JURY DEMANDS IN THE NEW FEDERAL PROCEDURE

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When Congress empowered the Supreme Court 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 for both,¹ it had misgivings as to what might happen to jury trials. The Act contains a warning that in any such union jury trial as at common law and as declared by the Seventh Amendment to the Constitution must be preserved inviolate. As a further safeguard it provides that any such rules promulgated become effective only after the close of the following Congress, thus giving it an opportunity to disapprove the scheme adopted, or any of its parts, if they seemed to endanger the right. The desire of Congress to sit in judgment on laws of the Supreme Court either lost its thrill of novelty, or it decided to affirm the decision of the Court by inaction. Although Rule 2² promulgated by the Court establishes the one form of action, Rule 38³ declares in no uncertain language that both Constitutional and statutory jury trial shall be preserved inviolate, and sets out a method of obtaining it by written demand. Since all other Rules must be interpreted in the light of this one, the question whether jury trial is preserved in the new federal procedure might seem to be a closed one. Arriving at a destination, however, often involves something more than an enthusiastic and purposeful start. The fears

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1. 48 STAT. 1064 (1934), 28 U. S. C. A. § 723c (Supp. 1938).

2. FED. RULES CIV. PROC. (1934) rule 2 reads: "One Form of Action. There shall be one form of action to be known as 'civil action'."

3. *Id.*, rule 38 reads:

"Jury Trial of Right.

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

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

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

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

expressed by Congress were based upon a past experience of various States under a single form of action, and had something more than a shadowy basis. The one form of action is but a vehicle for enforcing rights, and is no stronger than its weakest vital part. Though it has been experimented with in various forms for nearly ninety years, there is still much dispute as to what it really is. If there are weak places in the structure created by the Supreme Court's advisory committee, which the Court itself has not yet detected, they should be known so that they may be guarded against. Though Congress may have done so, it is folly to trust solely upon declared intentions of the builders.

It is the purpose of this paper to point out some weak spots in the federal scheme which endanger the right intended to be protected, but which may be strengthened if care is exercised in interpretation. It is hoped that the criticisms offered will be considered as constructive. Although many things in this paper have been discussed by this writer before, even in their relation to Federal Rules creating one form of action, because the discussion preceded the rules it could not bear directly upon their language and its interpretation. The earlier treatment was preventive in character.⁴ The present treatment is intended to be curative. The patient must not die even though there be considerable similarity in the treatments. The discussion centers around the inter-relations of Rules 2, 10⁵ and 38, and the dangers, because of obscurity and the laudable desire to simplify pleadings, either of unduly

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

5. FED. RULES CIV. PROC. (1934) rule 10 reads:

"Form of Pleadings.

"(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

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

"(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

Rule 8 (a), which should be construed in connection with Rule 10, reads:

"General Rules of Pleading.

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

urtauling jury trial, or, in an effort to avoid that evil, of unduly extending it.

The second paragraph of Rule 38 states that a party may demand a trial by jury "of any issue triable of right by a jury" by serving a demand therefor in writing at any time after the commencement of the action, and not later than 10 days after the service of the last pleading directed to such issue. The next paragraph provides that a party in his demand may specify the issues "he wishes so tried", and that in default of specification he shall be deemed to have demanded jury trial for "all the issues so triable". The Rule does not purport to state what issues are properly triable to a jury. It is assumed that this is known. A party knowing the extent of his right is given the privilege of claiming the whole or any part of it. A party who does not know whether he has a right, or who is uncertain of its extent, is permitted to experiment, demanding what he wishes. Presumably what he will get will be measured by what he should have, if the trial court can determine it any better than he can, unless what he may have is more than what he has wished for, in which event the wish governs. If he does not want to run the risk of asking for too little, and this seems to be characteristic of careful practitioners, he may gamble on the court's knowledge. If the court is in doubt, and wishes to play safe, he may get more than he is entitled to.

The writer would not have the temerity to make the above analysis of the rule upon jury demands, showing its vagueness, if the federal system were still one in which law actions and equity suits were separately administered, for, under that system, the bench and bar have no particular difficulty in determining the extent of rights to jury trial. The difficulties arise only because in the new system they may be administered together, and border lines which were once clear and distinct may be difficult of ascertainment. The greater the effort in the new system to obliterate the boundaries in the interest of simplifying pleadings, avoiding variances and new trials, and giving the relief the proof shows a party is entitled to, the more difficult it becomes to reconstruct the boundaries for the purpose of determining the right of jury trial and its extent. If Rule 10 (b) sanctions the pleading of a lay transaction in a single count, without reference to the types of reliefs obtainable thereon, legal or equitable or both, and if Rule 2, creating the one form of action, necessarily involves the concept of "merging"⁶ legal

6. For suggestions that the union of legal and equitable claims under one form of action involves a merger of them, see CLARK, *CODE PLEADING* (1928) 46, 77-84; 1 MOORE, *FEDERAL PRACTICE* (1938) 105, 111, 117-143, 146, 447, 449; 3 *id.* at 3009; PIKE, *CASES ON NEW FEDERAL AND CODE PROCEDURE* (1939) 79-103; Clark and Moore, *A New Federal Procedure* (1935) 44 YALE L. J. 415, 1293.

and equitable remedies, as distinguished from a less intimate joinder, the task of the trial judge in determining to what issues he should apply a jury demand has become greatly complicated. The law of compensation is at work. Simplicity of procedure in one respect can be had only at the cost of complexity in another. It is, therefore, because of the possible implications in Rules 2 and 10, singly and together, that the foregoing analysis of the jury demand is made. The trial judge and the practitioner may welcome some suggestions which would otherwise seem impertinent. Until the Supreme Court speaks in more definite language than is used in the Rules some guidance will be necessary. Notes of the advisory committee which framed the Rules will, of course, be consulted, as will expositions by the able assistants who sat in on their deliberations, but it will be remembered that these are persuasive only, and that they have not as yet received authoritative sanction.

It has been suggested by able writers, both before and since the promulgation of the Rules, that the right of trial by jury is attached to issues of fact, not to suits of a certain character, and that an eradication of distinctions between the character of suits as legal or equitable has no effect in determining whether the issues should be tried with or without jury.⁷ If this could be demonstrated, the problem of applying the jury demand under Rule 38 would be very simple. It is because it cannot be demonstrated, because it is false, that the difficulty exists. The right of jury trial under the Seventh Amendment attached to issues found in law actions only, never to issues in an equity suit, and it is not true that the issues in a law action were never the same as in an equity suit. On the contrary, almost any issue found in a law action may also be found in an equity suit. Issues bearing upon title to land may be found in an action of ejectment, but they are also found in bills quia timet, in injunction suits, and many other strictly equitable proceedings.⁸ At one time if an issue of title arose in an equity suit, a feigned issue was made up and sent to a law court to try and report back to the equity court,⁹ but even then the finding of the law court

At times the users of the terms "coalesce", "amalgamate" and "merge" seem to mean nothing more than the bringing together of legal and equitable remedies in the same suit. Studied use of these terms, and avoidance of the terms "union" and "joinder", however, indicate that there is some meaning they wish to convey not embodied in the latter terms. This more clearly appears when they discuss pleadings, which, they claim, have no relation to jury trial or to jury demands. It also appears when they discuss the one form of action apart from jury trials.

7. CLARK, CODE PLEADING (1928) 53-55; 1 MOORE, FEDERAL PRACTICE (1938) 110, 449; Clark and Moore, *supra* note 6, at 1293-1294.

8. See *Ward v. Farwell*, 97 Ill. 593, 612 (1881); *Northwestern Univ. v. Wesley Mem. Hospital*, 290 Ill. 205, 213, 125 N. E. 13, 17 (1919); *Lynch v. Metropolitan El. Ry.*, 129 N. Y. 274, 278-279, 29 N. E. 315 (1891); *City of Syracuse v. Hogan*, 234 N. Y. 457, 464, 138 N. E. 406, 409 (1923) (dissenting opinion of Cardozo, J.).

9. See *Johnson v. Harmon*, 94 U. S. 371, 372 (1876).

upon the issues was advisory only. In modern times equity courts try these issues themselves, calling in juries to aid them or not as they see fit. Issues of possession, of money due on promises, of damages to property, even of negligence resulting in personal injury,¹⁰ are found in equity suits as well as in law actions. Issues are colorless apart from the proceedings in which they are found. Their character, as triable with or without jury, depends upon association with other issues and remedies sought upon their determination. Issues, like men, have a nationality of origin or of adoption. They do not drift around in space, sole masters of their own destiny.

It requires no particular discrimination to identify jury issues in a territory where there are no other kinds of issues. Difficulties arise with the disappearance of territorial boundaries. Issues will now be found in mixed crowds. The greater their similarity of dress, language and goose step, the more difficult it will be to determine from whence they came. The federal judge of the divided administration, with the easy task of identifying jury from non-jury issues, must carry on under the one form of action. It does not add to the clarity of his thinking to admonish him that law and equity are now one, that they are "merged", "amalgamated", or "coalesced", that claims may now be set forth apart from characterizing remedies, but that he must be most zealous in protecting the right of jury trial. He may wonder if he is being blindfolded and asked to pin a tail on the donkey.¹¹ If he may think of the one form of action as a joinder of legal and equitable remedies less intimate than a merger, analogous to a marriage with sex remaining the same, eliminating the necessity of dealing with neuters, and if he can reasonably interpret Rule 10 as sanctioning only such a grouping together of facts as bear upon a particular remedy, he may be able to give effectiveness to the jury demand of Rule 38.

This is not the place to discuss the merits of jury trial. For the purposes of this discussion it may be admitted to be a cumbersome and complicating part of judicial machinery, very much overrated as to its protective qualities. It is enough for us to know that the necessity for its retention is contained in the fundamental law until such time as it is amended. If it is not desired it may be waived. The burden may be placed upon him who wants it to make that want known, and to make it known at any reasonable time before trial. But neither conscious

10. See *Nashville Ry. & Lt. Co. v. Bunn*, 168 Fed. 862, 863 (C. C. A. 6th, 1909); *First Tr. & Sav. Bk. v. Lowry*, 151 Ill. App. 170, 173 (1909).

11. The fallacy of disassociating facts in pleadings from their characterizing remedies in a system which sanctions preliminary moves in preparation for the trial is developed at greater length in McCaskill, *supra* note 4, at 415. Pleading colorless facts belongs to the system known as Notice Pleading, which does not adapt itself to a system where legal and equitable remedies are joined. See note 26 *infra*.

nor unconscious devices should be employed to entrap him into waivers not intended, which reveal to him the true character of the issues too late for him to make an effective demand. Nor should he be forced to submit to a trial by jury of issues not required to be so tried by the fundamental law, and which can be better tried by a trained jurist. Smoke screens which hide the character of issues, though they be desirable for other purposes, are not within the spirit of devices permitted by the Constitution.

Lest it be thought that the writer is conjuring up imaginary difficulties which never materialize, let him again call attention to some comparatively common problems which taxed the ingenuity and skill of as eminent a jurist as the late Justice Cardozo while he was a member of the New York Court of Appeals. In two of the opinions here referred to, he wrote for the court. In the third case he was moved to write a dissent. All were problems under the one form of action in New York, and involved jury trial.

In the first of the cases¹² a sub-contractor brought a suit against the contractor and owner to enforce a mechanic's lien for labor and materials, claiming a balance due. The owner denied the lien. The contractor traversed the complaint, and counterclaimed for damages against the sub-contractor for wrongfully abandoning his contract. A reply denied the counterclaim. Upon these issues plaintiff moved that the issues be stated for a jury trial, and two issues were stated: (1) Is the plaintiff entitled to a money judgment against the contractor, and, if so, for how much? (2) Is the contractor entitled to a money judgment against the plaintiff, and, if so, for how much? A jury found in response to the questions that plaintiff was entitled to a money judgment against the contractor in a stated amount, and that the contractor was not entitled to recover anything from plaintiff. The contractor requested that the verdicts be treated as advisory, and that the court find the issues for itself. This the court declined to do, holding that both verdicts were binding as common law verdicts. Justice Cardozo, writing for the court, held that the verdicts were advisory as to plaintiff, because he had waived his right to jury trial by joining legal with equitable issues in the same suit, but that they were binding upon defendant contractor. His claim was an independent cause of action, triable by jury as of right. The verdicts were conclusive that plaintiff had not abandoned the contract, and that plaintiff was entitled to a money judgment against the contractor. But defendant had joined a legal claim in plaintiff's suit for an equitable one, and no answer was given to the question why, if the character of the

12. *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993 (1917).

issues was to be determined by waiver, he did not also waive jury trial. The trial court had relieved plaintiff from his waiver, if there was one. Furthermore, the issues under the complaint and counterclaim, so far as they involved the contractor, were identical. The case is noted for its holding that a legal counterclaim does not merge with an equitable complaint in the same suit.

Eight years later, without distinguishing the above case, Justice Cardozo, again writing for the court, held¹³ that an equitable counterclaim to a suit for damages for breach of contract so nearly presented the same issues as were presented in the answer, though it sought reformation of the contract, that it became merged into the character of the suit brought, requiring all issues, even those of mutual mistake and fraud, to be tried by a jury. It also required that the parol evidence rule be disregarded.

Two years earlier, the City of Syracuse sought to recover possession of a portion of a public street which it was claimed defendant had appropriated with his store building, and to require defendant at his own expense to remove the building.¹⁴ The allegations were sufficient to show that a sheriff could not well put the city in possession. The majority of the Court of Appeals said that this was an action of ejectment, with injunctive relief incidental, or merged into it, and that all the issues were triable by jury. Justice Cardozo, in dissenting, contended that the merger was the other way, and that none of the issues were triable by jury. He denied that title must first be determined at law, saying: "We have left far in the distance the wasteful duplication of remedies and trials. We shall set the clock back many years if we return to it today". Neither majority nor minority referred to the form of the complaint as having any bearing.

These opinions are called to attention for the purpose of demonstrating that even the ablest judicial minds cannot avoid circuitry when they look upon the one form of action as a "merger" of legal and equitable remedies. At one time the equitable issues submerge the legal, at another the legal issues submerge the equitable. At still another time they half merge and half persist with separate characteristics. If there are mergers, it is difficult to tell how they work, and the limitations of their operation. Similar instances without number from almost any jurisdiction having the one form of action can be cited. The confusion exists when there is an attempt to follow the "merger" view of the single form of action. When the less jumbled "joinder" view, which recognizes identities within the union, is taken, seldom is there either

13. *Susquehanna S. S. Co. v. Andersen & Co.*, 239 N. Y. 285, 146 N. E. 381 (1925).

14. *City of Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923).

an infringement of jury trial or a failure to keep it within proper bounds.

Anyone familiar with procedural history knows that the single form of action involves a freer union of remedies, and of interplay between them, than was permitted at common law. Unquestionably barriers have disappeared under it. The problem is to determine how many have so disappeared, whether they disappear for all or limited purposes, and whether the concept is a fixed one of concrete character, or whether it is flexible enough to permit of different developments. The extent to which the concept colors subordinate provisions in its development is the specific problem with which this paper is concerned, but we must know something of the concept first.

The theory that common law actions and equity suits "merge" under the single form of action has its origin in the form of statement used in the New York code, and in those codes which have followed the New York pattern. A composite of that statement is:¹⁵

"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

Referring to this statement, the leading proponent of the "merger" theory says:¹⁶ "It should be noticed that the distinction between the actions themselves *and also between their forms* is to be abolished. Distinctions of form *and* of substance are to be done away with." Referring in another place to the section on joinder of causes of action, he calls attention to the language "whether formerly denominated legal or equitable or both", and insists that those designations are no longer appropriate because inconsistent with the abolishment of distinctions in the new order.¹⁷

A literal interpretation of the limited language quoted seems to lead to the conclusion for which he argues, but it ignores several things. It ignores a gradual breakdown of barriers between the common law forms of action through the overlapping process, and the growing trend toward fewer and more inclusive remedies without loss of distinct units within them.¹⁸ It sees the single form of action as a revolution against

15. CLARK, CODE PLEADING (1928) 46.

16. *Ibid.*

17. See Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 825. See the writer's criticism of the contention in *Actions and Causes of Action* (1925) 34 YALE L. J. 614, 624.

18. For example, general assumpsit came to include situations which could be redressed in account, debt on simple contracts, trespass for carrying away goods, and trover. If plaintiff were content to take their value instead of goods it also embraced the remedies of detinue and replevin. To understand when the fictitious promise would be raised, however, it was necessary to understand the essential features of the other actions.

what has gone before instead of the final step in an evolutionary process. It ignores an explanatory note of the inventors of the term "one form of action" which places definite limitations upon it. They say: "It is, however, no part of our purpose to present the principle of an union of law and equity jurisdiction, upon a broader basis than that which has reference to their forms of proceeding. It is enough for us to know that the fundamental law has united these functions in one tribunal; and in recommending to the legislature a system of practice, by which those functions may be conveniently exercised, it is only necessary that we should take care not to encroach upon substantial rights."¹⁹ It ignores the fact that in the section on joinder of causes of action²⁰ the classifications parallel very closely the common law classifications, liberalizing features coming in only through later amendments, and that such important remedies as replevin, ejectment and injunctions were omitted from the general scheme, being specially dealt with.

The New York code commissioners, recognizing the problem of jury trial under the united procedure, disposed of it by suggesting that a jury trial could be given in any type of case where any party wanted it, since the issues in an equity case were no more complicated than in a law case.²¹ Although this suggested extension of jury trial to all cases where it was desired, whether legal or equitable, was subsequently made a constitutional right in North Carolina²² and Texas,²³ it never met with favor in New York and other jurisdictions having the one form of action, and the framers of the Federal Rules would probably disclaim any intent to introduce it within the Rules. Unless driven to it through not knowing how else safely to proceed under Rules 10 and 38, it is hardly likely that the federal judiciary will take kindly to the idea.

Although he disclaims the universality of jury trial under the federal single form of action, one of its leading interpreters suggests a procedure for dealing with doubtful cases which approximates it.²⁴ The case supposed is one where plaintiff alleges facts entitling him to an accounting, but eventually proves only those allegations in the complaint which entitle him to money damages. He says: "Impanel a jury. If at the end of the case it is obvious that there was a partnership agreement (as alleged), the jury can be dismissed and the court proceed to make its findings of fact and conclusions of law. If the

19. N. Y. COMMISSIONERS ON PRACTICE AND PLEADINGS, FIRST REPORT (1848) 74. See also their statement wherein they recommend doing away with only such forms as serve no valuable purpose. *Id.* at 87.

20. N. Y. LAWS 1848, p. 525.

21. N. Y. COMMISSIONERS, *op. cit. supra* note 19, at 179.

22. N. C. CONST. art. I, § 19, interpreted as applicable to equity cases in *Cozad v. Johnson*, 171 N. C. 637, 642, 89 S. E. 37, 39 (1916).

23. TEX. CONST. art. V, §§ 8, 10.

24. 3 MOORE, FEDERAL PRACTICE (1938) 3017-3018.

case is not obvious, the court should take the jury's verdict on the reasonable value of plaintiff's services; and, in addition, make findings of fact as to the amount plaintiff is entitled to on a partnership basis. Then, no matter how it enters judgment for the plaintiff, whether on the basis of a partnership or on the basis of the jury's verdict, the case is in such condition that if either party is dissatisfied with the judgment that is entered and appeals, the appellate court will be able to affirm or, in most cases, to order judgment entered either on the court's findings or the jury's verdict, and not be obliged to send the case back for a new trial." Jury trial would be waived unless demanded. The difficulty with the suggestion lies in the necessity of having a jury hear the evidence simply because one of the parties demands it, although to all appearances the case is purely equitable. To require the empanelling of a jury upon the conjecture that the case may turn out to be one for it to pass upon, even though at the end of the trial a verdict be not taken, requires substantially the same expenditures for juries, and the adoption of the practice pertinent to jury trials, as though the verdicts were taken. Taking verdicts and making findings both may result in a final determination upon appeal, but the records for such appeals are quite likely to be voluminous. The suggestion assumes that cases to the jury and to the judge are, or should be, tried in the same way. Most of the objections urged against jury trials are based upon the opposite assumption. Juries do greatly complicate procedure because of the necessities of providing safeguards against improper action by untrained minds. All trials should not be so complicated because, perchance, the case may turn out to be one for a jury. Yet the suggestion made is quite consistent with the "merger" theory of the single form of action, although it is in the direction of effecting the merger by submerging equitable into legal issues.

The fallacy that, because the determination of whether a jury trial is to be had in a case comes after the pleadings are drawn, there is no propriety in an attempt to draw the pleadings with reference thereto, is responsible for the urge to draw pleadings as the layman tells his story, making such divisions therein as are called for by good rhetoric. It is assumed that such letters to the court and opponent are good business letters. But the assumption ignores the peculiar business of courts to give relief in accordance with law and the facts pertinent thereto. Grouping together facts which lead to particular reliefs may seem artificial to the layman, but it looks like good sense to the lawyer and judge. An indiscriminate admixture of facts in a pleading makes it extremely difficult later to marshal the facts appropriate to reliefs for the purpose of determining whether the issues are properly triable by jury. A pre-

trial procedure which calls counsel for the parties before the court for an informal conference to determine the issues to be tried by a jury might take the place of formal pleadings if members of the bar were all co-operative, but the pre-trial procedure of the Federal Rules²⁵ does not contemplate fixing the mode of trial. The demand for a jury must be made before it is had, and a waiver of jury by failure to demand it cannot as of right be recalled at the later conference. There must be something upon which to base jury demands; and upon what else if not upon the pleadings? The lay story type of pleading fits into a system of procedure to which the jury is foreign, and where all the emphasis is placed upon the trial at large.²⁶ It does not encourage demurrers, motions which may delay the trial, or jury demands, and it is difficult to establish any harmony of relations between them. They belong to different systems, and neither works well out of its proper environment.

The advocates of the "merger" theory of the single form of action, as we have seen, derive their doctrine from the abolishing language in the New York code, giving it a literal interpretation. But in many of

25. FED. RULES CIV. PROC. (1934) rule 16. For comment on this rule see 1 MOORE, FEDERAL PRACTICE (1938) 439, 814-827. In the first of these references the author observes that the pleading rules are implemented by and depend upon pre-trial procedure for the formulation of issues, and to disclose the true nature of the action, *making pleadings*, in and of themselves, *relatively unimportant*. But aside from the fact that the contemplated pre-trial procedure in order follows the jury demand, instead of preceding it, whether it is had at all depends on judicial discretion.

The suggestion that supplementing devices make pleadings relatively unimportant is one worth pondering over. If vague, colorless and uninformative pleadings are in fact employed, something else usually has to do their work. Common counts produce bills of particulars. Disguising multiple counts and general issues bring discovery into law actions. Attempts at notice pleading bring all these, and pre-trial procedure in addition. Pleadings may be simplified to the point of unimportance, but usually the simplification at this point brings compensating complications at another, one of them being to find the compass which points to the proper mode of trial when pleading clouds obscure the polar star.

26. The so-called Notice Pleading, much advocated but nowhere used in courts of record in this country, is based upon the theory that defendants usually know all about claims against them, and that about the only function of pleadings is to identify time and place. Legal theory is squeezed out. Demurrers never have accomplished anything but delays. Cases ought not be tried twice, once on the pleadings and again on the merits. It is folly to attempt to formulate issues in advance of trial. All intervening obstacles to a quick trial on the merits should be eliminated. See CLARK, CODE PLEADING (1928) 29; Arnold, Simonton and Havighurst, *Judicial Administration* (1929) 36 W. VA. L. Q. 26, 32-33; McCaskill, *The Elusive Cause of Action* (1937) 4 U. OF CHI. L. REV. 281, 284-285; Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501. It is said that many municipal courts follow this system, and that its best illustration is the motion for judgment procedure of the Virginias. In none of these courts, however, has there been a total elimination of the demurrer, motion to make definite, and other proceedings intervening between the pleadings and the trial. Technicalities have been eliminated, and improvements made, but even here a disclosure of legal theory relied upon can be forced in advance of trial, and a trial had on the pleadings. The pleadings of the modern English courts, often referred to, are not as simple as often represented, for "the pleadings" in present English trials include not only what we think of as pleadings, but all the information extracted by depositions, discovery, and other new supplementing devices. The advocates of the "merger" theory of the one form of action are enthusiasts for the pure type of Notice Pleading, but that the federal rules adopt no such concept is evidenced by the motions which function as demurrers, FED. RULES CIV. PROC. (1934) rules 7, 12; motions for summary judgment, *id.*, rule 56; and provisions for discovery, *id.*, rules 36, 37.

the states which adopted the one form of action all reference to abolition of distinctions was deleted.²⁷ It was too uncertain what these words accomplished, and it may have been thought more wise to let the provisions of the codes work out some sort of uniform procedure unhindered than to attempt to impress dubious overtones upon them. But the merger advocates are not content to confine their doctrines to the New York type of one form of action. They insist upon the abolishing of distinctions whether it is expressly mentioned or not.²⁸ There is, and can be, but one type of single form of action, and that is the merger type. The merger idea, therefore, cannot be divorced from the one form of action. It must pervade and influence the interpretation of every part of the system. It must, of necessity, affect pleading provisions, by implication if not expressly.

Having shown the relation between the one form of action, pleadings and jury demands, we should now ascertain whether the merger advocates, some of whom were members of the advisory committee which drafted the Federal Rules,²⁹ succeeded in writing their overtones into the new system.

No evidence of it is found in Rule 2. There is no mention of abolishing distinctions. The first part of Rule 38 is a model of virtue, not excelled by the tables from Sinai. But idolaters will strive for a golden calf, and take up church subscriptions to get it. An easy going Aaron may be beguiled with Rule 10, but a Moses may also appear on the scene. In that Rule the attempt is made to institute the story telling type of pleading, with its intermingling of facts without reference to appropriate remedy or legal significance, and which forms issues of such indefinite character that jury demands cannot be aimed at them successfully. It is the more dangerous because it is a flank movement instead of a frontal attack. The pertinent portion of the Rule reads:

"Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth." ³⁰

Observe a plausible interpretation, and one which will be urged. "Claims founded upon the same transaction or occurrence may be set out together in one narrative always. They may also be set out together

27. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING (1897) c. 5.

28. 1 MOORE, FEDERAL PRACTICE (1938) 142-145; cf. CLARK, CODE PLEADING (1928) 47-50.

29. Judge Charles E. Clark, formerly Dean of the Yale Law School, was Reporter for the Advisory Committee. Prof. James Wm. Moore was a research assistant to the committee.

30. The rule is set forth in full in note 5 *supra*.

even when they arise out of separate transactions and occurrences unless it interferes with clear story telling." The transaction or occurrence is made the procedural unit for pleading. As transaction and occurrence have never been given boundaries in law of definite character, it is natural to attach only lay boundaries to them. If these are the boundaries authorized, then the transaction is what is to be pleaded. Though the claim may be present, it may be commingled, or scrambled, with other claims. The cause of action is to be forgotten, for it has too many complicating legal implications.³¹ Try to apply the jury demand of Rule 38 to such a pleading if the transaction involves facts giving both legal and equitable relief, or alternative legal and equitable relief! If it appears easy in the case selected, take one where, under the divided procedure, a plaintiff was privileged to proceed partly at law and partly in equity (as where he first settled title at law, and then sought equitable relief in equity), or wholly in equity. The recognized mergers in equity were the result of the inability of equity courts to exercise law jurisdiction. A dual forum may exercise dual jurisdiction, and joinders do not necessitate mergers into a single character.³² The benefits of the old mergers should be retained without forcing new ones. The old mergers were within the Constitution. Plaintiffs could accept them for themselves, and force them on defendants. Any new type of merger forced upon the parties under the dual system would appear not to be valid, unless joinder of legal and equitable remedies is expressly made a waiver of jury trial, which it is not. The failure to demand it is the only waiver provided for in the rules.

We have seen how Justice Cardozo became perplexed because of the supposed merger effect of the New York single form of action, rendering opinions difficult to reconcile, and that somewhere along the line jury trial was either curtailed or given an undesirably extended scope. In two of those cases³³ the complaints differed in no respect from equity bills. Under the old procedure, and new, there was a proper merger of all issues on the complaint into equitable issues, unless the old merger is lost. The privilege to sever under the enlarged jurisdiction was not availed of and was waived. There was no reason why this privilege should require two actions. Separate statements in the complaint could have effected it, with trial of the title issues first. When defendant brought in counterclaims,³⁴ which of necessity were separately stated

31. I MOORE, *FEDERAL PRACTICE* (1938) 3, 145-147; cf. CLARK, *CODE PLEADING* (1928) 83-84.

32. This subject has been developed by the writer in *Actions and Causes of Action* (1925) 34 YALE L. J. 614, 630.

33. *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993 (1917); *Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923).

34. As in *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 394, 115 N. E. 993 (1917), and *Susquehanna Steamship Co. v. Andersen & Co.*, 239 N. Y. 285, 290, 146 N. E. 381, 386 (1925).

from the complaint, if the issues on them were of different character from those in the complaint, there was no occasion to apply the merger principle. There was a joinder merely, and each of the different kinds of issues might have received their appropriate mode of trial. To the extent that they overlapped, an adjudication under one method should have obviated the necessity of determining them under the other. The issues were not legal as to one of the parties and equitable as to the other, because of a jury demand by one and a waiver by the other. Such a concept is most confusing. The issues, as to both, were the same in character, but, as to both, the same issues were made under the complaint *and* under the counterclaim. Had two suits been pending at the same time, one on the complaint and another on the counterclaim this would be perfectly clear. The chancellor, by deciding the issues first, could enjoin the further hearing at law. The prior adjudication at law, barring special circumstances, would bind the chancellor. The chancellor is no less a chancellor because he also acts as a law judge in the same trial. But instead of his legal characteristics racing with his equitable characteristics for priority, they unite in agreeing which shall prevail in a particular case. In effect, though not in words, this is what Justice Cardozo worked out in the first case discussed.³⁵ The verdicts of the jury prevailed. He could have held without error that the trial judge might have treated the verdicts as advisory, and have discarded them.

In the second case³⁶ with which he dealt the counterclaim to reform the contract was equitable. The issues of mutual mistake of fact and fraud in inducement necessitated ignoring the parol evidence rule, and were not proper issues for a jury in a well ordered trial. This was frankly admitted. But apparently under the temporary influence of the merger theory of the single form of action, he held that the issues under the counterclaim took the character of the issues in the complaint to which they were attached. Here there was no overlapping of issues as in the previous case. The mutual mistake and fraud issues involved the counterclaim only. They were not defensive to the complaint, though they were also improperly embodied in the answer. Answers and counterclaims have distinctive functions which should not be scrambled together by any merger theory, mixing up issues which properly belong to the jury with those which do not.

In the third case³⁷ the issues were all such as might have been found in a properly constituted equity suit for mandatory injunction. They might have been found in distinct suits, one of which was eject-

35. *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993 (1917).

36. *Susquehanna S. S. Co. v. Andersen & Co.*, 239 N. Y. 285, 146 N. E. 381 (1925).

37. *City of Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923).

ment alone, but that was not their environment in this case. There might have been an attempt in the single suit to have characterized the issues bearing on title and right to possession alone, as by segregating them in a separate count, and thus indicate that a proper equitable merger was not desired. No such attempt was made. The form of the pleading indicated a desired merger. Plaintiff alone determined whether there should or should not be a merger under the old procedure, and when constitutions were adopted, the granting of a jury to defendant was a favor, not a right. The majority of the court, getting tangled up on its merger theories, merged the equitable into the legal issues, extending the functions of a jury, just what Justice Cardozo sanctioned in the case previously discussed, but to which he could not agree in the present case. The difficulties in the three cases consisted of inconsistent uses of the merger principle, and a failure to distinguish between joinders and mergers.

Federal Rule 10 does or does not invite the pleader and the court into malignant "mergeritis", depending upon the interpretation adopted. If emphasis is placed upon the transaction, giving it a lay scope, partitioning pleadings into counts according to rhetoric instead of according to reliefs obtainable in law, improper mergers will almost certainly follow. Distinctions between actions at law and suits in equity are so thoroughly abolished that in many cases it will be impossible to determine the proper scope of jury trial, and jury demands under Rule 38 will be arrows shot in the dark. The wishes of the parties, or the guesses of the trial judges, rather than the Constitution, will determine what is obtained. The parties may get too little, or too much. If, in interpreting Rule 10, the emphasis is placed on pleading the claim, rather than the lay transaction (not requiring separate actions for separate claims, but separate divisions within the single action), the target for jury demands will be a distinct one. A transaction is an elastic concept which may be moulded to fit efficient judicial administration. For judicial purposes, it may be confined to the facts out of which a single claim arise. It may contain some facts of no legal import, and hence be larger than the claim, and be something out of which the claim may arise without being identical with it, but when additional facts appear having legal import upon another claim a second transaction appears. A separation into counts will "facilitate the clear presentation of the matters set forth" whenever a more distinct target for jury demands is thus presented.

The writer has been unable to discover that any of the federal courts have thus far have fallen victims of "mergeritis", the communism of legal and equitable remedies and insidious destroyer of con-

stitutional jury rights. Propaganda, however, is to be found everywhere—in bar meetings to discuss the Rules, in current texts upon them, and in articles in law reviews. Members of law faculties have contracted the disease, and are passing it on to students. We should not blind ourselves to the seriousness of the evil because it has not as yet produced a major casualty in the new system. Its judicial victims are many in other jurisdictions having the one form of action.