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Merger of Law and Equity in Florida--Problems and Proposals

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NOTES

MERGER OF LAW AND EQUITY IN FLORIDA — PROBLEMS AND PROPOSALS

The procedural distinctions between suits in equity and actions at law were erased on January 1, 1967, by the 1967 revision of the 1954 Florida Rules of Civil Procedure.[1] Most of the reasons that favor the merged procedural system under which Florida now operates are grounded on considerations of trial convenience. The old common law requirement that pleading establish a single issue of fact or law to be adjudicated for any given action had already been abrogated by the 1954 Rules, which allowed parties to join in one action as many claims or causes of action as they had against the adverse party.[2] This liberal joinder provision was subject to the trial court's power to separate issues if convenience or protection from prejudice demanded.[3] Thus, convenience and avoidance of prejudice were the criteria used to determine the feasibility of adjudication of all issues in a single action. There was one substantial limitation on this rule of convenience — the concurrent existence of separate common law and equity dockets made joinder of legal and equitable claims impossible in one action.[4] Removal of this final impediment to free joinder culminated in a progression of pleading simplification begun by the Florida Supreme Court in the 1954 Rules. The merged system should enable all issues between identical parties to be resolved in one trial, subject solely to the rule of convenience.

Various problems that are unique to a merged procedure system are expected to arise. It is the purpose of this note to anticipate several of these problems and to propose possible solutions. The topics to be discussed, although not exhaustive of the problems that may occur, will include pleading, joinder of causes of action and claims, permissive joinder of plaintiffs, res judicata, right to jury trial, and scope of appellate review.

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1. "There shall be one form of action to be known as 'civil action.'" FLA. R. CIV. P. 1.040. Several other changes in the 1954 Rules were necessary to accomplish the merger of the two types of action. Provisions for separate dockets and for transfer between the two dockets in rules 1.2 and 1.39 of the 1954 Rules were omitted. The wording of rule 1.110 (g), "Joinder of Causes of Action; Consistency," was altered to allow legal and equitable defenses *and claims* to be stated in the same action. Sections II and III of the 1954 Rules, designated "Actions at Law Only," and "Suits in Equity Only," were consolidated. Former rule 3.2, "Joint and Several Demands," found in Section III, was deleted, as was rule 3.7 of that section, "Joinder of Causes of Action."

2. FLA. R. CIV. P. 1.8 (g), 178 So. 2d 15 (Fla. 1965).

3. FLA. R. CIV. P. 1.20 (b), 178 So. 2d 15 (Fla. 1965).

4. Rule 1.8 (g) of the 1954 Rules did allow defenses and counterclaims of a mixed equitable and legal nature to be asserted in the same action. Prior to merger, however, this permissive provision was strictly construed. *See* Filaretou v. Christou, 133 So. 2d 652 (2d D.C.A. Fla. 1961), where in an action at law the court refused to allow the defendant to prove his equitable "defenses" because they were in effect requests for affirmative equitable relief.

PLEADING

Successful pleading of the new "civil action" will depend on the parties' full appreciation of merger's effect on each phase of the litigation process. The plaintiff may now, in the same civil action, request and receive either equitable or legal relief, or both.[5] When the facts support only one reasonable theory of recovery, when the relief requested is appropriate to that theory, and when the proof at trial is sufficient to sustain the allegations, the defendant and court are fully informed of all possible ramifications of the complaint. In that situation, neither party is confronted in a newly merged jurisdiction with any major procedural changes. Neither has gained nor lost any advantage as a result of merger. Ramifications of the merged system become apparent, however, when one set of alleged facts gives rise to one or more formerly equitable and one or more formerly legal remedies, or when the demand for judgment is inconsistent with the facts, either as alleged or as proved at trial. When one of these conditions exists, merger may largely determine the scope of the pleadings and their treatment by the court.

Transition to a merged procedural system raises several questions at the pleading stage. How does merger affect the substance of the complaint? What type of relief will the court award upon proof of allegations supporting both legal and equitable theories of relief? What part is played in the complaint by the demand for relief? What is the effect of requesting relief that is unsupported by proof at trial? Will there be any change in dismissal of the cause? Some answers to these and other questions are suggested below.

Pleading Under the Florida and Federal Rules

The philosophy of pleading and the purpose a complaint serves in the litigation process within each jurisdiction will largely determine the effectiveness of merger in erasing procedural distinctions between the two formerly distinct actions.[6] Professor Pomeroy felt that the distinction between actions at law and suits in equity was exhibited most markedly in stating the cause of action and in obtaining relief thereon: "[I]t is in this feature, therefore, that the change must be the most sweeping and radical, if the distinction

5. FLA. R. CIV. P. 1.110 (g). Dictum in a Florida appellate decision rendered prior to the effective date of merger indicated that joinder of legal and equitable claims was permitted at that time: "Such claims or defenses [available to the pleader in the same right] may be alleged in the alternative regardless of consistency, and whether based on legal or equitable grounds, or both. Hines v. Trager Constr. Co., 188 So. 2d 826, 830 (1st D.C.A. Fla. 1966), (citing rule 1.8 (g) of the 1954 Rules). The statement appears to be an erroneous or at least a misleading assumption, for only after the revision of rule 1.8 (g), now rule 1.110 (g), could causes formerly legal or equitable be joined.

6. C. CLARK, CODE PLEADING §15 (2d ed. 1947) [hereinafter cited as CLARK]. *See* Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925). References to a plaintiff's pleading may be applied equally to the pleading of a defendant that states a counterclaim against the plaintiff, to a cross-claim or to a further pleading of the original plaintiff which asks affirmative relief on grounds other than, or in addition to, the original allegations. FLA. R. CIV. P. 1.110 (g).

has in truth been abolished."[7] It should be remembered, however, that while the new Florida Rules have effected a unity of procedure, they have changed neither the "legal" nor "equitable" nature of a particular form of relief; nor have they changed the necessary elements of the theory upon which it is granted.[8]

Professor Pomeroy's call for sweeping and radical changes in the statement of the cause of action to achieve true merger was appropriate for those jurisdictions that at an early date converted directly from common law pleading to a merged system of pleading regulated by statute or court rules.[9] There is no reason to expect such a noticeable and drastic change in Florida pleading practice. Many of the liberalized pleading rules and procedural practices necessary to the proper functioning of a merged court system, and usually present in such a system, were introduced into Florida practice by the 1954 Rules and their subsequent revisions, or by earlier rules of practice. Except for final merger of law and equity into the single action, Florida pleading practices have approached in many ways those of the federal courts and other merged jurisdictions since introduction of the 1954 Florida Rules.

In Florida, the pleading of a party demanding judgment must state a "cause of action"[10] and contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."[11] The Florida Supreme Court set similar criteria for the complaint even before implementation of the 1954 Rules. The plaintiff, stated the court, "must plead factual matter sufficient to appraise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect."[12] In other words, facts before the court must be sufficient to support a right to some type of relief if they are proved as alleged. The 1965 revision of the Florida Rules eliminated a provision that if the pleading "informs the defendant of the nature of the cause against him, it shall be held sufficient," because it had been interpreted as being of itself definitive of a cause of action.[13] This deletion would seem to indicate explicit rejection of a pure "notice pleading" theory, in which no attempt is made to state the details of the cause of action, and in which the plaintiff makes only a general

7. J. POMEROY, CODE REMEDIES 27 (4th ed. 1904).

8. Fitzpatrick v. Sun Life Assur. Co. of Canada, 1 F.R.D. 713, 715 (D.C.N.Y. 1941); *cf.* J. POMEROY, CODE REMEDIES 14 (5th ed. 1941).

9. For a compilation of all merged jurisdictions and those that allow joinder of legal and equitable claims, see Appendices A and B to Joiner & Geddes, *The Union of Law and Equity: A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059, 1110-11 (1957).

10. One meaning given to the term "cause of action" is that each separate remedy gives rise to a different cause of action. *See* McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925). The most widely accepted definition is that of Judge Clark: "[O]ne group of operative facts gives rise to but a single cause of action upon which varying claims, both legal and equitable, may be made." CLARK 445. Judge Clark's definition is adopted for discussion purposes within this note, except when a contrary meaning is indicated. For extensive periodical references discussing "cause of action," see 2 J. MOORE, FEDERAL PRACTICE 359 n.26 (2d ed. 1965) and CLARK 127-48 nn.135-96.

11. FLA. R. CIV. P. 1.110 (b).

12. Messana v. Maule Indus., 50 So. 2d 874, 876 (Fla. 1951).

13. *See* Kislak v. Kreedian, 95 So. 2d 510, 513-14 (Fla. 1957).

reference to the occurrence out of which the case arose.[14] Florida courts have, however, recognized the necessity of pleading matter other than "ultimate facts" and have noted that the pleading is often a mixture of conclusions of law and factual matter of varying specificity.[15]

The Federal Rules of Civil Procedure require only a "short and plain statement of the claim."[16] Federal court decisions have interpreted this more lenient federal rule as denoting the "aggregate of operative facts which give rise to a right enforceable in the courts."[17] Both jurisdictions apparently aim toward providing a minimum of "fair notice" both to the court and to the defendant.[18] "Fair notice" is considered to be a combination of facts or conclusions of law sufficient to place each party and the court on notice of the matters that are in dispute. Because it is a relative standard, the particularity of allegation will vary according to the issue of the case.[19] Beyond the facts necessary to give the defendant a fair opportunity to prepare a defense, nothing is required. For although the allegations must be stated with a definite rule of law in mind, no legal theory need be explicit in the complaint itself.[20]

The "theory of the pleadings" doctrine requires the plaintiff to select a theory of action in his complaint.[21] He is then restricted throughout the litigation to that initial choice, and his case is lost if the theory is not supported by evidence introduced at trial.[22] Fortunately, the doctrine has been rejected in Florida as well as in federal courts.[23] In neither jurisdiction does success of the action depend upon the correctness of the plaintiff's initial choice of a rule of law. Discretion is allowed the court to award the relief warranted by proof at trial. The rules of both jurisdictions provide for liberal amendment of the pleadings to conform with such relief.[24] This tolerance may lead to a disparity between the theory and relief initially contemplated and the relief finally awarded or denied. As long as a shift in theories is not too drastic, it should be allowed — particularly in a merged jurisdiction.[25]

Florida's rejection of the less flexible theory-of-the-pleadings doctrine has become particularly significant with the advent of merger. Heretofore in

14. *See generally* CLARK 240-41.

15. Williams v. Guyton, 167 So. 2d 7, 9 (3d D.C.A. Fla.), *cert. denied*, 168 So. 2d 751 (Fla. 1964); Luckie v. McCall Mfg. Co., 153 So. 2d 311 (1st D.C.A. Fla. 1963).

16. FED. R. CIV. P. 8 (a).

17. Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943).

18. CLARK 126, 232. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("fair notice" of plaintiff's claim and grounds upon which it rests are required); Chasin v. Richey, 91 So. 2d 811 (Fla. 1957) (defendant must be placed on proper notice by allegations in body of complaint).

19. CLARK 232.

20. O'Donnell v. Elgin, J. & E. Ry., 338 U.S. 384 (1949); *accord,* Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 364, 137 P.2d 934, 939 (1943).

21. CLARK 259-65.

22. Walrath v. Hanover Fire Ins. Co., 126 N.Y. 220, 110 N.E. 426 (1915).

23. Nord v. McIlroy, 296 F.2d 12 (9th Cir. 1961); Neter v. Western Union Tel. Co., 25 F. Supp. 478 (S.D. Cal. 1938); Davis v. Stow, 60 So. 2d 630 (Fla. 1952). *See generally* Albertsworth, *The Theory of the Pleadings in Code States,* 10 CALIF. L. REV. 202 (1922).

24. FED. R. CIV. P. 15 (b); FLA. R. CIV. P. 1.190 (b).

25. CLARK 265. See text accompanying note 55 *infra.*

Florida, award of the relief warranted by the allegations and proof at trial was applied only to homogeneous actions (those raised on only one "side" of the court) except where equity retained jurisdiction to award damages incidental to, or in lieu of, equitable relief.[26] The plaintiff's relief in an action at law was restricted to damages based upon one of the various common law forms of action. In a suit properly in equity, relief was restricted to remedies historically of an equitable nature. Merger permits one court to award the relief to which the plaintiff is entitled, regardless of its historically legal or equitable nature. In order to avoid an unexpected form of judgment, both plaintiff and defendant should be cognizant of this greater latitude given the court to award the appropriate relief.

Courts in merged jurisdictions are now reluctant to dismiss an action because the pleader has incorrectly labeled his claim or chosen an inappropriate remedy. They have held that the plaintiff's recovery does not stand or fall on his initially adopted theory if relief on any rule of law is warranted.[27] Even before merger in Florida, the complaint was not dismissed for an insufficient cause of action if its allegations could support a claim for any relief, legal or equitable.[28] In such a situation, the case was amenable to a motion to transfer the action to the other side of the court.[29] Thus, merger has not enlarged the plaintiff's right to remain in court when the complaint is tested by a motion to dismiss. It has only saved him the trouble and expense of transferring his case to the "other side."

The general characteristics of Florida pleading, discussed above, indicate that Florida is now in a position similar to the federal courts in 1938 after introduction of the Federal Rules of Civil Procedure. Florida should profit from the experience of the federal courts, which have operated for thirty years under rules similar to those now in effect in Florida. Parties faced with procedural questions brought about by merger can look to the federal courts for guidance, for the Florida judiciary has indicated its receptiveness to federal pleading practices. Interpretation by federal tribunals of federal rules after which Florida rules have been patterned has been described by Florida courts as "persuasive" or "pertinent" in interpreting similar Florida provisions.[30] Treatment of pleadings similar to that of the federal courts, therefore, can logically be anticipated under the merged Florida procedure. Hopefully,

26. *E.g.*, Norris v. Eikenberry, 103 Fla. 104, 137 So. 128 (1931).

27. "Since the enactment of the Code . . . the question . . . is not whether the plaintiff has a legal or an equitable right, or the defendant a legal or equitable defense against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish or the defendant shows that the plaintiff ought not to have the relief sought for." Crary v. Goodman, 12 N.Y. 266, 268 (1855). But for an example of strict application of the theory-of-the-pleadings doctrine, *see* Supervisors of Kewaunee County v. Decker, 30 Wis. 624, 633 (1872).

28. Hankins v. Title & Trust Co., 169 So. 2d 526 (1st D.C.A. Fla. 1964). When the plaintiff has requested equitable relief but his allegations failed on their face to raise an equitable claim, Oklahoma courts have treated the claim as one of damages and denied a motion to dismiss, even though no specific sum was requested. Fraley v. Wilkinson, 79 Okla. 21, 23, 191 P. 156, 158 (1920); Schelling v. Moore, 34 Okla. 155, 125 P. 487 (1920).

29. FLA. R. CIV. P. 1.39, 178 So. 2d 15 (Fla. 1965) (deleted in 1967 revision).

30. *See* Savage v. Rowell Distrib. Corp., 95 So. 2d 415, 417 (Fla. 1957).

reference to federal experience will enable the Florida judiciary and bar to avoid pitfalls into which the federal courts have fallen from time to time.

It is unlikely that merger in Florida will evoke the adverse criticism that has occasionally accompanied procedural change in other jurisdictions. Early criticism of the federal pleading rules appeared to be partially founded upon fear that such rules would place the defendant at great disadvantage. It was thought that his inability to know which theory would be argued by the plaintiff at trial or which theory of relief would be accepted by the court might hamper the preparation and presentation of his defense. Judging by the success of federal pleading practices,[31] however, there appears to be little substance to these objections. On the contrary, the pretrial discovery devices of the Federal Rules permit the defendant to uncover many concealed facts and issues.[32] Additional safeguards have been imposed in individual cases, such as one court's refusal to grant relief when the defendant had no opportunity to present certain equitable considerations in his defense.[33] Florida courts have similarly protected the defendant. They have indicated that the practice of permitting a plaintiff to amend his pleadings and of awarding relief on a theory other than that initiated by the plaintiff is a corrective measure allowable only when it does not unduly prejudice the defendant.[34]

Choice of Relief

Both Florida and Federal Rules require that the complaint contain "a demand for judgment for the relief to which he [the plaintiff] deems himself entitled."[35] Although the demand for relief is a necessary component of the complaint,[36] in neither jurisdiction is it considered an integral part of the statement of the cause of action or ultimately determinative of the nature of the relief that will be granted.[37] In Florida, the facts alleged and proved, rather than the form of relief requested, determine the nature of the judgment awarded.[38] A few cases in both jurisdictions have held that where the plaintiff's theory is in doubt, the form of relief demanded may be examined

31. 2 J. MOORE, FEDERAL PRACTICE 457 (2d ed. 1965).

32. Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 353 (1950).

33. United States v. An Article of Drug Consisting of 47 Bottles, 320 F.2d 564 (3d Cir. 1963).

34. Tucker v. Daugherty, 122 So. 2d 230 (2d D.C.A. Fla. 1960).

35. FED. R. CIV. P. 8 (a); FLA. R. CIV. P. 1.110 (b).

36. *Id. See* Oklahoma Transp. Co. v. Phillips, 265 P.2d 467 (Okla. 1953), in which the prayer for relief was said to be a necessary part of the petition but not part of the cause of action.

37. Cohen v. Randell, 137 F.2d 441 (2d Cir. 1943); Southern Pine Extract Co. v. Bailey, 75 So. 2d 774 (Fla. 1954). *Cf.* Schwartz v. Eaton, 264 F.2d 195 (2d Cir. 1959), where the trial court's striking a portion of the prayer for relief in an attempt to dismiss some of the plaintiff's legal theories, was said to be a futile and meaningless gesture; the trial judge at the close of the case was still obligated to grant to the parties the relief proved to be warranted.

38. Phelps v. Higgins, 120 So. 2d 633 (2d D.C.A. Fla. 1960); Chasin v. Richey, 91 So. 2d 811 (Fla. 1957).

to determine the theoretical framework of the allegations.[39] This practice, though, has been criticized as a reversion to the theory-of-the-pleadings doctrine.[40] Despite such criticism, it seems unrealistic to assume a court that has studied a complaint to determine its sufficiency could ignore the inferences raised by the nature of relief sought. Where both legal and equitable theories of relief are raised by the allegations, the demand should notify the court and defendant of the theory and relief initially preferred by the plaintiff.[41] However, as mentioned above, he normally would not be limited to his initial choice of theory or form of relief.

The liberal amendment provisions of both the Federal and Florida Rules allow plaintiff to amend his demand for judgment and to conform it to the relief found warranted at trial.[42] Such amendments, however, are usually not essential to the granting of the appropriate relief.[43] It is doubtful that Florida courts will tolerate a completely nonspecific demand for relief, such as a request "for any relief, equitable or legal, which the court finds warranted by the proof at trial."[44] Under merger, the specific form of legal and equitable relief preferred should be requested, although it may be cumulative or stated in the alternative. An overly generalized claim for relief is made unnecessary by Florida Rule 1.110(b), which provides that "every complaint shall be considered to pray for general relief." This provision is similar to the federal provision that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."[45] In some cases, "particular legal theories of counsel" have yielded to "the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not."[46] This seemingly blanket discretion of the trial judge does have limits in both jurisdictions: relief that neither party desires ordinarily will not be forced upon him;[47] relief will not be granted if the grounds for that

39. *E.g.*, Rank v. Krug, 90 F. Supp. 773, 784 (S.D. Cal. 1960) (relative to plaintiff's right to a jury trial); Ellison v. City of Ft. Lauderdale, 175 So. 2d 198 (Fla. 1965).

40. 6 J. MOORE, FEDERAL PRACTICE 1209 (2d ed. 1965).

41. In Everit v. Walworth County Bank, 13 Wis. 468 (1861), the court noted that the nature of action could be determined by the prayer for relief in cases of doubt and uncertainty.

42. FED. R. CIV. P. 15(b); FLA. R. CIV. P. 1.190(b).

43. Cohen v. Randell, 137 F.2d 441 (2d Cir. 1943); Shirley v. Lake Butler Corp., 123 So. 2d 267 (2d D.C.A. Fla. 1960).

44. Inadequate specificity in the demand for judgment is illustrated by the following demands in an equity action, which were considered to be "improper" by the court: "[T]he amended complaint, which concludes with a prayer that the court 'construe the sworn allegations herein, the exhibits attached, and the testimony presented, and ascertain to what extent the defendant has committed unfair labor practices . . . . That if unfair labor practices have been committed, and are being committed . . . a permanent injunction be entered . . . and that plaintiffs have damages . . . and that the court allow such other relief as in equity may be just.'" Hotel & Restaurant Employee Union v. Boca Raton Club, Inc., 73 So. 2d 867, 869 (Fla. 1954).

45. FED. R. CIV. P. 54(c). The relief awarded may differ greatly from that requested in the petition. Owens v. Purdy, 90 Okla. 256, 217 P. 425 (1923) (rescission of contract granted when plaintiff desired enforcement).

46. Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 976 (2d Cir. 1945).

47. Mercury Oil & Ref. Co. v. Oil Workers Union, 187 F.2d 980 (10th Cir. 1951); Daniel

relief have not been substantiated by proof.[48] These limits should prevent either party from being prejudiced by a surprise award of legal relief when equitable relief was expected, or vice versa.

Examples from other merged jurisdictions illustrate the treatment that may be expected in Florida. When the plaintiff, demanding a judgment stemming from a solely equitable cause of action, fails to prove grounds for equitable relief but does establish a case for legal relief, it has been held that he should recover the legal judgment.[49] New York courts have held that if legal relief alone is requested and the party's allegations and proof entitle him solely to equitable relief, the court should disregard his demand for judgment, rely on the facts alleged and proved, and grant equitable relief.[50] If the plaintiff thought he had a right to both legal and equitable relief and pleaded the necessary facts, praying for both remedies but failing to establish his equitable cause of action at trial, he should still recover the legal judgment.[51] Finally, a situation may arise in which the factual allegations entitle the plaintiff solely to equitable relief; equitable relief alone is demanded, and proof at trial fails to establish the facts alleged but does establish a legal cause of action entitling the plaintiff to legal relief. On the principle that "the court looks to the facts alleged and proved, and not to the prayer for relief," Professor Pomeroy proposes that the suit must be dismissed because the specific allegations in the complaint were not proved.[52] This principle is recognized in Florida,[53] but Florida's liberal amendment policies allow a more just result. If the defendant has had a fair opportunity to rebut the facts introduced at trial, whether or not contained in the original complaint, the court could (and should) allow the plaintiff to amend the allegations and award the relief warranted by the proved facts.[54]

Pleadings — Summary

The prevailing view denies that the defendant is entitled in every case to advance notice of a single legal theory upon which the plaintiff is required to rely. Courts today prefer to protect a party's substantive right to recover upon any rule of law properly found applicable to the established facts, rather than to protect his adversary from possible, but often fanciful,

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v. Daniel, 171 So. 2d 180 (2d D.C.A. Fla. 1965).

48. Carter v. Baltimore & O.R.R., 152 F.2d 129 (D.C. Cir. 1945).

49. Truth Seeker Co. v. Durning, 147 F.2d 54 (2d Cir. 1945); Pasley v. De Weese, 183 Okla. 424, 82 P.2d 1066 (1938).

50. Emery v. Pease, 20 N.Y. 62, 64 (1859); *accord,* Blazer v. Black, 196 F.2d 139 (10th Cir. 1952); Perkins v. Remillard, 84 F. Supp. 224 (D. Mass. 1949).

51. Sternberger v. McGovern, 56 N.Y. 12, 21 (1874) (specific performance and damages).

52. J. POMEROY, CODE REMEDIES 39 (4th ed. 1904).

53. Phelps v. Higgins, 120 So. 2d 633 (2d D.C.A. Fla. 1960).

54. *E.g.,* Shores v. Murphy, 88 So. 2d 294, 296 (Fla. 1956); Dworkis v. Dworkis, 111 So. 2d 70 (3d D.C.A. Fla. 1959). Liberal pleading and amendment practices such as those in effect in Florida should allow a plaintiff to avoid the harsh results of a decision such as Stafford v. McDougal, 171 Okla. 106, 42 P.2d 520 (1935), in which plaintiff's request for rescission of a contract was not substantiated, yet the plaintiff was not permitted to amend his pleadings to request damages.

surprise.[55] By this, the better interpretation, merger will occasionally require the defendant to defend against both legal and equitable claims raised by a single or multiple set of factual allegations, whether or not the plaintiff demands more than one type of relief. The burden of added preparation, occasioned by the exceptional case, is a small price to pay for the opportunity to conclude litigation between the parties with one, all-inclusive action. For as Mr. Justice Black has remarked: "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end."[56]

JOINDER OF CAUSES OF ACTION

Before merger, rule 1.8(g) of the 1954 Florida Rules permitted claims and statements of fact in the alternative and joinder of as many claims as the pleader had against the opposing party.[57] Only defenses were pleaded without regard to their equitable or legal nature. This rule has been modified to allow pleading and joinder of defenses *and claims*, whether legal or equitable.[58]

The Florida rule governing joinder of causes of action is not patterned after the federal provision. Its phraseology, however, appears to arrive at the same result: liberal joinder of any cause of action brought by the plaintiff "in the same right."[59] Such latitude promoting widespread joinder

55. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 194-200 (1952). *See* James, *The Objective and Function of the Complaint, Common Law — Codes — Federal Rules*, 14 VAND. L. REV. 899 (1961); James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1481-85 (1958).

56. Maty v. Grasselli Chem. Co., 303 U.S. 197, 200 (1938).

57. "A pleader may set up in the same action as many claims or causes of action or defenses in the same right as he has, and claims for relief may be stated in the alternative if separate items make up the cause of action, or if two or more causes of action are joined. A party may also set forth two or more statements of a claim or defense alternatively, either in one count or defense, or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency, and whether [a defense be] based on legal or on equitable grounds, or on both. All pleadings shall be construed so as to do substantial justice." FLA. R. CIV. P. 1.8(g), 178 So. 2d 15 (Fla. 1965). Words in brackets were deleted by the 1967 revision. One express exception to joinder permitted by the rule is found in FLA. STAT. §46.08 (1965), which prohibits joining actions of replevin and ejectment with each other or with other causes of action.

58. FLA. R. CIV. P. 1.110(g).

59. Pertinent provisions of the Federal Rules are as follows: "A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." FED. R. CIV. P. 8(e)(2). "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied." FED. R. CIV. P. 18(a). The

of actions, whatever their former equitable or legal nature, should permit Florida to reap the full benefits of merger, at least in actions involving only one plaintiff and defendant.

Many of the early merger statutes limited the causes that could be joined to those arising out of the same transaction, occurrence, or series of transactions.[60] This limitation was aimed at preventing litigation of diverse issues in a single suit, which might cause undue confusion and complexity during trial – particularly a jury trial.[61] The latitude of the federal provision suggests that the convenience and utility of resolving all differences between parties simultaneously has come to outweigh vague fears of confusion and complexity. Many states have found the earlier, more restrictive provisions inadequate and have adopted a rule identical with or similar to the federal rule.[62] The problem is now considered one of trial convenience and practicality rather than a problem of pleading. Difficulties resulting from joinder of too many diverse causes can be judged accurately only at trial.[63] There is no real need to restrict joinder of claims at the pleading stage, for once the causes are set for trial, the court is authorized to grant separate trials if the issues are too complex or if one party may be unduly prejudiced by a single trial.[64]

Experience in federal courts illustrates the success of the liberal joinder-of-claims provision in allowing legal and equitable causes to be tried together. Equitable claims for injunction and restitution have been joined as both independent and alternate claims.[65] A plaintiff has been allowed to sue for reformation or rescission of a contract in the same action in which he sues for damages on the contract.[66] A plaintiff has pursued in the same suit legal claims for conversion and for money had and received, and equitable claims for the declaration of a constructive trust and for an accounting.[67] Decisions

Florida provision that the pleader must be affected "in the same right" places a general restriction upon joinder of causes of action. The plaintiff must be affected in the same capacity in the sense that a cause affecting one as an individual, for example, cannot be joined with another that affects him only as an administrator. FLA. R. CIV. P. 1.110(g).

60. Such a provision first appeared in the New York Civil Practice Act §258, N.Y. Laws ch. 392, §167. These classes have usually numbered from six to ten, and have included: (1) express or implied contracts; (2) injuries to the person; (3) injuries to character; (4) injuries to property; (5) actions to recover real property with or without damages; (6) actions to recover chattels with or without damages; (7) claims against a trustee by virtue of a contract or operation of law; and (8) actions arising out of the same transaction or transactions connected with the same subject of action. CLARK 441.

61. CLARK 434.

62. FED. R. CIV. P. 18(a). These states are listed in CLARK 443.

63. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580 (1952). *See* Joiner, *Michigan Procedural Revision: A Partial Set of Rules*, 38 MICH. S.B.J., Jan. 1959, p. 10.

64. FED. R. CIV. P. 42(b); FLA. R. CIV. P. 1.270(b). For a general background on joinder of causes of action under common law, equity, and the codes, *see* Blume, *A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims*, 26 MICH. L. REV. 1 (1927).

65. United States v. Ziomek, 191 F.2d 818 (8th Cir. 1951).

66. Smith v. Bear, 237 F.2d 79 (2d Cir. 1956); Venn-Severin Mach. Co. v. John Kiss Sons Textile Mills, Inc., 2 F.R.D. 4 (D.N.J. 1941).

67. Palmer v. Palmer, 31 F. Supp. 861 (D. Conn. 1940).

in states with a merged system having joinder provisions similar to the federal rule have granted similar freedom to plead both legal and equitable causes in the same complaint.[68]

Professor Wright has advised: "[I]f there is any reason why bringing in another party or another claim might get matters settled faster, or cheaper, or more justly, then join them."[69] Although the Florida rule governing joinder of causes of action in itself will permit extensive joinder of legal and equitable causes, some restriction may be encountered when an attempt is made to join the claims of more than one plaintiff. Presumably, the joinder-of-causes-of-action provision applies to litigation involving both single and multiple parties. Its usefulness in encouraging joinder under the merged system may be curtailed, however, by Florida's somewhat restrictive rule governing permissive joinder of plaintiffs.

Permissive Joinder of Plaintiffs

Rule 1.210(a) of the Florida Rules provides for permissive joinder of plaintiffs: "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs." New York and English experience with such permissive joinder provisions indicates an inseparable relationship between rules controlling joinder of parties and those regulating joinder of causes of action. If the joinder-of-plaintiffs rule is the more restrictive of the two rules, it often sets the limit for joinder of causes of action.[70] Other jurisdictions have found that wording similar to that used in the Florida provision has overly restricted joinder of plaintiffs and causes of action. The Florida rule lists two separate requirements that must be met before plaintiffs may be joined: each plaintiff must have an interest "in the subject of the action *and* in obtaining the relief demanded."

The present rule copies the phraseology of Florida's former equity practice.[71] This provision was first used in New York's original Field Code and was in keeping with the drafters' intention to apply equity procedures to all

68. Crabtree v. Standard Sav. & Loan Ass'n, 187 Okla. 189, 102 P.2d 127 (1940) (suit for specific performance and in the alternative for damages). Early Missouri decisions showed a reluctance typical of states soon after merger to allow plaintiffs to join claims for both legal and equitable relief. *See* Curd v. Lackland, 43 Mo. 139 (1868) in which plaintiff was not allowed to unite an equitable claim for cancellation or reformation of a deed with a legal claim for possession. *Cf.* Gott v. Powell, 41 Mo. 416 (1867). Later cases revealed the courts' acceptance of joining legal and equitable claims. In Martin v. Turnbaugh, 153 Mo. 172, 54 S.W. 515 (1899), the court noted that: "[T]he petition may now have a count at law and a count in equity . . . the answer may contain a legal defense, an equitable defense, and an equitable cross bill or counterclaim . . . and the reply may set up legal or equitable defenses to the new matter set up in the answer . . . . The object of all which [*sic*] is to simplify proceedings, and to settle the whole controversy between the parties in the one action." *Id.* at 186, 54 S.W. at 517.

69. Wright, *supra* note 63, at 632.

70. *See* McBaine, *Recent Pleading Reforms in California*, 16 Calif. L. Rev. 363, 381 (1928); Toelle, *Joinder of Actions—With Special Reference to Montana and California Practice*, 18 Calif. L. Rev. 459, 470 (1930).

71. Florida Equity Rule 8, Fla. Laws 1931, ch. 14,658, §8.

actions under the Code.[72] Since its first adoption in the Field Code, the provision has appeared at one time or another in the code or court rules of more than twenty states.[73] In New York it was soon recognized that the dual requirements, when strictly interpreted, would occasionally be a stumbling block to plaintiffs. Some courts even required that all plaintiffs have an interest in the *whole* subject of the action and in *all* relief demanded.[74] After several intermediate amendments to the 1848 provision, each proving somewhat inadequate, New York adopted the full federal reform in 1949.[75]

Courts in Missouri have dismissed contract actions under an identical provision because all plaintiffs "were not interested in the relief demanded," when multiple obligees with separate interests sued their common obligor,[76] and when obligees under separate contracts sued the same obligor.[77] A history of the Missouri Rules[78] points out that the court's confusion resulted from failure to apply the phrase "an interest in" equally to both clauses, "subject of the action" and "relief demanded." Under Missouri's unfortunate interpretation, each plaintiff would have to be entitled to relief identical with that requested by every other plaintiff. Pomeroy noted, however, that neither extent nor source of the "interest" was significant as long as the two requirements were satisfied.[79] In 1943, Missouri adopted what is in substance the federal rule discussed below.[80]

California's experience with a Florida-type provision, from 1872 until substitution of a different rule in 1927,[81] prompted a change in the provision's wording from "and" to "or," thereby placing the requirements in the alternative. Numerous legislative measures specifically abolishing restrictive judicial interpretations of the former provision were also enacted.[82]

The Wisconsin Supreme Court in 1956 also placed the joinder require-

72. N.Y. Sess. Laws 1848, ch. 379, §97.

73. These states are listed in Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action,"* 18 CORNELL L. Q. 20, 25 n.31 (1932).

74. Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1950). *See* Gray v. Rothschild, 48 Hun 596, 1 N.Y. Supp. 299 (Sup. Ct. 1888), *aff'd*, 112 N.Y. 668, 19 N.E. 847 (1889) (claims by multiple plaintiffs for money damages dismissed). For a discussion of the significance of the term "subject of action" *see* Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action (pts. 1-2)*," 18 CORNELL L.Q. 20, 232 (1932-1933).

75. N.Y. CIV. PRAC. ACT §212 (McKinney 1963).

76. Keary v. Mutual Reserve Fund Life Ass'n, 30 F. Supp. 359 (C.C.E.D. Mo. 1887), *error dismissed*, 136 U.S. 359 (1890).

77. Ballew Lumber & Hardware Co. v. Missouri Pac. Ry., 288 Mo. 473, 232 S.W. 1015 (1921).

78. Wheaton, *History of Civil Procedure in Missouri*, 29 MO. ANN. STAT. 1, 6 (1949).

79. J. POMEROY, CODE REMEDIES 166 (4th ed. 1904).

80. 29 MO. ANN. STAT. §507.040 (1949).

81. *See, e.g.*, Daly v. Ruddell, 137 Cal. 671, 70 P. 784 (1902); Geurkink v. Petaluma, 112 Cal. 306, 44 P. 570 (1896) (where abutting landowners whose respective lots would be similarly damaged by a threatened change of watercourse were allowed to join suits to restrain the change but not to recover damages).

82. CAL. CIV. PRO. CODE §378 (Deering 1959). *See* Yankwich, *Joinder of Parties in the Light of Recent Statutory Changes*, 2 So. CAL. L. REV. 315 (1929), to the effect that the object of the 1927 amendment was to avoid the double requirement by providing two classes of persons eligible to join as plaintiffs, as specified in the amended rule.

ments in the alternative by substituting "or" for "and," but it did not add the liberalizing provisions found in the 1927 California amendment.[83] The Judicial Council of Wisconsin indicated that the change was to allow joinder of plaintiffs with different interests in the subject of the action and to permit them to ask for the same or different types of relief.[84] The change was also intended to permit joinder of plaintiffs who were commonly interested in the same relief, even though there was no common interest in the subject of the action.[85]

The successive repudiation of the provision by New York, Missouri, California, Wisconsin, and other states[86] indicates a growing recognition of the clause's shortcomings. As shown above, it has produced results contrary to the liberal pleading rules' objective to join plaintiffs whenever the subject matter of the action can be conveniently and fairly litigated in one trial. A rule unduly limiting joinder of plaintiffs may prevent full use of Florida's provision for free joinder of causes of action. Serious consideration, therefore, should be given to replacing rule 1.210 (a) with one more in keeping with the objectives of merger. The present Florida provision dictates to rather than guides the court.[87] It can automatically preclude joinder of plaintiffs who have more than one question of law or fact arising out of circumstances sufficiently related to justify a single trial. Several plaintiffs, some requesting legal relief and others equitable relief, frequently want to bring a suit based on allegations arising from a common occurrence or event. Under a strict interpretation of the joinder provision, a single suit would be impossible because of the plaintiffs' inability to qualify as having a common "interest in the relief demanded." The broad provision for joinder of causes of action is thereby rendered ineffective.

This restrictive effect has motivated over one-third of the states[88] to reject such provisions and to adopt more liberal ones that essentially require only that the case present a common question of law *or fact* affecting all parties. Consider the provision in the Federal Rules:[89]

> Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action . . . . *A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.* Judgment may be given for one or more of the plaintiffs according to their respective rights to relief . . . .

Such a rule would be broad enough to permit joinder of plaintiffs com-

83. Court Rules, 271 Wis. v, vi (1956) (§260.10).

84. WIS. STAT. ANN. §260.10 (1957) (interpretive commentary).

85. *Id.*

86. For a listing of states that have enacted new provisions liberalizing joinder of causes of actions and parties, see 1955 WIS. L. REV. 458, 471 n.72.

87. CLARK §58, at 369.

88. CLARK §58.

89. FED. R. CIV. P. 20 (a) (emphasis added).

mensurate with the present provision for joinder of causes of action in Florida. It contains reasonable limits within which the trial judge may exercise his discretion to assure an unprejudiced, yet efficient, trial of issues common to the plaintiffs. Although Florida courts apparently did not find the present rule to be a major procedural stumbling block before merger, a new rule similar to the Federal Rule would avoid problems experienced by other jurisdictions and insure maximum use of the expanded joinder-of-claims provision under merger.

RES JUDICATA

Res judicata, or former adjudication, describes the effect of prior litigation on a subsequent proceeding: a judgment on the merits upon an issue in controversy between parties is conclusive in any subsequent litigation upon the same subject matter between those same parties.[90] There are two aspects of the doctrine. The first concerns the effect of a prior judgment in a subsequent trial based on the same cause of action. The second is the effect of a judgment in a subsequent trial based on a different cause of action.

The effect of res judicata, when the same cause of action is involved, is that if plaintiff prevails in the first suit, his cause of action is merged in his judgment or decree and may never again be made the subject of judicial inquiry; if he loses in the first suit, his cause of action is barred from subsequent litigation.[91] In order for the defense of bar or merger to be successful in the subsequent action, the former judgment must have been on the merits,[92] and the defendant's pleading must clearly show that the former judgment contained all elements necessary for res judicata to apply:[93] identity in the two suits of (a) parties,[94] (b) the thing sued for,[95] (c) the

90. Town of Boca Raton v. Moore, 122 Fla. 250, 165 So. 279 (1936). " '[R]es judicata' . . . may be briefly defined as the doctrine that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties and of their privies, in all other actions and suits . . . on the points and matters in issue in the first suit." United States Gypsum Co. v. Columbia Cas. Co., 124 Fla. 633, 636, 169 So. 532, 534 (1936).

91. RESTATEMENT, JUDGMENTS §§47, 48 (1942).

92. Armstrong v. County of Manatee, 49 Fla. 273, 37 So. 938 (1905). FLA. R. CIV. P. 1.420 states that voluntary dismissal of a suit by a party who has once dismissed an action based on or including the same claim, or involuntary dismissal by the court, unless otherwise specified in the court's order of dismissal, operates as an adjudication on the merits.

93. Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943). The pleadings must be specific enough to permit an intelligent decision, as regards res judicata, to be made thereon, Moorhead v. Moorhead, 159 Fla. 470, 31 So. 2d 867 (1947), and the party asserting the plea has the burden of proof. Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841 (1943).

94. Ford v. Dania Lumber & Supply Co., 150 Fla. 435, 7 So. 2d 594 (1942). Knowledge of or interest in the suit is not sufficient to make one a party thereto. The party to be estopped must have formally intervened or been served with process in the earlier suit, Virginia-Carolina Corp. v. Smith, 121 Fla. 720, 164 So. 717 (1935). Of course, persons in privity with the parties to a suit, who stand in mutual or successive relation to the same right are also bound by that adjudication. King v. Duke, 129 Fla. 741, 176 So. 787 (1937).

95. State v. Dubose, 152 Fla. 304, 11 So. 2d 477 (1943).

quality of the parties,[96] and (d) the cause of action.[97] The scope of bar or merger includes not only the issues actually litigated in the former suit, but also those that might have been litigated in sustaining or defeating the claim asserted.[98]

The second aspect of res judicata is generally known as collateral estoppel. When the parties to the former trial are litigating a different cause of action, issues of fact and certain issues of law actually litigated and essential to the earlier judgment are conclusively determined and cannot be relitigated.[99] There is no inequity in allowing res judicata to foreclose subsequent consideration of matters that were actually litigated in a former suit. When, however, the doctrine is allowed to foreclose consideration of matters that *might* have been litigated in the former suit, but which in fact were not, the result might well be inequitable.[100] It is as to this aspect of the doctrine that considerable disagreement over the wisdom of its use has arisen.[101]

Prior to the liberalization of pleading and joinder rules and the merger of law and equity, collateral estoppel was relatively free of unjust results. The scope of trial was sharply limited as to the number of issues that could be litigated in one lawsuit and, of course, combining legal and equitable claims was prohibited. Therefore, it was reasonable to require litigants to present all claims and defenses in one action and to disallow subsequent litigation of omitted claims or defenses. Liberalization of procedural rules and merger, however, permit adjudication of all legal and equitable claims between the parties in one suit, regardless of their logical inconsistency.[102] The question posed by merger, then, is the extent to which courts should allow res judicata to make compulsory that which is now merely permissible and desirable. It is obvious that strict application of res judicata to an expanded notion of cause of action would be an effective deterrent to litigants who wish to "hedge their bets" and rely on separate suits to enforce their rights. Subsequent suits would be impossible, since the matter which plaintiff would seek to have resolved would usually be one that "might have been offered" at the earlier trial. Strict application would thus compel parties to take advantage of the liberal joinder provisions of the code and litigate

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96. *Id.*

97. Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926). In this respect, the test of a cause of action is the identity of the facts essential to maintenance of the suit, Jackson v. Bullock, 62 Fla. 507, 57 So. 355 (1911).

98. State v. Mayo, 87 So. 2d 501 (Fla. 1956); Grant v. Hammond-Jones, Inc., 79 So. 2d 423 (Fla. 1955); *In re* Haskins' Estate, 63 So. 2d 320 (Fla. 1953); Wade v. Oliver, 94 Fla. 817, 114 So. 548 (1927); Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926); Sauls v. Freeman, 24 Fla. 209, 4 So. 525 (1888).

99. RESTATEMENT, JUDGMENTS §§68(1), 70 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 840 (1952).

100. *E.g.*, Ajamian v. Schlanger, 14 N.J. 483, 103 A.2d 9, *cert. denied*, 348 U.S. 835 (1954). *See generally* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

101. Cleary, *supra* note 100, at 341, is one of many who doubts the wisdom or justice of application in such a case. *Contra*, Wheaton, *Causes of Action Blended*, 22 MINN. L. REV. 498 (1938), who favors strict application of the rule in such cases.

102. FLA. R. CIV. P. 1.110(g).

all claims and defenses arising from the same transaction in one lawsuit. The countervailing consideration, however, is that foreclosure of a party's right to bring suit on a meritorious claim because of earlier failure to assert that claim, whether by negligence, inadvertence, or ignorance, seems a harsh manner by which to enforce the liberal joinder provisions of the new code. Examination of the historical application of res judicata prior to merger and the purposes of the doctrine is helpful in finding an equitable compromise.

Prior to merger, the existence of separate and independent court systems often necessitated resort to two proceedings in cases where a plaintiff was entitled to relief from both systems. If the situation was such that the legal and equitable remedies were alternatives, a second trial was possible if plaintiff's first choice of remedies was denied him for a reason that did not preclude the alternative remedy. In such cases, a judgment or decree in the first trial did not necessarily constitute a bar or merger. If plaintiff first sued in equity and lost, res judicata did not bar a subsequent action at law. Neither bar nor merger applied because the causes of action were not identical. By the application of collateral estoppel, however, matters actually litigated in, and essential to, the decree of the former equitable suit were not open to relitigation.[103]

In the typical premerger situation, plaintiff first sought an equity decree and then judgment in an action at law. It was possible for a court of equity, once having obtained jurisdiction to try the equitable issues, to dispose also of any legal issues in order to avoid multiplicity of trials. This exercise of jurisdiction over legal issues has been termed the "clean-up" doctrine.[104] However, the chancellor, at his discretion, could deny plaintiff's request to have the court consider the legal issues,[105] and the option initially lay with the plaintiff whether he would seek "clean-up." Neither the chancellor nor the defendant could force disposition of the legal portion of the case in equity, and plaintiff's failure to move for resolution of the entire case in equity was not penalized by subsequently barring litigation of the legal issues in a court of law.[106]

If plaintiff's suit in equity was unsuccessful, the decree had to be on the merits of the dispute in order to sustain a subsequent plea of res judicata. Dismissal of the suit for lack of equitable jurisdiction, because plaintiff had an adequate remedy at law, because of plaintiff's "unclean hands," or because of laches, was not deemed a final adjudication for res judicata purposes, and

103. RESTATEMENT, JUDGMENTS 68-69, 71-72 (1942).

104. C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 67 (2d ed. 1908); J. POMEROY, EQUITY JURISPRUDENCE §§181, 231 (5th ed. 1941). The term "clean-up" is taken from Levin, *Equitable Clean-up and the Jury—A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951). "Clean-up" was often unavailable. In Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928), for example, an injunc- was granted in an antitrust suit but treble damages were refused because of the necessity of a jury trial to settle the issue of treble damages.

105. *E.g.*, Marks v. Gates, 154 F. 481 (9th Cir. 1907); Prince v. Lamb, 128 Cal. 120, 60 P. 689 (1900); Dunlap v. Wever, 209 Iowa 590, 228 N.W. 562 (1930); Ludlum v. Buckingham, 39 N.J. Eq. 563, 2 A. 265 (Ct. Err. & App. 1885).

106. *See generally* Levin, *supra* note 104.

a subsequent suit was not barred.[107] If a decree unfavorable to the plaintiff was on the merits, a subsequent legal action was not barred, but if issues litigated in the equitable suit were pivotal to the legal action, it would be unsuccessful by application of collateral estoppel. For example, if a decree denying specific performance of a contract held the contract to be void, a subsequent legal action for damages for breach of that contract would be futile.[108]

If the plaintiff was successful in equity and his cause of action warranted both legal and equitable relief, his cause of action was deemed not to have been merged in his decree, and he could bring a legal action.[109] In such a case, collateral estoppel would still prevent relitigation of those matters actually litigated in the equity suit which were essential to the decree.[110] If plaintiff's equitable suit was successful and his cause of action was such that he was entitled to either equitable or legal relief, but not both, plaintiff was precluded from subsequent legal relief, not because of res judicata, but rather because of the election of remedies doctrine.[111] When plaintiff first sought legal relief, similar doctrines were used to determine his right to subsequently sue in equity and the scope of the suit if allowed.[112]

Two separate court systems were unsatisfactory, both because of trial inconvenience and because the existence of separate systems, each of which lent finality to the decisions of the other, often led to injustice.[113] Under merger, every plaintiff has the opportunity to obtain full relief in one suit. How should res judicata be applied so as to encourage resort to one trial for settlement of all claims between the parties while avoiding unnecessary hardship for any party?

One approach to this question would be to consider each claim, legal or equitable, as a separate cause of action. Application of res judicata would thus be technically impossible, and collateral estoppel would control the permissible breadth of the subsequent suit as in premerger practice. If such an approach were taken, and plaintiff sought only equitable relief and lost, a subsequent legal action would not be barred even if based on the same facts. Collateral estoppel would merely limit the litigation to matters not actually litigated in the former suit or nonessential to the decree. Adoption of this approach, however, would be improvident, since it contradicts one of the main purposes of merger and is inefficient in terms of court time. Since both legal and equitable claims can be enforced in one action after merger,

107. Hauer v. Thum, 67 So. 2d 643 (Fla. 1953).

108. W. COOK, CASES ON EQUITY 1116-26 (4th ed. 1948).

109. *E.g.*, Chapman v. General Petroleum Corp., 152 Ore. 147, 52 P.2d 190 (1935); Perdue v. Ward, 88 W. Va. 371, 106 S.E. 874 (1921), which were suits for legal relief brought after the granting of an injunction.

110. In Hutchinson v. Patterson, 226 Mo. 174, 126 S.W. 403 (1910), equity adjudication as to dispute over title to a piece of land was held to be conclusive when plaintiff later brought a suit for ejectment.

111. 5 A. CORBIN, CONTRACTS 1222-23 (1951).

112. A possible combination was the bringing of a suit for specific performance after an earlier suit brought for damages, as in Van Buren v. Fine, 101 N.J. Eq. 373, 139 A. 486 (ch. 1927).

113. *E.g.*, *see* Reed v. Allen, 286 U.S. 191 (1932).

the plaintiff really has but one cause of action. Failure to assert a claim and an attempt to assert it in another suit is, therefore, splitting a cause of action; res judicata should preclude the second proceeding.[114]

The better solution to the question is to decide the entire controversy in one trial. A plaintiff who is granted or denied relief — whether equitable, legal, or both — should be barred from a subsequent suit arising from the same cause of action. A cause of action, instead of depending upon the nature of relief sought, should be defined as merely that set of facts necessary to sustain the claims for relief. If a set of facts were substantially the same in the former and subsequent suits, the latter should be barred, even if the relief sought or the legal theory advanced in the subsequent suit were not involved in the former. Liberal joinder provisions of the code support such a position, for plaintiff may now join in one suit as many claims as he has against the defendant, or may seek relief in the alternative, regardless of consistency of claims or whether they are equitable, legal, or both.[115]

If the suggested rule is administered inflexibily, however, injustice may still result. For example, assume that a plaintiff sues to enjoin a nuisance and also seeks legal damages. If the injunction is granted and the claim for legal damages is dismissed merely because of insufficient pleading, it would be unjust to prevent a subsequent action for recovery of the damages. Inflexibily requiring all claims to be enforced in one suit could lead to such a result.[116] Res judicata is harsh because it is one of the few procedural rules that results in complete loss of remedy. Allowing a second trial when the parties did not have a reasonable opportunity to litigate all the issues in the first trial would eliminate this harsh result. Certainly the harm done by not applying res judicata strictly would be outweighed by the injustice of preventing a second trial. Indeed, even before merger it was often held that a party who was under a misconception as to available remedies, and thus erred unintentionally, was not barred from a subsequent proceeding.[117] Res judicata should be applied to encourage a party to litigate all claims in a single suit. To avoid occasional injustice, however, the doctrine should be applied with discretion and relaxed when failure to assert a claim is excusable or due to circumstances beyond the party's control and responsibility.

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114. "There seems no occasion for adopting the inconvenient rule that there are separate causes of action for each claim, legal and equitable; in fact to do so would be to set aside the well-settled rule of res judicata applied before the codes, namely, that matter once threshed out either at law or in equity could not be again litigated in the other tribunal. Formerly a litigant in the wrong court was not thereby prevented from going into the other court; but there is no longer reason for that particular rule. Hence the rule against splitting a cause of action is properly applied to prevent the litigation of legal and equitable claims on such cause at different times." CLARK 475-76.

115. FLA. R. CIV. P. 1.110 (g).

116. *See* Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N.W. 767 (1902), in which the court held, under facts similar to those hypothesized, that plaintiff's later suit in which he claimed legal damages was barred, plaintiff having but one cause of action, which he split up.

117. Harris v. Owens, 153 Fla. 310, 14 So. 2d 426 (1943).

JURY TRIAL

The right to jury trial of issues of fact should be the only procedural distinction between law and equity in a merged system.[118] Determining when the right is available for an historically legal action is frequently difficult. The problem exists because of the former separation of law and equity. Jury trials were available at law as a matter of right and were unavailable in equity. Whatever the original reasons for this distinction and regardless of its soundness, it is no longer open to debate. The distinction has existed for many years and is firmly grounded in state and federal constitutions[119] and in procedural rules.[120] The design of the rules is clearly to preserve the constitutional right to jury trial[121] as it existed at common law.[122]

Prior to merger of law and equity and prior to liberal procedural rules, there was little difficulty in complying with the constitutional mandate. Plaintiff's choice of forum determined to a large extent whether either party could receive a jury trial. If plaintiff brought an action at law and the cause of action was cognizable at law, either party was entitled to jury trial. On the other hand, a suit in equity effectively foreclosed either party's right to jury trial. There was little chance of adjudication of legal and equitable claims in the same action.[123]

The Florida Rules now permit,[124] and sometimes require,[125] adjudication of legal and equitable claims in the same action. The right to jury trial, however, is specifically preserved,[126] and neither party is said to have waived jury trial either by joining a legal claim with an equitable one or by asserting a legal counterclaim.[127] Where a single claim is asserted and a single remedy sought, there is no difficulty in historically classifying the action as legal or

118. "[T]he distinction between law and equity has no procedural significance whatever except where the right to a jury trial has been affirmatively denied, after a timely demand, in an action which historically would be considered as arising at 'law.'" Groome v. Steward, 142 F.2d 756 (D.C. Cir. 1944).

119. U. S. CONST. amend. VII; FLA. CONST. Decl. of Rights §3.

120. FED. R. CIV. P. 38; FLA. R. CIV. P. 1.430.

121. "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 inviolate." FED. R. CIV. P. 38(a). "The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate." FLA. R. CIV. P. 1.430(a).

122. "The right of trial by jury shall bee [*sic*] secured to all, and remain inviolate forever." FLA. CONST. Decl. of Rights §3. This section is designed to preserve and guarantee right of trial by jury in proceedings according to the usage of the common law as it was known and practiced at the time of adoption of the constitution. Hawkins v. Rellim Inv. Co., 92 Fla. 784, 110 So. 350 (1926).

123. *But cf.* FLA. R. CIV. P. 1.8(g) that, prior to merger, permitted a party to assert either a legal or equitable defense or both regardless of the substantive quality of the claim-in-chief.

124. FLA. R. CIV. P. 1.110(g).

125. FLA. R. CIV. P. 1.170(a).

126. FLA. R. CIV. P. 1.430(a).

127. Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961); Ring v. Spina, 166 F.2d 546 (2d Cir.), *cert. denied*, 335 U.S. 813 (1948); Hightower v. Bigoney, 156 So. 2d 501 (Fla. 1963).

equitable. Such cases present no problem, even after merger. However, complex actions — now permitted by the rules — that have no precise historical analogue do present a problem.

Statistics shed light on the potential impact of the problem. In Florida for the year 1965 (prior to merger), the percentage of civil cases tried before a jury was 3 8/10 per cent of the total number of civil cases.[128] According to a premerger study by the American Law Institute, this percentage is closely approximated in the thirteen federal circuits.[129] These figures reflect the average number of cases in which a party is likely to demand and receive a jury trial. The American Law Institute figures, moreover, disclose that, of the "legal" cases tried before a jury, fifty-five per cent involved negligence or other torts.[130] Such cases are not likely to involve both legal and equitable claims even after merger; therefore, jury trial problems in such cases are improbable. There are no available Florida figures, similar to the American Law Institute figures, which detail the breakdown of jury trial cases by type. One could reasonably assume, though, that a similar situation obtains in Florida since the jury trial-civil case ratio in both Florida and the federal circuits is similar. Thus, nontort legal cases, representing but roughly two per cent of the total number of civil cases, are the only ones in which the right to jury trial is a problem. Assuming no abnormal increase of jury trials during merger, the problem of right to jury trial will arise in only a small number of cases. Even in these cases, the problem will not arise unless three conditions exist: "(a) one party . . . desire[s] a trial by jury, (b) the other party . . . [does] not, and (c) the court cannot fairly decide between them."[131] From the standpoint of case load, therefore, the right to jury trial is not an overwhelming problem. If no jury is demanded, the case will be docketed for trial by the court.[132] If jury trial is demanded, and there is no opposition to the demand, the case will be tried before a jury. Even if the demand is opposed, the legal or equitable nature of the action may be obvious, thus clearly indicating whether the right exists.

A single claim and demand for a single remedy, when met merely by a negative defense, presents no difficulty. Neither does joinder of several claims or defenses, of itself, create any problem. In either case, if the claims, remedies, and defenses are all equitable or all legal, a rational classification of the action as historically legal or equitable is easy. Even if the claims or defenses are part legal and part equitable, but independent in character, no jury trial problem exists. Upon proper demand for jury trial and oppo-

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128. JUDICIAL CONFERENCE OF FLORIDA, Eleventh Annual Report (1966).

129. A.L.I., A STUDY OF THE BUSINESS OF FEDERAL COURTS 76 (1939), as cited in Joiner & Geddes, note 135 *infra*.

130. *Id.*

131. CLARK 94. FLA. R. CIV. P. 1.430 is instructive in this respect since failure of a party to demand a jury trial as required, *i.e.*, by service of demand any time after commencement of the action but not later than ten days after the last pleading directed to an issue triable by jury as of right, is deemed to constitute a waiver of the right to jury trial.

132. FLA. R. CIV. P. 1.430.

sition by the adverse party, the claims can be severed and separately tried.[133] The order of trial is immaterial because res judicata will not apply to the completely independent claims and defenses. If there are issues common to and determinative of both the legal and equitable claims, severance and separate trial of the claims present the problem determining which trial should take place first. The order of trial is important because the factual determinations in the first trial will bind the second trial as to those facts essential to the prior litigation.[134] If the trial court exercises its discretion and orders separate proceedings, the hearing in equity first, right to jury trial of the legal issues is rather meaningless. In spite of this, however, some maintain that the determination of order of trial, as well as the determination of the necessity or expediency of separate trials, should be purely discretionary with the trial judge.[135] A better solution is offered by Mr. Justice Black in *Beacon Theatres, Inc. v. Westover*[136] where it was held that the lower court's decision to try the equitable claim first was an abuse of discretion, correctable by write of mandamus. The Court further held that: "[O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[137] Prior to *Beacon Theatres*, federal courts were in disagreement whether the trial court's decision in scheduling order of trial was absolutely discretionary.[138] It is submitted that, in light of the constitutional requirement and strong policy supporting jury trials of legal issues, this is the only defensible solution to the order-of-trial problem.

A more difficult situation obtains when plaintiff has only one claim but seeks several remedies, either cumulatively or alternatively, some of which were historically available only at law and some only in chancery. Similar difficulties arise when, for example, plaintiff's equitable claims are met by a defense that raises legal issues, and separate trials are impracticable because of the close relationship between the claim and defense.

One approach to this problem is to ascertain the "basic nature of the action as a whole" and grant the party's demand for a jury trial if that "basic nature" is legal.[139] This test has been severely criticized, and right-

133. FLA. R. CIV. P. 1.270(b): "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claims, counterclaim, or third party claim or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issue." *Cf.* Bruckman v. Hellzer, 152 F.2d 730 (9th Cir. 1946); United States v. Connoly, 3 F.R.D. 417 (D. Mont. 1943); Bercovici v. Chaplin, 56 F. Supp. 417, 3 F.R.D. 409 (S.D.N.Y. 1944).

134. See discussion note 98 *supra.*

135. Joiner & Geddes, *The Union of Law and Equity—A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059 (1957).

136. 359 U.S. 500 (1959).

137. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

138. *Compare* Tanimura v. United States, 195 F.2d 329 (9th Cir. 1952) *and* Orenstein v. United States, 191 F.2d 184 (1st Cir. 1951) (in which equitable issues were ordered to be tried first), *with* Bruckman v. Hellzer, 152 F.2d 730, 732 (9th Cir. 1946) *and* Leimer v. Woods, 196 F.2d 828 (8th Cir. 1942) (in which the legal issues were tried first).

139. Fraser v. Geist, 1 F.R.D. 267 (E.D. Pa. 1940). "The decision as to whether or not the plaintiff is entitled to a jury trial as 'of right' must rest upon a prior determination as

fully so.[140] It contemplates classification based on the procedural distinction supposedly abolished by merger. Moreover, the cause of the jury trial problem — liberal code provisions for pleading, joinder, and counterclaims — makes possible actions more complex than those prior to merger. The distinctions inherent in this approach are based on a time when substantive law was less developed and litigation less complex. There being no historical analogue to the new actions, attempts to classify them according to historical, now repudiated, distinctions must fail. The basic-nature-of-the-action approach is often defended by fictional reasoning based on waiver[141] or a purported analogy to the premerger practice of granting legal relief in a suit in equity when that relief was incidental to the equitable relief.[142] Similarly, courts have selected one issue in the case and classified it as the "paramount issue," the legal or equitable nature of which determined the nature of the action as a whole, and hence, the right to a jury trial.[143] In addition to reaching incorrect and historically unfounded results,[144] this approach derogates the spirit of reformed pleading. It presupposes a theory-of-the-pleading, that is, determining the "nature" of the action from the prayer for relief, a

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to whether the action, in its essence, is one at law or in equity. If it is at law, the plaintiff is entitled to jury trial; otherwise he is not." *Id.* at 267.

140. C. WRIGHT, FEDERAL COURTS 354 (1963); Clark & Wright, *The Judicial Council and the Rule Making Power — A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1950); Joiner & Geddes, *supra* note 135; Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453 (1952).

141. The idea is that one waives one's right to a jury trial when, by joinder or counterclaim, one interposes in an "equitable" action a claim that might have been brought independently and tried to a jury. *E.g.*, Morrissey v. Broomal, 37 Neb. 766, 56 N.W. 383 (1893); Mackellar v. Rogers, 109 N.Y. 468, 17 N.E. 350 (1888); Installment Bldg. & Loan Co. v. Wentworth, 1 Wash. 467, 25 P. 298 (1890). The obvious drawback to this doctrine is that it derogates from the code policy of encouraging the inclusion of as many causes in one action as are convenient. If a joinder of claim or counterclaim is compulsory, such a holding would be untenable since it requires the destruction of a constitutional right as the penalty for asserting another legal right. Ring v. Spina, 166 F.2d 546 (2d Cir. 1948).

142. This is a reference to the earlier chancery practice of granting relief ordinarily available only at law. A court of equity would grant it in a case properly before it to avoid putting a party to the expense of going to a new court to gain full relief, Gulbenkian v. Gulbenkian, 147 F.2d 173 (2d Cir. 1945); C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 67 (2d ed. 1908). However, such precedent is limited and, in any case, with the necessity of beginning again having been eliminated by merger, it is not clear why this practice, historically justified only to avoid a multiplicity of suits, should be continued. In relation to the right to jury trial, it is an obvious fiction used to defeat that right where appropriately asserted. The courts characterize a suit as "equitable" and treat the demanded legal relief as analogous to the merely "incidental" legal relief that equity could always grant. This approach has been repudiated in the federal courts. Dairy Queen, Inc. v. Woods, 369 U.S. 470 (1962).

143. Mochsos v. Bayless, 126 Okla. 25, 258 P. 263 (1927); Carlisle Packing Co. v. Demming, 62 Wash. 455, 114 P. 172 (1911). Little need be said of the inappropriateness and lack of historical foundation of such an approach.

144. It has been pointed out that this test is sure to expand or contract jury trial rights in any case in which it is applied. McCoid, *Jury Trial in Federal Courts*, 45 IOWA L. REV. 726, 727 (1960).

practice repugnant to modern pleading.[145] This approach should be rejected as untenable and undesirable.

Another approach to determining the right to jury trial classifies issues as legal or equitable depending upon the desirability of jury trial in a given action. Desirability is determined by such considerations as complexity of issues and inherent capabilities of either judge or jury to deal with them.[146] If one accepts the desirability of retaining the right of jury trial as it existed before merger, insofar as it is possible to do so, there can be no question that this approach is less than desirable. It expands in some cases, and contracts in others, the right to jury trial as it existed before merger. It is, therefore, unlikely that courts will embrace it too enthusiastically.[147]

Another approach extends to *all* cases the right to jury trial.[148] For obvious reasons, this approach would be impractical and virtually impossible to administer. The most widely accepted method of resolving the right-to-jury-trial problem in a merged system is to determine the equitable or legal character of each issue of fact involved in an action and then to try it separately in the appropriate court.[149] This method gives effect to the liberal joinder and counterclaim provisions of the new procedural codes, and, unlike some of the other suggested approaches, recognizes the necessity of maintaining the right to jury trial as it existed prior to merger. Its major shortcoming is that most issues of fact cannot, by themselves, be characterized as either legal or equitable since an issue of fact usually could have arisen historically either at law or in equity.[150] Various rationale have been formu-

145. See discussion at note 21 *supra*. A theory of the pleading approach, because it would apply to all causes, would be unnecessarily broad and too all-encompassing. As noted above, note 128 and accompanying text, the number of cases in which the jury trial problem would be present is an exceedingly small percentage of total cases disposed of by our court system. Pleadings should be simple narrative devices that serve merely to relate plaintiff's complaint, give adequate notice to defendant and the court, and narrow the issues. To bog down the pleadings by assigning to them the function of determining the right to jury trial would be an undue burden in the great majority of cases. *See* Pike & Fischer, *Pleadings and Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645 (1945).

146. Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453 (1952).

147. See discussion at note 118 *supra*.

148. Van Hake, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157 (1952).

149. "Basic issues formerly triable as of right by a jury are still triable by a jury as matter of right." Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62, 65 (3d. Cir. 1943). "[T]he basic nature of the issues must determine whether this be a 'jury action' and . . . the nature of these basic issues must be determined." General Motors Corp. v. California Research Corp., 9 F.R.D. 565, 567 (D. Del. 1949); *see* CLARK 53-54; 5 J. MOORE, FEDERAL PRACTICE ¶38.16 (2d ed. 1965); Clark & Wright, *The Judicial Council and the Rule Making Power—A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1949); Note, *The Effect of Law and Equity on the Right of Jury Trial in Federal Courts*, 36 GEO. L.J. 666 (1948).

150. As stated by McCaskill: "The right of jury trial . . . 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, any issue found in a law action may also be found in an equity suit. Issues bearing on title to land . . . of possession, of money due on promises, of damage due to property . . . are found in equity suits as well as in law actions. Issues are colorless apart from the proceeding in which

lated to overcome the lack of historical foundation of this "issue-oriented" method; for example, the plaintiff chose his "preferred theory of the pleadings,"[151] or the "basic nature of the issue was determined by the judge."[152] Neither rationale, however, overcomes the shortcoming stated by McCaskill: that issues have neither an equitable nor legal nature apart from the proceedings of which they are a part.[153] There having been no necessity for separation of issues before merger, a method of solving the right-to-jury-trial problem based on such a separation necessarily alters this right.

Another approach is to extend to parties the same control over the jury trial question that they exercised before merger. To the extent that one party (plaintiff or defendant) would have had control over the question as it arose in the various stages of litigation, his demand or opposition to jury trial would be sustained. Thus the parties' positions on jury trial and the relief sought would maintain the right to jury trial as it existed prior to merger.[154] Aside from the involuntary waiver inherent in this approach[155] and the havoc it wreaks on joinder of all claims in one action,[156] it embraces a fundamental shortcoming. It uses a premerger test to classify a form of action that could not have existed before merger.

To show that a party could have achieved a desired result before merger by maneuvering in a certain manner is significant only historically. What in fact a party may *now* do is the only relevant consideration. The right to jury trial should be determined solely on considerations of modern policy as grounded in the constitutional guarantee. Recent federal cases bespeak

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they are found . . . . They do not drift around in space, sole masters of their own destiny." McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. PA. L. REV. 315, 318-19 (1940).

151. 5 J. MOORE, FEDERAL PRACTICE ¶38.17 (2d ed. 1965), which suggests that if plaintiff pleads for equitable and legal relief in the alternative, his "preferred" remedy should determine the nature of the issue and hence of the action. This is untenable. If the courts require that when the appropriate remedy is in doubt, one must make a choice before any proof is adduced in order to settle the problem of jury trial, then instead of destroying the procedural barriers to joinder of equitable and legal claims the courts will be merely resurrecting the barrier and giving it another name. Moreover, since the purpose of the rules is to encourage (and by some views to compel) seeking of all claims in one suit, it would seem unconstitutional to then require a plaintiff (or defendant in cases of a compulsory counterclaim) to forego either the reliance on both theories of the claim to right to jury trial. Requirement that all claims be brought in one suit is sensible and just and, since the "preferred theory" approach, if coupled with that requirement, leads to derogation of the constitutional right to jury trial, the latter theory should be repudiated. *See generally* Morris, *Jury Trial Under the Fusion of Law and Equity*, 20 TEXAS L. REV. 427, 432 (1942).

152. General Motors Corp. v. California Research Corp., 9 F.R.D. 565 (D. Del. 1949).

153. McCaskill, *supra* note 150.

154. McCoid, *Jury Trials in Federal Courts*, 45 IOWA L. REV. 726 (1960).

155. A legal counterclaim, whether permissive or compulsory, to an equitable claim would waive defendant's jury trial rights since before merger such a counterclaim, if brought in equity, would be disposed of in equity either as incidental to the claim-in-chief or by trying the equitable claim first to the court, and effectively foreclosing defendant's jury trial on the legal issue. Florida has expressly rejected such an interpretation. Hightower v. Bigoney, 156 So. 2d 501, 509 (Fla. 1963).

156. See discussion at note 57 *supra*.

the utter hopelessness of a strictly historical approach to effectuate the constitutional guarantee of trial by jury of legal issues of fact.[157]

A better rationale is suggested by consideration of three federal court cases. *Beacon Theatres, Inc. v. Westover*[158] was an action in which both legal and equitable claims were asserted. Their relationship was such that determination of the first factfinder would necessarily bind the later one. Therefore, if the issues were to be separately tried, the order of trial was very important. The Court held that the legal claim should be tried first so that it would not be precluded from jury determination.[159] In *Dairy Queen, Inc. v. Woods*,[160] a plaintiff with a single claim sought both equitable and legal remedies. The Court laid to rest the "basic nature of the issue" test by rejecting the argument that a basic equitable issue precludes the right to jury trial on other legal issues. The Court stated: "Our previous decisions make it plain that no such rule may be applied in the federal courts."[161] In *Fitzgerald v. United States Lines, Co.*,[162] the Court held that when interdependent claims or remedies arise from a single set of facts, expediency and practicality may require that they be tried by a single tribunal. It held that since a jury must determine legal issues, the other equitable but interdependent issues must also be determined by a jury. *Fitzgerald* thus goes beyond *Beacon Theatre* and *Dairy Queen*: not only must legal issues be

157. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

158. 359 U.S. 500 (1959).

159. "[T]he trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510. "In the federal courts this jury right cannot be dispensed with, except by the assent of the parties entitled to it . . . ." *Id.* at 511.

160. 369 U.S. 469 (1962).

161. *Id.* at 470. The court further stated that the holding of *Beacon Theatres, Inc. i.e.*, that jury trial of legal issues may not be lost through prior determination of equitable claims, "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not . . . . [W]here there cannot even be a contention of such imperative circumstances, *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." *Id.* at 163.

162. 374 U.S. 16 (1963). The case was a suit brought by a seaman seeking damages under the Jones Act (which requires a jury trial) and also for maintenance and care (which, being cognizable in admiralty, does not require a jury). Plaintiff demanded a jury for all the issues growing out of the single accident. The trial court judge granted it as to the Jones Act claim but held the question of relief for maintenance and care to try himself after the jury trial. The Court of Appeals affirmed, 306 F.2d 461 (2d Cir. 1962) and the Supreme Court reversed, holding, inter alia that: "Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel, and can easily result in too much or too little recovery . . . . In the absence of some statutory or constitutional obstacle, an end should be put to such an unfortunate, outdated, and wasteful manner of trying these cases. Fortunately there is no such obstacle . . . . Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Id.* at 18-21. The court further held that since a jury is required to try the Jones Act claim: "[T]he jury . . . is the only tribunal competent . . . to try all the claims." *Id.* at 21.

tried first, but in certain circumstances, both equitable *and* legal issues must be submitted to a jury.

The reasoning and results of these three cases adequately effectuate the desirable policy strongly favoring resolution of all claims and defenses in one suit. The cases provide the only method of maintaining the constitutional guarantee of jury trial for legal issues and are in keeping with the stated position of preference, which jury trial enjoys in Florida.[163]

APPELLATE REVIEW

Before merger, the permissible scope of review of a trial court's findings depended upon whether the action was tried in equity or at law. If in equity, review was a reexamination of the entire record — both facts and law;[164] if at law, review was limited to consideration of alleged legal errors committed by the trial court.[165] Since the distinction between law courts and courts of equity has been abolished,[166] the proper scope of appellate review should be redetermined. To maintain the scope of review as it was before merger would be ill-advised. Preservation of the premerger distinctions between law and equity for purposes of appellate review, after they have been abolished at trial court level, would create needless confusion.

A reasonable alternative would have scope of appellate review depend on the presence or absence of a jury in the proceeding below. The constitutional guarantee of jury trial for legal issues of fact is the only feature of a legal action that, prior to merger, caused different treatment in appellate courts.[167] This guarantee still prevents appellate review of a jury's findings of fact. When there is no jury, however, either because it is substantively unwarranted[168] or because the parties waive it,[169] differences of treatment between legal actions and suits in equity are not merited. This is so because determination of what formerly would have been a legal issue by a court sitting without a jury is substantially the same as determination of a pre-

163. "Other cases could be cited in support of our thinking on the concept of trial by jury and its place in our jurisprudence. . . . [I]t was at one time the right arm of common law but . . . it is now the dividing line that separates law from equity and . . . it is guaranteed by both the state and federal constitutions. It has had a long and distinguished history and is now one of the main avenues through which the common man directs the working of democracy." Hightower v. Bigoney, 156 So. 2d 501, 509 (Fla. 1963).

164. "[A]n appeal in a chancery cause opens the entire case for consideration by the appellate courts," Jackson v. Jackson, 80 Fla. 557, 86 So. 510, 511 (1920); *see* Okeechobee County v. Florida Nat'l Bank, 145 Fla. 496, 1 So. 2d 263 (1941); 5 C.J.S. *Appeal and Error* §§1526, 1663-64 (1958).

165. Holstun v. Embry, 124 Fla. 554, 169 So. 400 (1936); Mellet v. Henry, 108 So. 2d 69 (3d D.C.A. Fla. 1959); Salter v. Knowles, 97 So. 2d 138 (2d D.C.A. Fla. 1957).

166. FLA. R. CIV. P. 1.040.

167. U.S. CONST. amend. VII and FLA. CONST. Decl. of Rights §3 were designed to preserve and guarantee right of trial by jury in proceedings at common law as known and practiced at the time the Constitutions were adopted. Hawkins v. Rellim Inv. Co., 92 Fla. 784, 110 So. 350 (1926).

168. See jury trial discussion, notes 118-163 *supra*.

169. FLA. R. CIV. P. 1.430.

merger equitable issue. Scope of review for the two types of issues after merger would, therefore, be the same. In cases tried by the court without a jury, review of findings of fact *and* law would be permissible; but in cases tried before a jury, there would *only* be review of alleged legal errors. In neither case would scope of review depend on the legal or equitable character of the issues.

Complete uniformity in appellate review could be accomplished by permitting review of only alleged legal errors, whether the case was tried before a jury or without one. Such a course would obviously curtail the scope of review drastically and shield appellate courts from the necessity of reviewing large trial records. This would be a considerable benefit in itself. Review of only alleged legal errors in all cases, at first glance, appears to be a radical departure from present practice. In fact, though, it is substantially in accord with actual practice of Florida's appellate courts. Cases reveal that they generally apply much the same review techniques to all cases — whether tried with or without a jury.[170]

Simplicity and uniformity in appellate practice is desirable, and the advantages of reducing the number of appeals and the complexities of records in cases that are appealed are obvious. Moreover, accordance of due weight to the findings of fact of those who actually heard the witnesses and weighed their credibility would be practical and wise. Review of only alleged legal errors in *all* cases would, therefore, be the most desirable scope of appellate review.

CONCLUSION

The merger of law and equity in Florida should be a boon to practitioners. Fully understood and employed, it should further simplify the procedural obstacles that have often impeded a quick and just conclusion to litigation.

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170. Courts will not review the weight of the evidence on appeal beyond ascertaining the legal sufficiency of the evidence to sustain the judgment or decree, either in cases tried to the jury, Holstun v. Embry, 124 Fla. 554, 169 So. 400 (1936), or in cases tried to the court in chancery, Exchange Nat'l Bank v. Smith, 148 Fla. 473, 4 So. 2d 675 (1941). Determination of questions of credibility and weight to be given evidence and testimony presented is for the trier of facts, be it a jury or the court. Povia v. Melvin, 66 So. 2d 494 (Fla. 1953), Wilson v. Madox, 97 Fla. 489, 121 So. 805 (1929), which were tried to a jury, and Peterson v. Hancock, 146 Fla. 410, 1 So. 2d 255 (1941), Joyner v. Bernard, 148 Fla. 649, 6 So. 2d 533 (1942), which were tried in chancery, support this same conclusion as do the cases cited therein. The trier of facts, whether it be judge, jury, or chancellor must make the decision as to which of the legally permissible inferences are to be drawn from the facts adduced at trial, whether the case be tried at common law without a jury as in National Sur. Corp. v. Windham, 74 So. 2d 549 (Fla. 1954), or tried to a jury as in Atlantic Coast Line R.R. v. Gary, 57 So. 2d 10 (Fla. 1952) and Palatka Abstract & Title Guar. Co. v. Haskell, 100 Fla. 134, 131 So. 394 (1930), or tried in chancery as in Helton v. Northern Cent. Trust Co., 114 Fla. 796, 154 So. 328 (1934) and Sapp v. Warner, 105 Fla. 245, 141 So. 124 (1932). These cases and the cases cited therein amply support the conclusion that regardless of the availability of different modes of review in cases arising at common law or in chancery, the Florida courts in fact apply the same scope of review in all cases, that scope being limited to the alleged legal errors committed by the trier of facts.

In the majority of cases, which lie wholly within the ambit of either equitable or legal doctrine, no change in procedure or substance will result. In cases that share characteristics of both equity and law, however, significant changes should result. Obviously, there will be no need to file two sets of pleadings, change courts, or, in the majority of cases, be concerned with the effect of prior litigation on a case. In short, most of the complications resulting from a dual court system have been eliminated. Problems still exist, however. The most troublesome of these problems have been indicated in hope that by forethought and provision for their occurrence members of the bench and bar may avoid their destructive effect on a procedural system designed to be expeditious and fair.

Pleadings, hopefully, will be further simplified and will remain unfettered by the "theory of the pleadings" philosophy, which has plagued the effectiveness of merger in other jurisdictions. The burden placed on the trial judge to determine the legal or equitable theory appropriate to the allegations may be eased through the pretrial conference. Joinder of causes of action will be essential to speedy and thorough resolution of controversies. To that end, the present Florida rules governing permissive joinder may require revision so as to be in accord with the spirit of merger. The problems posed by res judicata under merger can best be solved on a case-by-case basis. This is so because undue adherence to any abstract theory, based on trial convenience or administrative economy, is bound to work hardship in individual cases. The importance accorded jury trial in Florida and the public policy favoring it should outweigh countervailing considerations of economy and efficiency. The approach of recent federal court cases offers a convenient and easily emulated solution to the right-to-jury-trial problem in most cases. The scope of appellate review should be governed by simplicity and concern for uniformity of treatment of equitable and legal actions. These factors favor extension of "legal" review to all cases. In a merged jurisdiction in which more complex cases are bound to arise, pretrial conferences should be utilized frequently so as to minimize the chances of injustice caused by procedural technicalities.

As an adjunct to Florida's substantive law, the Florida Rules of Civil Procedure should not be allowed to trap the unwary or be used as deceptive devices of the trade specialist. The bench and the bar must be constantly concerned with them, their shortcomings, and their possible improvement. Only such concern will assure that they will remain mere aids in the speedy and fair solution of conflict, rather than ends in themselves.

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