485ff (1922).

related to the Council, can hardly have escaped the implications of its defeat. The record does not show equivalent parliamentary action against him, but this could not be expected—the bounds of his jurisdiction were set by a quite different process, the day to day pressures of common law courts and lawyers that brought forth the tacit compromise in which the chancellor limited his jurisdiction by self-denying ordinance and was allowed to exercise jurisdiction so limited. Once the restrictive notion had become familiar, its survival is not hard to explain, for we know the power of legal rules to persist when there is nothing but professional tradition to keep them alive.

How does this tradition regarding trial of title fit in with our picture of the growth of injunction against waste, nuisance and trespass? We are concerned with cases only where there was a controversy concerning the underlying rights of the parties, as distinguished from (a) cases where there was only a dispute as to the remedy—e.g., as to the amount of damages or as to plaintiff's right to an injunction and (b) cases where there was no dispute at all. In the waste case the bill attributes to the defendant an estate which entitles him to possession, and defendant will rarely claim any other estate. In fact, in the typical case, there can be no room for dispute on this point unless someone has blundered in drawing will, settlement or lease. In the nuisance case, the defendant's title to the land he occupies will be quite immaterial. It may be essential to the establishment of the tort that plaintiff have some estate in land, since the tort is commonly thought of as an injury to others as land owners (not in a personal capacity), but it will be a rare case where the defendant will question plaintiff's claims of ownership. When we turn to trespass cases, we find the situation quite different. Plaintiff claims some kind of interest in the land and asserts that defendant has no interest therein, that he is a mere intruder. This, defendant will rarely admit. Even though he denies the allegations of the bill with respect to the acts he has done or threatened on that land he will usually deny the allegations of title. It seems clear that the rule against trial of title necessarily operates selectively, obstructing injunction in the trespass cases but not in the others. We have already seen that there were other reasons for the lag of injunction against trespass, but that is not inconsistent with the conclusions we have now reached. Indeed the several negative factors would reinforce each other.

The effect of these several restrictive factors was two-fold. (1)

The chancellor hesitated to grant injunction at all in trespass cases. Through the eighteenth and nineteenth centuries this use of the injunction was extended, but slowly and timidly. Even in the present century misgivings have been expressed about injunctions against trespass. (2) In the cases in which injunction was granted, the remedy was made to wait upon the adjudication of title in a law action. This necessarily meant two actions where one should have sufficed, and necessarily meant delay in the granting of the remedy—sometimes a serious matter, sometimes indeed so serious that the injunctions ultimately given had too much the character of locking the door after the theft.

B. *Logic: The Rule Expands by Analogy*

The rule against trial of title looks silly when viewed apart from its historical antecedents, and so, as feudal origins fell farther and farther into the abyss of time, lawyers must have felt that there was no reason at all for distinction between this particular kind of issue and other issues touching the legal rights of the parties. From such thinking one might expect abandonment of the rule. But the rule was writ large in the books and law is law. So lawyers were driven in the opposite direction. They generalized from the proposition concerning trial of title and came off with the sweeping proposition that the chancellor could not try disputes concerning the legal rights of the parties. Again we are indulging in historical speculation, for all that clearly appears in the record is the fact that late in the seventeenth century there was objection to trying the title to patent and copyright⁹ and in the eighteenth century the idea was extended to the issue of nuisance, *vel non*.¹⁰ It would be unprofitable to attempt a complete and detailed statement of the extent to which this process of logical ex-

⁹ Anonymous, Vern. 120, 23 Eng. Rep. 357 (1682); *East India Company v. Sandys*, 1 Vern. 127, 23 Eng. Rep. 362 (1682).

¹⁰ *Fishmongers' Company v. East India Company*, Dick. 163, 21 Eng. Rep. 232 (1752); *Weller v. Smeaton*, 1 Bro. C.C. 572, 28 Eng. Rep. 1304 (1784). The earlier cases show no recognition of this notion. See *Osborne v. Barter*, *Choyce Cases* 176, 21 Eng. Rep. 102 (1583), where the bill was *dismissed* because plaintiff *had* sued at law, and *Bush v. Western*, Prec. in Ch. 530, 24 Eng. Rep. 237 (1720), where injunction was granted without trial at law. In the latter case, plaintiff's title seems to have been clear and the objection frivolous, but the report does not indicate that this was regarded as an essential circumstance. Sixty years later, Lord Thurlow did not treat *Bush v. Western* as a sound decision on a clear title, but disposed of it as an anomaly. *Weller v. Smeaton*, *supra*.

tension was carried. We must, however, note that it was never carried to its logically ultimate conclusion. Not only in specific performance of contract but in injunctions against waste,¹¹ the tradition was established early enough to hold its ground. Other cases there were where logic faltered.¹²

When one takes a broad view of the whole field of equity, it becomes fairly clear that what happened in the seventeenth and eighteenth centuries was this: old notions about trial of title to land were stretched into broader notions about trial of legal issues in those critical cases where other difficulties were encountered. There, restrictive factors nourished each other. If the chancellor was embarrassed by lack of specific precedent, or was in doubt on the point of adequacy of legal remedies, dismissal of the bill could so easily be put on a supposed necessity of first establishing the legal right in a court of law. Per contra, where the case presented no other difficulties, the point about trial of the right was cheerfully ignored. This interpretation of seventeenth and eighteenth century cases is borne out by the fact that the infection never spread to certain types of cases which first rose in the nineteenth century, when we were doing our best to live down the old notions about trial of legal right; for example, the injunction against unfair competition and the labor injunction.¹³

¹¹ The sole exception seems to be *Lathropp v. Marsh*, 5 Ves. Jr. 259, 31 Eng. Rep. 576 (1800), where injunction was refused because no action had been brought. Eden said the decision was "clearly wrong." EDEN, *INJUNCTIONS*, 1st Am. ed., 141, note b.

¹² The two cases of contract and waste are mentioned because they are fairly analogous to the cases where the extension of doctrine did occur. Somewhat more remote is the case of foreclosure of mortgage where plaintiff was never required to establish at law the execution of the mortgage or the existence and amount of the debt. There were, of course, some types of suit to which even a strained logic could not lead, because the principles on which the chancellor acted were foreign to the common law: for example, the suit to enforce a trust, or the suit to redeem a mortgage.

¹³ The time factor is conspicuous in the case of the bill to remove cloud from title. Here the sole issue, on the merits, is title to land, that most sacred of all legal issues, yet it seems never to have been held that there must be a prior action at law or even that issues must be directed to a jury. In several cases such requirement has been expressly rejected. *Sharon v. Tucker*, 144 U.S. 533 (1892); *Blackwood v. Van Vleet*, 11 Mich. 252 (1863); *Whitehouse v. Jones*, 60 W. Va. 680, 55 S.E. 730 (1906). Is there any explanation except that this remedy developed in the 19th century, when the old tradition was expiring, and that this remedy bore little resemblance, on the surface, to the injunction cases where that tradition was still observed? The older bill to quiet title against one who threatened repeated actions at law was, of course, quite different. In that case, there must have been at least one prior suit at law, because it would be absurd to find an intention to bring repeated actions when defendant had not sued at all.

C. Justice: The Rule Is Eroded by Modern Demands for Procedural Efficiency

No great perspicacity is needed to see the untoward results of the doctrine under discussion, whether in the narrower form that went only to trial of land title, or in the extended form that moved toward inclusion of all legal issues. Whenever the rule is applied it produces as its minimum consequence double litigation, one action at law and one in equity, and usually it produces serious delay. But we must avoid exaggeration. The rule never interposed an absolute barrier to equitable relief, for it was always understood that when plaintiff had successfully prosecuted an action at law and defendant continued his tortious conduct, injunction was proper. This practice made the rule tolerable, but it also exposed its absurdity. Would a decision of a court of law yesterday, founded on the facts existing when the action was commenced last year, really establish the rights of the parties for the purpose of a bill filed today and seeking an injunction looking to the future? In at least three nuisance cases defendant contended he was no longer doing what was held to be nuisance in the prior action and thus that another trial at law was necessary to determine whether he was still guilty of nuisance.¹⁴ Obviously the same contention could be made with equal force after a second trial at law and so on ad infinitum. Therefore the contention was rejected. But it still must have been seen that the contention was logically sound, given the absurd premise that the court of equity could not determine legal rights.

It remains to examine several relaxations of the rule. The oldest of these employed what might be called the "ancillary temporary injunction." When an action at law had been brought, plaintiff could, upon a proper showing,¹⁵ obtain an injunction until the action reached judgment, and injunction could even be granted pending the determination of an action thereafter to be

¹⁴ *Soltau v. DeHeld*, 2 Sim. (n.s.) 133, 61 Eng. Rep. 291 (1851); *Imperial Gaslight Co. v. Broadbent*, 7 H.L.C. 600, 11 Eng. Rep. 239 (1859); *Carlisle v. Cooper*, 21 N.J. Eq. 576 (1870).

¹⁵ This involved some sort of showing with respect to the rights of the parties, presumably by pleadings and affidavits alone. From the early cases, one derives the impression (definite knowledge is impossible) that a stronger showing was required than would ordinarily be required today upon a motion for a temporary injunction. See *United States v. Parrott*, 1 McAll. 271, 27 Fed. Cas. 416, No. 15, 998 (1858).

brought. In the latter case, the court might frame issues to be tried at law, to make sure that the question of legal right and that only was litigated. In either case the injunction was conditioned upon diligent prosecution of the action and upon the results thereof. Usually the Chancery plaintiff was also the law plaintiff and the injunction was to be dissolved if he failed to prosecute the action diligently or the judgment went against him, and was to be made permanent if the judgment went in his favor. Sometimes the equity defendant was required to sue at law and in this case the injunction was to be made permanent if he failed to prosecute diligently. We are unable to say when this practice arose, but it was known before the close of the eighteenth century and was firmly established early in the nineteenth century.¹⁶ It eliminated the delay of the equitable remedy in those cases where the temporary injunction was granted, but this does not mean every case in which injunction was an appropriate remedy, because then, as now, there was a requirement of special equities for the interlocutory injunction. In no case did this practice eliminate the burden of double litigation.

The problem that remained was to eliminate or at least to mitigate the operation of the rule at final hearing, so that the whole controversy could be disposed of in the equity suit. Pursuing a familiar process, the profession went about this by a whittling process, chipping off a piece of the old rule here and another piece there. Let's patiently count the chips.

(1) Early in the nineteenth century a distinction was drawn between disputes on questions of fact and those on questions of

¹⁶ In *Weller v. Smeaton*, 1 Bro. C.C. 572, 28 Eng. Rep. 1304 (1784), Lord Thurlow sustained a demurrer to the bill (which of course precluded temporary injunction) and the opinion indicates that prior decision at law was regarded as indispensable. The earliest reported case granting the temporary injunction seems to be *Boulton v. Bull*, 3 Ves. Jr. 140, 30 Eng. Rep. 937 (1796), where infringement of patent was charged; plaintiff had brought an action and obtained a judgment subject to the opinion of the court, but the court was equally divided. In granting injunction pending another action, Lord Loughborough gave some weight to the verdict, but the opinion indicates, upon the whole, that the ancillary temporary injunction was well known. Unreported Maryland cases of the late eighteenth and early nineteenth centuries are cited in a note on 1 Bland Ch. 581. Other early cases are *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. Jr. 689, 31 Eng. Rep. 1260 (1802) (copyright); *Hogg v. Kirby*, 8 Ves. Jr. 215, 32 Eng. Rep. 336 (1803) (copyright); *Harris v. Thomas*, 1 Hen. & M. (Va.) 17 (1806) (trespass to land); *Shubrick v. Guerard*, 2 Desaus. Eq. (S.C.) 616 (1808) (trespass to land). To the last cited case, the learned editor appended a note indicating that in his opinion the decision was novel, if not erroneous.

law.¹⁷ This proceeded, of course, on the idea that the reason for the rule lay in the right to jury trial, an idea that is historically questionable but is plausible enough. This exception to the rule did not go unchallenged. In a copyright case Lord Cottenham said, . . . "if the Court were to exercise jurisdiction without giving an opportunity for trial at law, there would be a different law in this Court and in the courts of law upon the subject."¹⁸ This argument overlooked the appellate jurisdiction of the House of Lords, but its more serious fault lay in lack of proportion. Applying, or attempting to apply, the rules of the common law, the chancellor could not possibly create a hundredth part of the conflict that resulted from his deliberate departures from the common law in cases of trust, mortgage, etc. In either case, the real problem was a choice of evils. At least one American court has repudiated the distinction between fact questions and law questions.¹⁹ But after the reorganization of our courts, assigning to the same judicial personnel both law and equity cases, it becomes absurd for Judge Jones, sitting as a chancellor today, to say that he cannot decide this question of law until he has decided it in a separate action brought before him as a law judge next month or next year. The old talk about "trial at law" survives in some cases decided under fused procedure, but if one looks more closely it becomes clear that jury trial of issues assigned to jury decision is the only real point in dispute.

(2) The next step was to limit the rule to genuine disputes as distinguished from those that are merely factitious, as when the defendant claims title in his pleadings but is not prepared to urge the claim seriously.²⁰ This distinction seems never to have been ex-

¹⁷ *Belknap v. Belknap*, 2 Johns. Ch. (N.Y.) 463 (1817) (Chancellor Kent restraining public officers from exceeding their authority); *Lyon v. McLaughlin*, 32 Vt. 423 (1859) (rights in a watercourse); *Jennings Bros. & Co. v. Beale*, 158 Pa. 283, 27 A. 948 (1893) (title to land). Doubtless it would be more accurate to phrase this distinction in terms not of "law" and "fact" but in terms of "questions for judge" and "questions for jury," the former embracing construction of written instruments. See *United States v. Sandloss*, (D.C. N.J. 1940) 34 F. Supp. 81 (assuming state law governs this question).

¹⁸ *Bramwell v. Halcomb*, 3 Myl. & Cr. 737 at 739, 40 Eng. Rep. 1110 (1836).

¹⁹ *Black v. Delaware & Raritan Canal Co.*, 22 N.J. Eq. 130, 427 (1871), a case involving questions as to the powers of a corporation. Compare *Delaware & C. Co. v. Breckenridge*, 55 N.J. Eq. 141, 593, 35 A. 756 (1896).

²⁰ *White v. Flannigan*, 1 Md. 525 at 544 (1852) (obstruction of easement); *Oberheim v. Reeside*, 116 Md. 265 at 274, 81 A. 590 (1911); *Wheelock v. Noonan*, 108 N.Y. 179, 15 N.E. 67 (1888) (trespass to land); *Mathias v. Holland*, 132 Va. 274, 111 S.E. 134 (1922) (obstruction of easement).

pressly rejected, and presumably it would now be accepted everywhere, because it is intolerable to let a defendant postpone decision by merely colorable allegations. There is no acid test to determine which disputes are serious and which are not—but this merely means that this like other rules of law may be difficult to apply to some cases. A more bothersome problem is raised by the closely related idea that the requirement of trial at law is applicable only to serious disputes in the sense of disputes difficult to decide. If it is insisted that evidence must be taken at length to determine whether the dispute is too serious for the chancellor, double litigation is aggravated. Instead of leaving all questions on the merits to a law action, which at least simplifies the equitable suit to that extent, we will have a trial on the merits in equity and then, if the dispute proves serious, another trial on the merits at law. The rule must be administered with this point in mind. Defendant must be required merely to introduce "sufficient evidence, not to overturn the plaintiff's title or to establish his own (for these are the very questions hereafter to be tried) but to show that he has some plausible and real grounds for bringing the title in question."²¹ And if, on this preliminary showing it is held that the dispute is not serious, this decision must be adhered to, no matter what develops in the course of the trial. Otherwise, our last state will be worse than the first.

(3) Late in the nineteenth century, a few audacious courts declared that trial of the right rests in discretion.²² But one must not count on these cases too heavily. Do they mean any more than

²¹ Woodbury, J., in *Perry v. Parker*, 1 Woodb. & M. 280 at 282, 19 Fed. Cas. 291, No. 11,010 (1846), speaking on a motion for temporary injunction.

²² *Colman v. Dixon*, 50 N.Y. 572 (1872); *Wheelock v. Noonan*, 108 N.Y. 179, 15 N.E. 67 (1888); *Griffith v. Hilliard*, 64 Vt. 643 (1890); *Peck v. Ayres & Lord Tie Co.*, (6th Cir. 1902) 116 F. 273.

Vermont, in more recent cases, has gone as far as any state in rejecting the ancient rule. In *Barrell v. Renehan*, 114 Vt. 23, 39 A. (2d) 330 (1944), the Vermont court took it for granted that grounds for equitable relief justified trial of disputed title though there were genuine fact issues—adverse possession and acquiescence in boundaryline. In *Cabot v. Hemingway*, 115 Vt. 321, 58 A. (2d) 823 (1948), the issue of legal title involved only the question how far the boundary of plaintiff's land extended into Lake Champlain; defendant had already started a damage action of trespass against plaintiff, but it was held proper to consolidate that action for trial as part of plaintiff's equity suit, which had been started subsequently.

The Massachusetts court in *LaChance v. Rubashe*, 301 Mass. 488, 17 N.E. (2d) 685 (1938), held it to be proper to try an issue of title by adverse possession in equity as part of an injunction suit. See also *Ercanbrack v. Clark*, 79 Utah 233, 8 P. (2d) 1093 (1932).

that the court has discretion in cases of dispute that does not appear serious, and do they cover all issues, including that sacred issue of title to land? In any case, the discretion of the trial court is presumably reviewable and much depends upon the inclination of the appellate court to give the trial court elbow room. But this discretionary solution should be cultivated for it offers the easiest out for courts whose precedents commit them to the old rule. With an appeal to the idea of discretion which broods over the whole field of equity, they can give trial courts full control, and if this is done, we may see the end of any requirement that legal issues be tried at law.

(4) Long since, the process of extension from trial of land title to other legal issues went into reverse. In cases of patent and copyright, one has to go back half a century to find a direction of issues of fact, and still farther to find a case in which a genuine action at law was held prerequisite. The situation here is particularly clear because it is now generally recognized that in this class of cases what we need is not a less expert but a more expert tribunal. Perhaps it is also a material factor that most of the litigation is in equity, so that one easily comes to think of patent and copyright as pure equity business, forgetting that in theory they involve legal rights and legal torts.

(5) Of course another way to get rid of the old rule is to forget it, and this road has been much travelled. As one reads the advance sheets, he cannot but be impressed by the infrequency with which this point of procedure is raised, even when it would be in order. But a wide difference may be observed between the practices of the several states. In some the old rule has considerable vigor; in others, it is decrepit; in yet others it seems to be dead. At the present time, and we may suppose for the immediate future, the crucial issue is the dispute as to title to land, the point at which this strange story began. We mean the case where each party claims the whole title, so that success of one leaves the other high and dry. It cannot be denied that there are modern decisions, much too recent to be brushed away as archaic, which assert the old idea in some form—"trial at law" or "jury trial."²³ Do not in-

²³ *Hartman v. Pennsylvania Water & Power Co.*, 317 Pa. 417, 176 A. 437 (1935); *Southern Ry. Co. v. Greenwood*, (W.D. S.C. 1928) 40 F. (2d) 679; *Lake Lenore, Inc. v. Delaware, L. & W. R.R. Co.*, 113 N.J. Eq. 533, 168 A. 178 (1933); *Green v. Cowgill*, 30

quire why this case should be different. This is to ask for logic where there is no logic. If there is a reason to be found it will be found in some strange history that we may perhaps outlive.

Del. Ch. 345, 61 A. (2d) 410 (1948). *McRaven v. Culley*, 324 Ill. 451, 155 N.E. 282 (1927), used both adequacy of legal remedy and failure to establish the legal right as grounds for dismissing an action to enjoin trespass.