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Equitable and Legal Rights and Remedies Under the New Federal Procedure

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BY THE enabling act which conferred on the Supreme Court of the United States the rule-making power to prescribe and regulate pleading, practice and procedure for civil actions in the district courts of the United States,¹ the Court was also authorized to "... unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."² In the exercise of the power so reposed in it, the Supreme Court promulgated the Federal Rules of Civil Procedure, which became effective on September 16, 1938, to govern the procedure in the district courts of the United States in all suits of a civil nature, whether cognizable as cases at law or in equity.

Rule 2, which is the keystone of the new procedure, reads as follows:

"Rule 2. One form of action. There shall be one form of action to be known as 'civil action'."

The purpose and effect of the foregoing rule was to abolish the procedural distinction between actions at law and suits in equity, as well as to abrogate the differentiation between various forms of actions at law. As was aptly stated by Edgar B. Tolman, the eminent Secretary of the Advisory Committee, which drafted the rules, "... the effect of these rules is to take off all the labels, abolish all the different forms of actions, and thus clear the way for the joinder of legal with equitable claims."³ While the coalescing of law and equity was a notable departure in federal practice and constituted one of

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¹ Act of June 19, 1934, 48 STAT. (1934) 1064; 28 U. S. C. (1941) §723(b)(c).

² *Ibid.*

³ AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE SYMPOSIUM ON FEDERAL RULES OF CIVIL PROCEDURE (1938) 275.

the outstanding achievements of the new practice, nevertheless this measure was not an unprecedented innovation, but, like so many other features of the new rules, had been in successful operation in other jurisdictions.

The abolition of procedural distinctions between law and equity and of the traditional armory of numerous forms of actions originated in the State of New York in 1848 as a result of the adoption by the legislature of the so-called Field code. Section 69 of this code, as amended the following year, provides as follows:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

From New York this reform measure rapidly spread to other jurisdictions, until a considerable number of states gradually adopted it. It also found its way to England.

The Supreme Court of Judicature Act of 1873⁴ completely reorganized the English judicial structure. Among other things, it substituted a single tribunal, known as the Supreme Court of Judicature, for the various courts that had existed in England for centuries, such as the High Court of Chancery and the various common law courts, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, and others. Pleading, practice and procedure are now regulated by rules of court. One of the principal features of the new system is the abolition of the distinction between suits in equity and actions at law. Order I, Rule 1, of the rules of the Supreme Court of Judicature governing this subject, provides as follows:

"All actions which, immediately before the 1st November, 1875, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham and all suits which, immediately before that date, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action."⁵

It should be observed, however, that the new court, although constituting a single tribunal, is divided into divisions, one of which is

⁴ 36 & 37 VICT. (1873) c. 66.

⁵ ANNUAL PRACTICE (1942) 1.

known as the Chancery Division, to which are assigned, generally speaking, all actions which prior to the reorganization would have been deemed suits in equity. Other divisions became known as the King's Bench Division and the Common Pleas Division, to which were assigned all cases which theretofore would have been regarded as actions at law. While the distinction between actions at law and suits in equity was abrogated, nevertheless the writ of summons by which an action is commenced, is required to specify the Division of the High Court to which it is intended that the action should be assigned.⁶ Consequently, a complete amalgamation of law and equity has not taken place, even though the same forms of pleading and the same type of procedure is followed in both classes of cases.

In the federal courts even prior to the introduction of the new rules several important inroads had been made on the traditional separation between law and equity. If a party resorted to a bill in equity when he should have brought an action at law, or vice versa, it was no longer necessary to dismiss the suit erroneously instituted and to commence a new proceeding. Authority was conferred on the court to transfer the cause from the equity to the law side of the court, or from law to equity, as the case may be, and to permit the pleadings to be amended so as to conform to the proper practice.⁷ The Act of March 3, 1915,⁸ also authorized the interposition of equitable defenses in actions at law and provided that in such a situation the defendant should have the same rights and obtain the same equitable relief as if he had filed a bill embodying the defenses. The Supreme Court held that under such circumstances the equitable issue should first be disposed of as in a court of equity and that then if an issue at law still remained, it would be triable to a jury. The court called attention to the fact that such a course would preserve the same order of procedure as that which prevailed under a system of separate courts. In such a jurisdiction, if a defendant in an action at law had an equitable defense he resorted to a bill in equity to enjoin the prosecution of the action until he could make his equitable defense effective by a hearing before the chancellor.⁹

It remained for the new rules, however, to create one form of

⁶ *Ibid*, Rule 1, p. 9.

⁷ EQUITY RULE 22, 38 STAT. (1915) 956, 28 U. S. C. (1941) §397; *Liberty Oil Co. v. Condon Bank* (1922) 260 U. S. 235.

⁸ 38 STAT. (1915) 956, 28 U. S. C. (1941) §398.

⁹ *Liberty Oil Co. v. Condon Bank*, *supra* note 7, at 243.

civil action in the federal courts and to abolish the procedural demarcation between law and equity. The purpose of this discussion is to explore some of the consequences of this far-reaching measure on the rights and remedies of the parties.

The basic principle that must underlie all discussions of the various ramifications of this intriguing topic is that the effect of the new rules is limited to an abolition of the procedural distinction between law and equity and to a substitution of a single form of civil action for suits in equity and actions at law. It does not extend to abrogating the differentiation and demarcation between the substantive rules of equity and the substantive common law. The distinction between equitable rights and legal rights likewise remains undiminished, as does also the classification of remedies into those of an equitable character and those of a legal nature. The innovation resulting from the new rules consists in the use of the same procedure for the purpose of vindicating equitable and legal rights and invoking equitable and legal remedies.

No other approach to this subject was feasible in the light of the provisions of the enabling act that conferred the rule-making power on the Supreme Court. The statute limited the authority vested by it to the regulation of pleading, practice and procedure. Obviously it was not intended to confer a power to modify substantive law by general rules.

There is a more fundamental reason, however, why any attempt to abolish the distinction between law and equity, except from a procedural standpoint, would have been impracticable. The differentiation between law and equity is one of the basic features of Anglo-American jurisprudence. While the explanation for the separation is to be found in what may be called accidents of history rather than any *a priori* reasoning, this circumstance does not detract from the conclusion that the distinction between substantive rules of law and equity is so much a part of the warp and woof of our jurisprudence and is so deeply imbedded in it, that the classification cannot be discarded without completely demolishing some of the foundation stones of our legal system. It is clear that no such result was intended by the draftsmen of the rules.

It is perhaps not felicitous, therefore, to speak of the new procedure as constituting a union, or a coalescing, or an amalgamation of law and equity, as occasionally has been done. From the substantive aspect, law and equity still remain separate and distinct as they were

previously. It may be of some significance in this connection to note the phraseology of Rule 1. That rule refers to "all suits of a civil nature whether cognizable as cases at law or in equity. . . ." It will be observed that it does not use the words "heretofore cognizable."

Actions at law and suits in equity still continue to be cognizable at law or in equity, as the case may be. According to Rule 2, the same form of action is used for both types of proceeding and according to Rule 18, legal and equitable claims may be joined in the same action.

These principles have been expressed by the courts in various forms. For example, Judge Brewster, for the District of Massachusetts, formulated this thought as follows:

"The distinction between Law and Equity, abolished by the new rules, is a distinction in procedure and not a distinction between remedies."¹⁰

In the Southern District of New York, Judge Mandelbaum stated,

"The new Federal Rules of Civil Procedure have abolished procedural distinctions between actions and the forms of action at law and in equity. So that, there is now only one form of civil action in the federal courts. . . . In other words, legal and equitable remedies may be administered in the same forum and in the same action. This, however, has not abolished the substantive distinction between law and equity."¹¹

In the Eastern District of Pennsylvania, Judge Kalodner enunciated this doctrine as follows:

"The rules of civil procedure have abolished the distinction in procedure between law and equity. The rules have not abolished the distinction between legal and equitable remedies. They still remain."¹²

Still another similar expression is found in a case decided by Judge McDuffie in the Southern District of Alabama,

"While the formal distinction between proceedings in law and in equity is abolished by the new rules of civil procedure, . . . yet remedies both at law and in equity are available to parties in the same court and in the same case. Neither legal nor equitable remedies have been abolished. What was an action at law is still an action at law,

¹⁰ *Bellavance v. Plastic-Craft Novelty Co.* (D. Mass. 1939) 30 Fed. Supp. 37, 39.

¹¹ *Grauman v. City Company of New York* (S. D. N. Y. 1939) 31 Fed. Supp. 172, 173-74.

¹² *Williams v. Collier* (D. Pa. 1940) 32 Fed. Supp. 321, 323.

and what was a bill in equity is still a civil action founded on principles of equity."¹³

In the District of New Jersey, Judge Smith discussed this point somewhat more elaborately,

"The Rules of Civil Procedure established a uniform system of procedure for law and equity and eliminated only the formal distinction. The 'civil action' is a mere procedural unit and the joinder, as in this case, of legal and equitable causes of action, which the rules permit, does not require or even warrant their being considered as a unit for the purpose of trial. While the rules effect a unity of procedure they do not effect a merger of remedies. Legal and equitable remedies, while they may be administered in the same proceeding, must be administered separately as heretofore. It is not intended that the remedies shall be either jointly or interchangeably administered at the will or demand of the litigants. The rights and remedies of the respective parties remain unaffected."¹⁴

The decisions are replete with other similar expressions.¹⁵

The abolition of procedural distinctions between law and equity necessarily leads to a great deal of simplification. For example, it is no longer necessary to allege a lack of an adequate remedy at law in a complaint based on an equitable right or praying for equitable relief.¹⁶ Rule 54(c) in effect provides that, except in case of defaults, every final judgment shall grant the relief to which the prevailing party is entitled, irrespective of the relief demanded. Consequently, if a party prays for equitable relief, but proofs show that he is entitled only to legal relief, this circumstance is no longer a ground for dismissal or even for a transfer of the action from one side of the court to the other, since the traditional division of the court no longer persists. The plaintiff is awarded equitable or legal relief according to

¹³ *New England Mut. Life Ins. Co. v. Barnett* (S. D. Ala. 1941) 39 Fed. Supp. 761, 763.

¹⁴ *Fitzpatrick v. Sun Life Assur. Co. of Canada* (D. N. J. 1941) 1 Fed. Rules Dec. 713, 715.

¹⁵ *Fleming v. Peavy-Wilson Lumber Co.* (W. D. La. 1941) 38 Fed. Supp. 1001; *Monks v. Hurley* (D. Mass. 1942) 45 Fed. Supp. 724; *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.* (C. C. A. 2d, 1942) 124 F. (2d) 563; *Sun Oil Co. v. Burford* (C. C. A. 5th, 1942) 130 F. (2d) 10; *Ransom v. Staso Milling Co.* (D. Vt. 1941) 2 Fed. Rules Dec. 128; *Fraser v. Geist* (E. D. Pa. 1940) 1 Fed. Rules Dec. 267.

¹⁶ *Berger v. McHugh* (M. D. Pa. 1939) 26 Fed. Supp. 107; *Commonwealth Trust Co. v. R. F. C.* (W. D. Pa. 1939) 28 Fed. Supp. 586; *American La France Fire Engine Co. v. Borough of Shenandoab* (E. D. Pa. 1939) 30 Fed. Supp. 251; *Grauman v. City Company of New York*, *supra* note 11; *Towle v. Ross* (D. Ore. 1940) 32 Fed. Supp. 125.

which of the two is warranted by the law and the facts. It necessarily follows, therefore, that it is no longer material insofar as the sufficiency of a pleading is concerned, whether the party in praying for equitable relief alleges that he has no adequate remedy at law. On the same basis, a suit in equity instituted prior to the effective date of the new rules should not be dismissed merely on the ground that the plaintiff should have sued at law.¹⁷

Except under conditions which will be subsequently discussed, it is unnecessary for the plaintiff to determine or indicate whether he regards his action as legal or equitable, or for a defendant to show whether the counterclaim that he has interposed is cognizable at law or in equity. The legal theory on which the party predicates his rights need not be suggested in the pleading. The complaint or counterclaim should be merely a simple, unadorned narrative in plain, modern, lay phraseology succinctly and briefly setting forth the ultimate facts, or perhaps even ultimate facts mixed with conclusions of law, on which the pleader bases his right to recover judgment against his adversary. We have not, perhaps, reached the ideal simplicity of the English system of pleading under which even a narrative is dispensed with and the party is permitted to epitomize the nature of his claim in a single sentence. The new federal procedure has, however, reached the point at which the simple summary of the salient facts need not be adjusted to the framework of equity or common law.

The progressive steps taken as a result of the new rules are accentuated by the liberal provisions as to joinder of claims and remedies. The plaintiff may join in his complaint all the claims of whatsoever nature which he may have as against the defendant. The latter may pursue the same course as to his counterclaims. It is immaterial whether the claims or counterclaims are legal or equitable. Irrespective of their nature, they may all be asserted in the same action. Thus the abstruse and useless learning dealing with the subject of joinder of causes of action and developed even under code pleading, which in its time was looked upon as a great, progressive reform, has become obsolete, perhaps to the chagrin of antiquarian scholars, but much to the relief of litigants and greatly to the assistance of lawyers who have on occasion found themselves enmeshed in the metaphysical distinctions governing what was considered an intricate and complex topic.

¹⁷ *Thermex Co. v. Lawson* (E. D. Ill. 1938) 25 Fed. Supp. 414.

The abolition of the procedural distinction between law and equity was vividly illustrated in a case involving an action brought under the Securities Act to recover the consideration which had been paid on a purchase of securities. The basis of the action was a claim that the plaintiff had been induced to make the purchase by an untrue statement of material facts. The act provided that such an action might be brought in equity or at law. The plaintiff in his complaint prayed solely for general relief. The court held that if it appeared that the plaintiff was not entitled to any equitable relief, but only to a judgment for money damages, such judgment could be rendered without requiring the plaintiff to bring another action.¹⁸ The court suggested that the plaintiff might amend his complaint by limiting his prayer for relief to one for a money judgment. It may be, however, that even such an amendment was not strictly necessary, since under Rule 54(c), to which reference has been made, a party is awarded whatever relief the proof justifies, and in disregard of the demand for relief.

A striking demonstration of the proposition that the effect of the new rules is to abolish the procedural differences between law and equity, and not to obliterate the differentiation as between equitable and legal rights and as between equitable and legal remedies, is found in *Ettelson v. Metropolitan Life Insurance Co.*,¹⁹ decided by the Supreme Court on December 7, 1942. The action had been brought to recover the benefits due under life insurance policies. The plaintiffs demanded a jury trial. The defendant's answer contained a counterclaim, alleging that the policies had been obtained by fraud and prayed that they be decreed void on condition that the premiums that had been paid by the deceased be refunded. The counterclaim further prayed that the plaintiffs be enjoined from further prosecuting the action. The court directed that the counterclaim should be heard and disposed of by the court sitting in equity prior to the trial of the issues framed by the complaint and answer in the action at law. The plaintiffs appealed to the circuit court of appeals. The defendant moved to dismiss the appeal on the ground that the order was not appealable. The circuit court of appeals certified to the Supreme Court the question whether the order was in effect an injunction and, therefore, appealable as such. It was conceded that if

¹⁸ *Independence Shares Corp. v. Deckert* (C. C. A. 3d, 1939) 108 F. (2d) 51.

¹⁹ 63 Sup. Ct. 163, 87 L. ed. Adv. Ops. 156.

the question had arisen prior to the adoption of the Rules of Civil Procedure, the order would have been deemed appealable.

In the light of the decision in *Enelow v. New York Life Insurance Co.*,²⁰ in which a similar state of facts existed, the Court held that an order requiring an equitable defense to be tried first was equivalent to an injunction restraining proceedings at law, precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. It was indeed argued that the *Enelow* case was no longer governing, since the distinction between actions at law and suits in equity, which still persisted in the federal courts at the time that the *Enelow* case was decided, had since then been abolished and that equitable defenses were part and parcel of the single action initiable by the plaintiffs. On this basis it was contended that any direction by the court respecting the order in which the claim and counterclaim were to be heard was interlocutory, amounting at most to a stay of the trial of one branch of the litigation and in no sense an injunction against the plaintiffs. The Court, however, declined to accept this reasoning. It stated that, as in the *Enelow* case, so in the case at bar, the result of the order of the district court was the postponement of the trial of the jury action and might in practical effect terminate that suit. The court pointed out that in these respects the order was as effective as an injunction issued by a chancellor.²¹

The proposition that the innovation introduced by the new federal practice does not affect equitable rights and remedies, gives rise to far-reaching implications and wide ramifications. As has been intimated above it is still necessary for some purposes to determine whether the plaintiff's claim or the defendant's counterclaim, as the case may be, is cognizable at law or pertains to equity. Situations are at times presented in which a determination of this question becomes indispensable.

²⁰ (1935) 293 U. S. 379.

²¹ Before the decision of the Supreme Court in the *Ettelson* case, a different attitude had been indicated by the Circuit Court of Appeals for the Second Circuit in *Beaunit Mills Inc. v. Eday Fabric Sales Corp.*, *supra* note 15, where the plaintiff sued for equitable relief. The defendant interposed a counterclaim, which he contended was triable by a jury. An appeal was taken from an order dismissing the counterclaim. The plaintiff moved to dismiss the appeal on the ground that the order was not appealable. The circuit court of appeals held that the *Enelow* case did not apply to present day federal practice where law and equity are united in a single civil action. While the decision of the circuit court of appeals was based on two distinct grounds, one of the grounds was that the abandonment of the separation between law and equity led to the conclusion that the order could not be regarded as an injunction. The appeal was dismissed.

One situation of this kind involves cases in which it is necessary to decide whether an equitable doctrine, such as the doctrine of clean hands or laches, may be invoked. In the light of the principles heretofore discussed, equitable doctrines have not been abrogated. On the other hand, they have not been extended to what were formerly actions at law. Consequently, for the purpose of reaching a conclusion whether one of these doctrines is applicable in a specific case, it is necessary to determine whether the case should be regarded as an action at law or a suit in equity. Such a problem was presented to Judge Sweeney of the District of Massachusetts,²² in a case in which the plaintiff sought equitable relief. The defendant contended that the plaintiff did not come into equity with clean hands. The court made the following observations:

"The new rules of procedure have abolished the distinction between legal and equitable forms of action. Rule 2, Federal Rules of Civil Procedure. However, the distinction which has been abolished is a procedural and not a substantive one. . . . Where the subject matter of a civil action is such as would be cognizable exclusively in equity under the old practice, and therefore governed by equitable principles, such principles would be equally applicable to such an action today. The new rules have not abrogated equitable doctrine, and the instant case seems to present a clear situation in which the plaintiff should be denied equitable relief because she has not come into court with clean hands."²³

A second situation, in which it becomes necessary to ascertain whether the pleader is asserting a claim at law or in equity, is presented when the applicability of the statute of limitations is in question. There are many expressions to the effect that statutes of limitations affect the remedy rather than the right and, therefore, relate to matters of procedure rather than of substance.²⁴ Were this always the case the question whether a claim is barred would be governed by federal law. In that event, considerable embarrassment would arise by reason of the fact that there is no general federal statute of limitations for civil cases and the new rules are silent on this point. The subject of limitations is not, however, to be regarded as a procedural matter for all purposes. It is quite apparent that without elaborately discussing the topic, the federal courts tacitly assume the

²² *Monks v. Hurley*, *supra* note 15.

²³ *Ibid.* at 728.

²⁴ *McElmoyle v. Cohen* (1839) 38 U. S. (13 Pet.) 311; *Michigan Insurance Bank v. Eldred* (1889) 130 U.S. 693; 3 BEALE, *CONFLICT OF LAWS* (1935) 1620.

matter to be one of substantive law, and therefore, the state statutes of limitations to be applicable²⁵ within the rule of *Erie Railroad Co. v. Tompkins*.²⁶ Since in many states varying periods of limitations are prescribed for different types of actions, it may become necessary under such circumstances to determine what kind of a claim is being asserted. As was aptly stated by the Circuit Court of Appeals for the Fifth Circuit, "Even under the new rules, when limitation depends on the state law and that law refers to a form of action as determinative, it will be necessary to ascertain what sort of case the pleader is presenting."²⁷

A third situation, which perhaps occurs more frequently than the other two which have been discussed above, is confronted when it is necessary to determine whether a party is entitled to a trial by jury. Since the right to a trial by jury in suits at common law, where the value in controversy exceeds \$20, is guaranteed by the Seventh Amendment, no modification in substantive or adjective law may derogate from this privilege. The draftsmen of the rules made it clear that there was no intention to infringe on this constitutional guaranty, by expressly providing in Rule 38(a) that this right 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. The right to trial by jury was neither diminished nor enlarged by the new rules. It, therefore, becomes necessary to determine, whenever a jury trial is claimed as of right, whether the parties would have been entitled to such a trial had the action been instituted or had the trial taken place before the introduction of the new procedure. In order to arrive at a solution of this problem, it is manifestly essential to ascertain whether the action would have sounded in equity or at law under the old procedure. Obviously, therefore, under such circumstances the distinction between equitable and legal rights and remedies must still be recognized and drawn as heretofore. Legal issues are triable by jury, whereas equitable issues must be determined by the court.²⁸ As was aptly observed by Judge Brew-

²⁵ *McGrath v. Rubinstein, Inc.* (S. D. N. Y. 1939) 29 Fed. Supp. 822; *Downey v. Palmer* (S. D. N. Y. 1939) 32 Fed. Supp. 344; *Momand v. Paramount Pictures Distributing Co.* (D. Mass. 1941) 36 Fed. Supp. 568; *El Paso v. West* (C. C. A. 5th, 1939) 104 F. (2d) 96; *Williamson v. Columbia Gas & Electric Corp.* (C. C. A. 3d, 1939) 110 F. (2d) 15.

²⁶ (1938) 304 U. S. 64.

²⁷ *City of El Paso v. West*, *supra* note 25, at 97.

²⁸ *Bellavance v. Plastic-Craft Novelty Co.*, *supra* note 10; *Williams v. Collier*, *supra* note 12; *Fraser v. Geist*, *supra* note 15; *Fitzpatrick v. Sun Life Assur. Co.*, *supra*

ster in the District of Massachusetts, "... what was ... an action at law is a jury action, and what was a suit in equity falls into the category of a non-jury action."²⁹

In dealing with this matter a vital question arises, which has not as yet been definitively answered by any authoritative decision. Is the question whether an issue is to be regarded as legal or equitable and, therefore, triable with or without a jury, to be determined by federal law, or in accordance with the law of the state where the case is to be tried? Neither the Supreme Court nor any circuit court of appeals appears to have passed upon this point. The few decisions of the district courts which have referred to this matter are divided, some holding that the state law should be followed,³⁰ while others regard the question as federal.³¹

The cases which applied the state law in deciding whether a party is entitled to a jury trial presumably predicated their reasoning on the proposition that whether the basis of an action is legal or equitable is a question of substantive law and, therefore, under the doctrine of *Erie Railroad Co. v. Tompkins*, must be governed by the rule prevailing in the state in which the federal court is held. There is indeed some basis for this approach, particularly in view of the frequent reiteration of the observation that what was a suit in equity under the old procedure is a civil action triable without a jury, and what was an action at law has become a civil action triable by a jury under the new rules. One may well wonder, however, whether this approximation, which is sufficiently accurate for most purposes, does not at times result in a dangerous over-simplification. Actually what the federal rules preserve to the parties, in order to effectuate the constitutional guaranty of the Seventh Amendment, is the right of trial by jury, as declared by the Seventh Amendment, or as given by a statute of the United States. The right to a particular form of trial

note 14; *Ransom v. Staso Milling Co.*, *supra* note 15; *Friedman v. Boyarer* (E. D. N. Y. 1942) 2 Fed. Rules Dec. 376; *Conn v. Kohlemann* (E. D. Pa. 1942) 3 Fed. Rules Dec. 514.

²⁹ *Bellavance v. Plastic-Craft Novelty Co.*, *supra* note 10, at 39. In this connection, see also Pike and Fischer, *Pleadings and Jury Rights in the New Federal Procedure* (1940) 88 U. OF PA. L. REV. 645.

³⁰ *Ross v. Service Lines, Inc.* (E. D. Ill. 1940) 31 Fed. Supp. 871; *Beagle v. Northern Pac. Ry. Co.* (W. D. Wash. 1940) 32 Fed. Supp. 17.

³¹ *Hollingsworth v. General Petroleum Corp.* (D. Ore. 1939) 26 Fed. Supp. 917; *Williams v. Collier*, *supra* note 12; *Conn v. Kohlemann*, *supra* note 28. See also, Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure* (1941) 16 ST. JOHN'S L. REV. 1.

would seem to be a procedural rather than a substantive right. The fact that it is fundamental and vital has no bearing on the question whether it is in its nature procedural or substantive.³²

It is a fallacy to assume that because a particular subject is important, it thereby enters the domain of substantive rather than the field of adjective law or that the law of procedure is necessarily of secondary or subordinate significance. The test is found solely in the intrinsic nature of the subject matter rather than in the degree of its importance. The right to invoke a particular form of procedure may be as basic and valuable as the right to recover on a particular state of facts.

The American Law Institute *Restatement of Conflict of Laws*, which obviously must be entitled to a great deal of weight, states that matters of procedure include the form of proceedings in court.³³

If the question whether a party is entitled to a trial by jury is to be deemed one of procedure rather than of substantive law, then the federal courts would be under no obligation to accept the state law as a guide under the formula laid down by *Erie Railroad Co. v. Tompkins*. The matter would be disposed of as a federal question and the conformity principle would play no part in reaching a conclusion.

There is, moreover, a transcendent factor that would seem to be governing and that far outweighs the considerations already discussed. Irrespective of whether the right of trial by jury is to be regarded as substantive or procedural, it is a right guaranteed by the Constitution of the United States. The construction of the meaning of a constitutional provision is always a federal question and depends exclusively on federal law. The constitution necessarily means the same in all parts of the United States and its significance may not vary from one state to another. The constitutional right to a trial by jury would seem to consist of two aspects: first, the right to invoke a trial by jury in all cases of the type defined in the constitution; second, the right to the type of jury envisaged by the common law and acting in accordance with common-law procedure. On this basis

³² 3 BEALE, *op. cit. supra* note 24, at 1607, states, "*Prima facie* it would seem perfectly clear that the issue as to whether or not a given fact is to be passed on by the court or by the jury is purely a question of procedure; and hence to be governed by the law of the forum. Nevertheless the cases are not in agreement." THE CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) §594, deals with the subject of mode of trial in its chapter on procedure.

³³ *Ibid.* §585.

it has been held that the common-law guaranty of a trial by jury comprises a trial by a jury of twelve persons instructed by the court and acting by a unanimous vote.³⁴ By the same token, the question whether in any specific case the parties are entitled to a trial by jury would also seem to be a federal question and in no wise dependent on state law. It was recently observed that in order to ascertain the scope and meaning of the Seventh Amendment "... resort must be had to the practice at common law in similar proceedings when this amendment was adopted in 1791."³⁵ On this basis it was held that the right to a jury trial did not exist in condemnation proceedings because that remedy was unknown in cases of that type at common law prior to 1791.

To permit this question to be determined according to the law existing in a particular state at any particular time would enable the states by a process of attrition to encroach on the constitutional right of a trial by jury in the federal courts. It may be readily perceived that by this means the right of trial by jury in cases originally triable in this manner might be gradually withdrawn as a result of state statutes or decisions of state courts.³⁶ Such a result would be as incongruous as might be an attempt of the federal courts to follow state practice in those jurisdictions in which a unanimous vote of the jury is not required.

It is entirely conceivable that individual states, by constitutional provisions, statutes or even judicial decisions, may from time to time modify the right to a jury trial and alter its extent. Surely it could not have been intended by the framers of the Seventh Amendment that the constitutional guaranty of a jury trial in the federal courts should continuously shift with the diversities and vagaries of local law.

In the light of the foregoing discussion, the writer ventures to submit the thought that the question whether in any specific case the parties are entitled to a jury trial as a matter of right should not be determined in accordance with state law under the principles of *Erie Railroad Co. v. Tompkins*, but should be regarded as a federal question.

Under the new rules, legal and equitable claims may be joined in the same action and an equitable counterclaim may be interposed

³⁴ *Thompson v. Utah* (1898) 170 U. S. 343, 349; *Maxwell v. Dow* (1900) 176 U. S. 581, 586; *Patton v. United States* (1930) 281 U. S. 276.

³⁵ *Welch v. T. V. A.* (C. C. A. 6th, 1939) 108 F. (2d) 95, 98.

³⁶ See *Scott v. Neely* (1841) 140 U. S. 106, 114.

to a legal claim, or vice versa.³⁷ For example, a claim for the rescission of a contract may be combined with a claim for damages for breach of the agreement, in spite of the fact that the two causes of action are inconsistent.³⁸ A claim for an injunction against the maintenance of a nuisance and a claim for past damages may be included in the same complaint.³⁹ Under the former procedure, a defendant who chose to assert a legal counterclaim in an action in equity lost the privilege of a jury trial as to the counterclaim, but submitted his rights to the determination of the equity court.⁴⁰ This is no longer the case, due both to the liberality contemplated by the new rules as well as because of the provision making the interposition of certain counterclaims compulsory.⁴¹ The union of legal and equitable claims and counterclaims in the same action does not, however, deprive the parties of their right to a trial by jury whenever such a right exists. Consequently, the considerations heretofore discussed requiring a determination as to the nature of a claim or counterclaim, as the basis for a decision as to the mode of trial to which a party is entitled, exists in cases in which a number of claims, some of which may be equitable and some legal, are found in the same action. While such situations at times give rise to practical difficulties in connection with the arrangement of the trials of legal and equitable issues, the question is one largely of practical administration and involves no insuperable obstacles.

Traditionally, when a party to an action at law brought a bill in equity for relief which would affect the action at law, as, for instance, a bill for the cancellation of a promissory note on which suit has been instituted, the equitable issues were tried first in a court of chancery, which would issue an injunction against the prosecution of the action at law in the interim. If the disposition of the suit in equity did not terminate the action at law, the latter would then be tried in the common law court. Apparently adhering to this analogy, a number of district courts have held that if under the new rules an action presents issues triable without a jury and others as to which a right to a jury trial exists and is invoked, the former issues should be tried

³⁷ FED. RULES CIV. PROC. Rules 13 and 18(a).

³⁸ *Venn-Severin Machine Co. v. John Kiss Sons T. Mills* (D.N.J. 1941) 2 Fed. Rules Dec. 4.

³⁹ *Ransom v. Staso Milling Co.*, *supra* note 15.

⁴⁰ See *American Mills Co. v. American Surety Co.* (1922) 260 U. S. 360, 365.

⁴¹ *Union Central Life Insurance Co. v. Burger* (S.D.N.Y. 1939) 27 Fed. Supp. 554; FED. RULES CIV. PROC. Rule 13(a).

first, and then if legal issues still remain for determination, the latter should be taken up for disposition. For example, this course has been followed in actions in which a claim for the cancellation of a document and a claim for damages were joined in the same complaint.⁴²

In the *Ettelson* case, which has been discussed above, the Supreme Court recently held that an order directing a separate trial of equitable issues in advance of legal issues is appealable. Obviously, of course, no inference can be drawn from this conclusion that the Supreme Court regarded the practice as erroneous or improper. It merely ruled that the order was equivalent to a preliminary injunction, and, therefore, its propriety in any particular case was subject to review by the circuit court of appeals.

If this treatment were to be applied to all of such cases, however, a great deal of waste might result. Frequently the same evidence bears on both legal and equitable issues in the same case. A separation of the issues for trial might, therefore, result in a wasteful and costly duplication of effort as well as a useless burden on the court. A number of judges, taking advantage of the flexibility contemplated by the new practice, have assumed that they were not bound by any rigid rule on the subject and have resourcefully and ingeniously molded and adapted the procedure to the needs of the individual case. A solution of this type was reached by Judge Hincks in the District of Connecticut in a case in which the complaint consisted of two counts.⁴³ The first count stated a cause of action in tort by reason of the interference by one defendant with a contract between the plaintiff and a codefendant. The court held that the plaintiff was entitled to a jury trial on all the issues raised under the first count. The second count alleged a claim for fraud, which involved legal issues. In addition to seeking damages, however, the second count also prayed for a decree setting aside certain instruments and declaring a trust. The court held that the latter group of issues were of an equitable nature. The court disposed of the question of the mode of trial as follows:

"... I rule that all issues which are common to the legal causes of action (in either count) and to the equitable cause stated in the second count shall be tried together, the legal issues, of course, to the

⁴² *Union Central Life Insurance Co. v. Burger*, *supra* note 41; *Frissell v. Rateau Drug Store, Inc.* (W.D.La. 1939) 28 Fed. Supp. 816; *New England Mut. Life Ins. Co. v. Baruett*, *supra* note 13; *Fitzpatrick v. Sun Life Assur. Co.*, *supra* note 14.

⁴³ *Ford v. C. E. Wilson & Co.* (D.Conn. 1939) 30 Fed. Supp. 163, 165.

jury and the equitable issues to the court; and that all equitable issues which do not pertain to the legal causes shall be tried to the court immediately following the jury trial.

"This ruling will have practical application as follows: On the day of trial . . . the parties will proceed precisely as though trying to the jury both the first count and the second count viewed as charging actionable fraud, and the rulings on the evidence will be made as though no other issues were before the court. The court, however, will accept all evidence which is received in the jury trial for any proper bearing it may have upon the second count viewed as a cause of action in equity. After the jury has been charged and has retired to deliberate, the court will proceed to hear additional evidence on the equitable cause stated in the second count. There will be neither need nor permission to reiterate evidence already received in the jury trial; but any evidence theretofore offered and excluded in the jury trial may again be offered for its bearing on the second count viewed as a cause of action in equity.

"The presiding judge will of course have discretion to await a verdict of the jury before embarking upon a further hearing of evidence on the equitable issues. . . . However, the parties should be in readiness to proceed forthwith when the jury retires. For a defendant's verdict would apparently still leave open equitable issues, and the judge may feel that it is better to take any additional evidence thereon forthwith, while the parties and witnesses are in attendance, rather than to wait for the verdict of the jury."⁴⁴

A somewhat similar solution was reached by Judge Moscovitz in the Eastern District of New York, in a case in which a count for a violation of the State Civil Rights law was joined with a count for libel.⁴⁵ The plaintiff demanded a jury trial as to the first cause of action, but lost his right thereto as to the second cause of action by failing to serve a timely demand. The court held as follows:

"There is no necessity for two trials, one by the Judge with a jury and one by the Judge without a jury. The trial of both issues can be had at the same time. The procedure which should be followed here is the same as that indicated by the Court in *Elkins v. Nobel*, 1 F.R.D. 357, 358, decided June 24, 1940, as follows:

"The inclusion in the complaint of a fraudulent transfer cause of action does not deprive the defendants of their right to a trial by jury as to the other causes of action. However, there need not be two trials. The defendants will not be prejudiced by one trial as the evidence relating to all the causes of action is practically the same. The Court can proceed to impanel a

⁴⁴ *Ibid.* at 165.

⁴⁵ *Munkacsy v. Warner Bros. Pictures, Inc.* (E. D. N. Y. 1942) 2 Fed. Rules Dec. 380.

jury, take such evidence as is germane to the second, third and fourth causes of action, submit those causes of action to the jury, then decide the issue of fraudulent conveyance or, if necessary, take such additional testimony as may be necessary on that cause of action, in the absence of the jury.'

"The Court should impanel a jury on the first cause of action, take such evidence as is germane to the first cause of action and submit that cause of action to the jury. If all the evidence is in then the Court may decide the issues raised by the second cause of action or, if necessary, take such additional testimony as may be necessary on that cause of action in the absence of the jury."⁴⁶

The same device has been applied in a number of other cases and appears to have many potentialities.⁴⁷

One of the outstanding and commendable features of the new rules is their simplicity, flexibility and adaptability. The abolition of procedural distinctions between law and equity and the possibility of joining legal and equitable claims in the same action enables the courts to eliminate a great deal of traditional circuitry of action and to discard numerous technicalities, which have acted as impediments and obstructions to efficient, expeditious and inexpensive administration of justice. All this is being accomplished without in any way affecting the substantive rights of the parties and without detracting from the efficacy or changing the nature of the remedies to which they may be entitled.

⁴⁶ *Ibid.* at 381.

⁴⁷ *Dellefield v. Blockdel Realty Co.* (S. D. N. Y. 1941) 1 Fed. Rules Dec. 689; *Healy v. Fidelity Nat. Bank* (S. D. N. Y. 1942) 2 Fed. Rules Dec. 339.