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HOW CONCURRENT ARE THE RESTITUTIONARY REMEDIES?

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ENGLISH law, some 600 years ago, split into separate bodies of law and equity, each with its separate courts and distinct procedures, imbued with different philosophies—an historical accident unique to the common law.[1] But the divisive force of history has long been challenged by the unifying pressure of reason and expedience. Merger of law and equity has been attempted by various codes of civil procedure,[2] by the Judicature Acts,[3] by piecemeal statute,[4] and by judicial decision.[5] Lord Mansfield's importation of equitable principles into the rigid thinking of the common law[6] created the legal action of quasi contract which closely parallels the equitable remedy of the constructive trust, both seeking the common goal of restitution. It has been said that parallel lines meet only at infinity. The purpose of this article is to measure the recent and fairly recent distance between these lines, and between equity and law in general, to see if we may not hope for a somewhat earlier meeting. Our law, like Humpty Dumpty, may defy all efforts to put it together again, but it is possible that time may heal the wounds and experience weld equity and law into one body doubly effective because it retains the best of both systems.

In this article we shall consider first the commonly recognized bases of equitable jurisdiction relating to matters wholly equitable, then the requirements of equitable matters wherein jurisdiction is usually held to be concurrent with that of law, and then those cases where the assumption of jurisdiction by equity is error and the matter properly belongs only at law. The constitutional right to a jury trial at law may, as we shall see, be operating to enlarge this last category at the expense of the area of concurrent power. And by the same token, equity may be enlarging its sphere of influence by treating as inadequate legal remedies not in all respects as effective as those of equity. No effort is made herein to restrict our specimen cases to any one jurisdiction, and as a result the divergence

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1 See 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 446-52 (7th rev. ed. A. Goodhart & H. Hanbury 1956).

2 *See* C. CLARK, CODE PLEADING 210-45 (2d ed. 1947).

3 Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, §§ 24-25.

4 *E.g.*, FLA. STAT. § 52.20 (1965) (equitable defenses in suits at law).

5 Moses v. Macferlan, 97 Eng. Rep. 676 (K.B. 1760).

6 *See* G. KEETON, AN INTRODUCTION TO EQUITY 7, 14 (6th ed. 1965).

noted may not be uniform and certainly it is subject to variation depending upon the extent of procedural merger in the various states.

In England and in most American states the separate court of chancery has long disappeared and both equity and law are administered in one court and by the same judge.[7] One might think that the effect of this merger would be to allow the court to administer whatever form of relief seemed most appropriate without regard to its designation as legal or equitable, but such has not been the case. As long ago as the reign of James I it was settled that when the result of a suit in equity differed from that of an action at law on the same general facts, equity had power to enjoin enforcement of the judgment at law.[8] This would seem to indicate that no conflict should any longer exist, that the rules of equity would henceforth prevail, and that certainly when the two courts were merged into one all distinctions, procedural as well as substantive, should come to an end. But the distinctions are still very much in evidence. Making due allowance for the natural conservatism of the Bar, the only valid reason for allowing the substantive distinction lies in the procedural differences between law and equity, the very differences the codes and the Judicature Acts were designed to eliminate. Such matters as the right to jury trial, the scope of appellate review, the applicability of the statute of limitations, the availability of equitable defenses, the necessity for tender by the plaintiff before suit, the availability of punitive damages, the methods of enforcement of the judgment or decree, all may depend upon the classification of the action as either legal or equitable. The distinction may be vital. Only when we no longer care will equity and law be truly merged.

Maitland has defined equity as "that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity."[9] This is a most unsatisfactory definition and Maitland was not happy with it, but it has the merit of directing our attention at rules in practice rather than at some theoretical standard whose meaning would be open to argument. Its weakness is that it defines equity in terms of the actual practice in a court now relegated to history, and tends to freeze equity into a mold at once archaic and arbitrary, shaped as much by the procedural limitations of a bygone era as by the ethical standards of its judges. But if equity is a gloss upon the law, as Maitland put it,[10] it should accommodate itself to changes in the law and give

[7] 1 J. POMEROY, EQUITY JURISPRUDENCE § 40 (5th ed. S. Symons 1941).
[8] The Earl of Oxford's Case, 21 Eng. Rep. 485 (Ch. 1615).
[9] F. MAITLAND, EQUITY 1 (2d rev. ed. J. Brunyate 1936).
[10] *Id.* at 18.

up gracefully those aspects of its jurisdiction which a reformed common law can adequately handle. Unfortunately, in the United States, in order to comply with the constitutional mandate protecting the right to jury trial, the courts have used, for the most part, an historical test.[11] If the matter would properly have been in equity at the time of the adoption of the particular constitution then no jury is required.[12] And some cases have held it error to permit a jury to decide issues historically equitable despite the fact that the constitutional guarantee does not give anyone a right not to have a jury.[13]

The Bases of Equitable Jurisdiction

As any first-year law student will affirm, the basic requirement of equitable jurisdiction is inadequacy of the remedy at law. And the traditional remedy at law is damages, a sum of money awarded to the plaintiff to compensate him for his injury. Damages by their very nature are usually inadequate. But, in many cases, inadequate or not, they are the only remedy available. If *A* has negligently driven his car into *B* causing *B* personal injuries, money is certainly an inadequate compensation for *B*'s pain and suffering, but it is the best that any system of law can offer. Equity can offer nothing better and the remedy at law must do. And on the other side of the coin, if *A* is repeatedly trespassing on *B*'s land causing no injury to the land but threatening to continue his trespass indefinitely, repeated actions at law by *A* will produce no more than nominal damages, a remedy so obviously inadequate when contrasted with equity's power to enjoin the trespasses that few would question the propriety of equitable intervention.[14]

Rarely will one find an equitable remedy when on the same facts some legal relief will not be available.[15] So the test for equitable jurisdiction becomes a matter of comparison. Is the legal remedy in all respects as good as that which might be obtained in equity?[16] If logically applied, such a test might give over to equity large areas of the law where damages are obviously not so adequate a remedy as specific relief. Whether the subject matter of a contract is unique or not, specific performance would, in most cases, seem superior to damages for breach. And in like fashion, specific restitution of personal

[11] *E.g.*, Swanson v. Boschen, 143 Conn. 159, 120 A.2d 546 (1956).

[12] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

[13] Sanders v. Needy, 363 S.W.2d 114 (Ky. 1962); Style v. Greenslade, 364 Mich. 679, 112 N.W.2d 92 (1961).

[14] *See, e.g.*, Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955).

[15] *But see* Camden Trust Co. v. Handle, 132 N.J. Eq. 97, 26 A.2d 865 (Ct. Err. & App. 1942) (equitable waste); Warren v. Parkhurst, 45 Misc. 466, 92 N.Y.S. 725 (Sup. Ct. 1904) (pollution of stream).

[16] *See* RESTATEMENT OF TORTS, § 938, comments b, c at 701-04 (1939).

property would appear more desirable than damages for its detention. But the law has not gone so far. It would almost appear that the ancient struggle for jurisdiction still continues despite the merger of law and equity into one court. The reluctance of courts to give equitable relief outside of the traditional areas is reminiscent of the placating subterfuge that equity acts only in personam and does not in fact conflict with law. It may be that the historical test of the right to jury trial is the inhibiting factor and that the courts view equitable relief as inextricably tied to classic equitable procedure. Undoubtedly precedent, which must of necessity draw on the past, is a potent factor restricting the expansion of equitable relief. But the codes and the Judicature Acts would seem sufficient authority for awarding equitable relief in a traditionally legal action so long as the right to jury trial is protected.

There are some areas where the availability of equitable relief is unquestioned. For instance the settlement of the accounts of an express trustee would appear to be without question of equitable cognizance. Whether this is so because the express trust is a creature of equity or because the accounting is too difficult a matter to entrust to a jury is not altogether certain. Indicating that the latter may be the reason are those cases requiring a common law action of account or in quasi contract against an express trustee when all that remains to be done is to compel payment by the trustee of a specific balance due.[17]

Of course an honest trustee seeking settlement of his account has no remedy at law. He merely wants to be relieved of liability and of the responsibilities of his trust. His suit is similar to a bill quia timet. If he is not an honest trustee or if he has violated his trust in some manner equity would seem appropriately to have jurisdiction to compel him to abide by his trust and to hold him in contempt if he fails to do so.[18] Viewed in this light the remedy at law would seem inadequate even though the decree in equity might be for money only, the same as a judgment at law. Contempt as a means of enforcing the decree would make the equitable remedy superior. But this does not mean that the equitable remedy is exclusive. If all that the plaintiff wants is money an action of conversion would lie at law and would produce a judgment for the same sum as would the suit in equity. In fact a suit at law for damages for breach of contract might be equally available or in quasi contract to recover the unjust enrichment of the trustee.

[17] Ripling v. Superior Court, 112 Cal. App. 2d 399, 247 P.2d 117 (1952); Conner v. Fisher, 169 Okla. 197, 36 P.2d 501 (1934). *See also* 1 J. POMEROY, EQUITY JURISPRUDENCE § 178 (5th ed. S. Symons 1941).

[18] *See* Princess Lida v. Thompson, 305 U.S. 456 (1939).

So also where there has been an abuse of a confidential or fiduciary relationship, or duress, or fraud, the injured party may resort to an action at law for damages, or seek restitution at law in quasi contract, and he may also bring suit in equity for an accounting to establish a constructive trust or equitable lien upon identifiable property and, if necessary, employ tracing in equity to follow property beyond the verge of identification. But if no property can be identified as being that of the plaintiff, and if tracing fails, no constructive trust or equitable lien may be established. May equity under these circumstances retain jurisdiction and render a decree for money only?

Concurrent Jurisdiction

A good question at this point might be—is there such a thing as concurrent jurisdiction? A better one is—what is meant by concurrent jurisdiction?

Does concurrent jurisdiction only arise when, on a given set of facts, the remedy at law is identical with that in equity? Or may we say that jurisdiction is concurrent if on the same facts some relief is obtainable on either side of the court? If the latter, then whenever any relief is obtainable in equity it is probably concurrent with some remedy at law. But if our definition requires that the remedies on both sides of the court be identical then it may well be that, at least under the more recent decisions, there no longer is any such thing as concurrent jurisdiction. Only in those cases where the question is raised can the question be decided. And if the question is raised merely by asserting that the plaintiff has an adequate remedy at law the answer may be inconclusive. But when the question is raised by an assertion of an adequate remedy at law coupled with a demand for a jury trial the real soul searching begins. Constitutional guarantees are not lightly to be brushed aside.

Restitution should provide a fruitful field for investigation. The constructive trust is the equitable counterpart of the law's quasi contract. Both may result in recovery of a sum of money only. Equitable principles apply to both. Statutes or constitutional provisions outlawing imprisonment for debt deprive equity of contempt as a means of enforcement of its decree and limit enforcement of both the judgment and decree to execution.[19] The remedies are virtually identical and if concurrent jurisdiction exists we should find it here.

According to the *Restatement of Restitution*, "the chief difference"

[19] *E.g.*, FLA. CONST., DECLARATION OF RIGHTS § 16 (1885); N.Y. CIVIL RIGHTS LAW § 21 (1948).

between a quasi contractual obligation and a constructive trust is

> that the plaintiff in bringing action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property.[20]

However, it would appear that many courts have allowed personal judgments for money only with equal facility on either side of the court. Even the *Restatement* recognizes that if the only reason for denying the constructive trust is that no res can be identified "a decree establishing a personal liability of the defendant" may be obtained in equity.[21] Perhaps it is merely a paraphrase of the *Restatement* position, but it seems more descriptive of the decisions to say that if equity assumed jurisdiction by virtue of a confidential relationship or duress or fraud even where the plaintiff claims no specific property, the court may treat the wrongdoer as a "constructive trustee" and subject him to purely personal liability. This is the identical relief which could have been obtained at law.

In *Hochman v. Zigler's Inc.*[22] the plaintiff sought recovery in equity of part of the purchase price of his store extorted from him by his landlord who threatened to deny the plaintiff's vendee a lease unless the plaintiff gave the landlord nearly half of the proceeds of the sale. Here there was no insolvency, no confidential relationship, and certainly nothing unique about the money sought to be recovered. The chancellor frankly recognized concurrent jurisdiction saying, "[o]rdinarily, the money can be recovered by an action of *assumpsit* but equity also has jurisdiction."[23]

In *Grand Trunk Western Railroad Co. v. Chicago & Western Indiana Railroad Co.*[24] the plaintiff made an overpayment of money to the defendant for the use of certain railroad facilities. This overpayment should have been collectable by action at law for money paid. However, the statute of limitations had run against a large portion of the overpayment and thus the plaintiff did not rely upon this cause of action. Within the period of the statute, however, the defendant collected the amount of the overpayment from the corporation which should have made the payment in the first place. It was this later collection which the plaintiff sought successfully to recover. Without differentiating between an action for money had and received and a constructive trust, the court found the latter. It did so on the basis of unjust enrichment citing section 1 of the *Restatement of Restitution*: "A person who has been unjustly en-

[20] RESTATEMENT OF RESTITUTION, § 160, comment *a* at 642 (1937).
[21] *Id.*, Introductory Note to Part II, at 640.
[22] 139 N.J. Eq. 139, 50 A.2d 97 (Ch. 1946).
[23] *Id.* at 143, 50 A.2d at 100.
[24] 131 F.2d 215 (7th Cir. 1942).

riched at the expense of another is required to make restitution to the other,"[25] a statement as applicable to the action in quasi contract as it is to the constructive trust. The only justification for equitable relief was the existence of a confidential relationship.

In cases such as these where the court can base its use of the equitable remedy upon some recognized head of equitable jurisdiction most of the incidents of that jurisdiction would seem legitimately to follow. If the statute of limitations is more favorable to the plaintiff in equity, the existence of concurrent jurisdiction should not deprive him of it.[26] Enforcement of the decree for money only will probably be by execution rather than contempt because of constitutional or statutory prohibitions against imprisonment for debt. In many of the cases the selection of one forum rather than the other is of no particular moment because the defendant concurs in the plaintiff's choice and thus raises no untidy questions.[27]

But a series of cases in New York which antedate the *Restatement of Restitution* by some years do raise some rather perplexing questions. *In Fur & Wool Trading Co., Ltd. v. George I. Fox, Inc.*[28] the plaintiff sought relief in equity, alleging that goods had been forcibly taken from it and transferred by the thief to the defendant who had knowledge of the facts. The defendant refused to account for the goods and asserted that in any event the plaintiff had an adequate remedy at law. After a demurrer was sustained in the lower courts the plaintiff appealed to the court of appeals where Justice Andrews, writing the majority opinion, reversed and held that the complaint stated a good cause of action in equity.

Andrews conceded that there was a remedy at law. The plaintiff might have sued for conversion and recovered a personal judgment for the value of the goods. Or, if the wrongdoer still retained the goods, "an action in replevin would have afforded a complete remedy for their recovery."[29] Or, if they had been sold, as the case here, "there is an action for money had and received, resulting in a personal judgment for the proceeds."[30] It was recognized that equity could not acquire jurisdiction to allow a bill of discovery as the plaintiff had a full statutory right to discovery at law.

However, Andrews pointed out that in certain cases equity will

[25] *Id.* at 218.

[26] Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910); McKenzie v. Wappler Elec. Co., 215 App. Div. 336, 213 N.Y.S. 389 (1926). *Contra* Keys v. Leopold, 241 N.Y. 189, 149 N.E. 828 (1925).

[27] *See* Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959), where the court used both constructive trust and quasi contract to prevent unjust enrichment.

[28] 245 N.Y. 215, 156 N.E. 670 (1927).

[29] *Id.* at 217, 156 N.E. at 670-71.

[30] *Id.* at 217, 156 N.E. at 671.

entertain a suit for an accounting.

> This is so where such a relation exists between the parties as under established principles entitles the one to demand it of the other. . . .[31] A trustee in possession of trust funds may in a proper case be called to account to his *cestui que trust* . . . , and this rule is enforced as well where the trust is implied as where it is express.[32]

Having thus burdened his fictional trustee with the obligations of an express trustee, Andrews, citing *Newton v. Porter*,[33] held that the thief, "having sold stolen goods may be treated as a trustee of the proceeds and also of any property into which they have been transformed, so long as either may be identified."[34] This would presumably permit the use of equitable tracing, and would, according to Andrews, permit an equitable accounting, the declaration of an equitable lien, or a decree of restitution of the trust property. It was held that unless the property could be identified there could be no lien. But even if there were no longer any trust res, it was held that equity could still retain jurisdiction to give a personal judgment. Thus the court reversed the lower courts and held that the complaint stated a cause of action in equity.

What sort of personal judgment is this? Is it the same that the plaintiff could have obtained in an action for money had and received? Or, being an equitable decree may it be enforced by contempt? What has happened to the defendant's right to a jury trial? In short, is the decree in all respects an equitable decree in an equity suit? The measure of recovery in either law or equity would be the unjust enrichment of the defendant. Why then should equity take jurisdiction? There was nothing unique or special about the stolen goods which would entitle the plaintiff to specific restitution, and in any event the plaintiff sought only money. Insolvency of the defendant as a basis for equitable intervention was expressly ruled out by the court.[35] However, the court recognized two instances in which equity might intervene asking, despite the remedy at law,

> is the plaintiff entitled to still other relief in excess of what a court of law is competent to give? Or is his case one where under historic rules, equity has been wont to assume jurisdiction?[36]

In other words, is the remedy at law really adequate? Or, perhaps even if it is, is this an established head of equity?

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[31] The court here cited Brown v. Corey, 191 Mass. 189, 77 N.E. 838 (1906), and Schantz v. Oakman, 163 N.Y. 148, 57 N.E. 288 (1900), both of which denied an accounting because of a lack of fiduciary relationship.

[32] 245 N.Y. at 217-18, 156 N.E. at 671.

[33] 69 N.Y. 133 (1877).

[34] 245 N.Y. at 218, 156 N.E. at 671.

[35] *Id.*

[36] *Id.* at 217, 156 N.E. at 671.

The assumption of jurisdiction in this case appears to rest, in part, on both theories. The court stated that, upon the facts of the case, "broader relief may be obtained in equity than at law."[37] This broader relief was then described as entitling the plaintiff to (1) an accounting, (2) an equitable lien, and (3) a surrender of the trust property.

Considering these points in reverse order, it should be noted that the plaintiff did not ask that the property be returned to him. His complaint acknowledged that the goods had been disposed of by the defendant. And further, as we have already mentioned, the property was not unique. Nor is there any indication that the plaintiff sought an equitable lien other than in his plea for general equitable relief. And, as the court pointed out a lien is dependent upon identification of the specific proceeds and the tracing of them into property which can be subjected to a lien. The plaintiff did not claim to be able to trace. On the contrary he denied knowledge of both the amount and disposition of the proceeds. However, an accounting might have cured this. It might have disclosed what profit the defendant made on the sale of the goods and what disposition he made of the profits. But the complaint envisioned no complicated accounting requiring equitable procedures on grounds of difficulty alone. Discovery proceedings at law would have given the plaintiff all the information he needed to draw a proper complaint. And his judgment at law would have been for the same sum as the decree he sought in equity.

However, the court then stated that even if this plaintiff could not avail himself of the "broader relief" of equity, "[i]f equity has properly obtained jurisdiction it may retain it so as to afford proper relief—personal judgment in such a case against the wrongdoer."[38] Conceding for the moment the correctness of the proposition, the question still remained whether equity had properly obtained jurisdiction.

The court found such jurisdiction in the established power of equity to regulate the affairs of the trustee and his *cestui que trust.* Analogizing from express to constructive trustees and applying the same rules to each, the court found inherent jurisdiction to award a personal judgment against the trustee. This does seem rather like begging the question. If the defendant was subject to equity he would be a constructive trustee; therefore, he was declared a constructive trustee so that he would be subject to equity.

In *Fur & Wool* the court relied heavily on *Lightfoot v. Davis,*[39]

[37] *Id.* at 218, 156 N.E. at 671.
[38] *Id.*
[39] 198 N.Y. 261, 91 N.E. 582 (1910).

which was an action in equity to recover the principal and interest on certain negotiable bonds from the estate of the thief who had stolen them from the plaintiff. Nearly 25 years elapsed from the time of the theft until the discovery of the thief, and the appellate division, relying upon the 6 year statute of limitation applicable to conversion, denied recovery.[40] The court of appeals, however, reversed. Applying the equitable doctrine of concealed fraud, it was held that the statute did not commence to run until the discovery of the fraud. The fraud consisted of the failure of the thief to reveal that he was the thief. In *Lightfoot* the jurisdiction of equity was held to be merely concurrent with that of law but none the less the court felt justified in applying the then exclusively equitable doctrine of concealed fraud instead of following the law. But how did even concurrent jurisdiction arise? The court discussed *Newton v. Porter*[41] which had permitted equitable tracing to establish a constructive trust without the hitherto vital requirement of a fiduciary relationship. But in *Newton v. Porter* the constructive trust depended as much upon the ability to trace as the right to trace depended upon the constructive trust. In *Lightfoot*, however, tracing was admittedly impossible. As a last resort the court rested its jurisdiction on the ancient power of equity over fraud. Thus, the fraud whose existence required the aid of equity to assist the plaintiff in avoiding the legal statute of limitations was the means of the court's acquiring jurisdiction. But in *Fur & Wool* there was no semblance of fraud—just open robbery. It would seem that, on the basis of these cases, in New York at least, where the defendant's acquisition of property is tortious, the remedies in law and equity should be concurrent and the plaintiff able to elect his choice in the light of matters other than jurisdictional prerequisites.

We have spent a good bit of time on *Fur & Wool* and the New York cases which led up to it because they represent the maximum effort of equity to encroach upon fact patterns which by the older law would have seemed the exclusive province of courts of law. The other side of the coin, the importation of equitable doctrines into the law by virtue of quasi contract, has a far longer history commencing with Lord Mansfield and endowing the common law with such concepts as equity and good conscience and unjust enrichment. There is certainly a substantive merger of sorts in the field of restitution. Law and equity here work towards identical goals. Whether obliteration of all distinctions between the remedies in this area is possible is quite another matter.

Although *Fur & Wool* indicates an expansion of equity into

[40] Lightfoot v. Davis, 132 App. Div. 452, 116 N.Y.S. 904 (1909).
[41] 69 N.Y. 133 (1877).

hitherto traditionally legal areas in the field of restitution, there is substantial evidence in the more recent cases that the procedural merger of law and equity under the federal rules may be bringing about an intrusion of legal procedures into equity that may in time make the distinction between the two courts of historical significance only. The extension of the jury into actions where previously the chancellor was judge of both fact and law, the so-called "unitary approach," may in time result in true merger where the procedures of the two courts will be available in one court of law.

The New York Court of Appeals did not consider the right to jury trial in *Fur & Wool* and the "personal judgment" which that case envisioned was one awarded by equity. However, even at that date, the usual historical test would seem to have raised a question as to the mode of trial. In most jurisdictions the criteria to sustain a demand for a jury involve an inquiry as to whether the particular cause of action was one triable as of right to a jury at the time of the adoption of the constitutional provision requiring that the right to jury trial shall remain inviolate.[42] Attempting to apply such a test to *Fur & Wool* leads to the conclusion that any money judgment could have been equally well awarded by a court of law employing a jury from well before the time of the American revolution. Quasi contract, in the guise of a suit for money had and received, dates from Lord Mansfield's landmark decision in *Moses v. Macferlan*[43] and Lord Mansfield not only envisioned a jury, but according to Blackstone's report of the case, saw the jury going into all of the equities between the parties.[44]

Effect of a Demand for Jury

In 1959 Mr. Justice Black in his decision in *Beacon Theatres, Inc. v. Westover*[45] dispensed with concurrent jurisdiction by assuming that equity can act only when the remedy at law is inadequate, and, to preserve the defendant's right to jury trial, held that where the issues of fact are common both to an equitable complaint and a legal counterclaim the counterclaim must be tried first to the jury. The dissent characterized the decision as disregarding "the historic relationship between equity and law."[46]

In 1962, Mr. Justice Black in *Dairy Queen, Inc. v. Wood*,[47] to preserve the defendant's right to a jury trial, held that where injunc-

[42] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Swanson v. Boschen, 143 Conn. 159, 120 A.2d 546 (1956).

[43] 97 Eng. Rep. 676 (K.B. 1760).

[44] Moses v. Macferlan, 96 Eng. Rep. 120, 121 (K.B. 1760).

[45] 359 U.S. 500 (1959).

[46] *Id.* at 514.

[47] 369 U.S. 469 (1962).

tive relief and an accounting were sought together with an award of the money to be found due under the accounting, the right to a jury trial existed as to the accounting and the jury trial must precede any finding of fact by the court. It was conceded that if the accounting were so complicated as to be beyond the competence of a jury the court might decide the facts, but such an eventuality was considered extremely remote in view of the availability of special masters to assist the jury. The *Beacon Theatres* dissenters concurred in the result.

In 1963, Mr. Justice Black, in *Fitzgerald v. United States Lines Co.*,[48] again to preserve the right to jury trial, held that where a claim in admiralty which would normally be tried to the court was coupled with a claim under the Jones Act where the right to jury trial exists, both claims should be tried to the jury. Although admiralty is not equity, the principle could apply equally well when an equitable claim is coupled with one at law.

When one considers that traditional equity practice allowed the chancellor to retain jurisdiction of all facets of a case, legal as well as equitable, if equitable jurisdiction had been properly obtained on one issue, it can be seen that the result of Mr. Justice Black's approach is revolutionary. Whereas the former rule was: Equity having properly taken jurisdiction for one aspect of a case will retain it for all aspects and no right to a jury trial exists as to any of them, now the rule is: If any claim for relief is properly at law, a jury trial must be awarded if demanded. And the implications of *Fitzgerald* are that if the facts giving rise to the legal issue are entwined with those upon which the equitable relief depends, both the legal and equitable issues shall be tried to the jury. *Fur & Wool* was an effort towards merger of law and equity into equity; the current trend is towards a merger of law and equity into law. The right to jury trial frustrated the trend toward equity; no right to trial by court alone restricts the expansion of law. So long as the principles of equity follow the equitable subject matter such a trend could complete the blending of the two systems commenced by Mansfield more than two centuries ago.

What has been the impact of Black's view on other courts? The courts of California, at least, were ahead of Black in protecting the right to jury trial even though the action in which it was demanded would appear to be predominantly equitable. In *Mortimer v. Loynes*[49] the plaintiff sought to recover a secret profit obtained by the president of a building and loan association allegedly in fraud of his principal. Here all the customary jurisdictional requirements for equitable

[48] 374 U.S. 16 (1963).
[49] 74 Cal. App. 2d 160, 168 P.2d 481 (1946).

relief would seem to be present. There was fraud, there was breach of a confidential relationship, there was concealment of the fraud and the facts were complicated. The trial court denied plaintiff's demand for a jury and awarded judgment in favor of the defendants. In reversing, the district court of appeal held the action to be one at law because all that the plaintiff sought was a recovery of money. They applied the equitable doctrine of concealed fraud to extend the period of the statute of limitations, and frankly relied upon equitable principles. The case stands for the proposition that whenever the remedy sought is one which could be obtained in a court of law then it must be a legal remedy. Or, to put it perhaps more accurately, where the remedy at law would be the same as the remedy in equity the court will use equitable principles but will preserve the jury, thus blending the best features of both systems.

In *Carey v. Hays*[50] the Supreme Court of Oregon considered the problem of law versus equity and decided that when all the plaintiff sought was money the action was one at law. This case involved a fiduciary relationship between the parties and the alleged taking of a secret profit by the defendant on the purchase of land by the parties. The trial court considered the matter as a suit in equity for a partnership accounting. The statute of limitations was raised as a defense, but the trial court found the plaintiff not guilty of laches and did not consider the statute of limitations. On appeal it was held that the matter was predominately legal and that the defendant was entitled to a jury trial. Although the plaintiff sought cancellation of the defendant's stock in the corporation which had taken title to the land and although such relief could admittedly be obtained only in equity, the supreme court felt that such relief was merely ancillary to the main action at law and did not make the action an equitable one. Thus the statute of limitations would apply and the defendant was entitled to a jury determination as to when the statute commenced to run. Presumably the law court could award the equitable relief of cancellation of the stock. Instead of the equitable claim authorizing equity to retain jurisdiction and award legal relief this case regards the legal claim as controlling and authorizes the law court to retain jurisdiction and award incidental equitable relief.

In *Bollenback v. Continental Casualty Co.*,[51] the Oregon Supreme Court again had to decide between equity and law and again held the action to be at law. This was a suit by an insured for restitution of premiums paid based upon a repudiation of the contract by the insurer. The jury trial question was not involved, but to determine

[50] 243 Ore. 73, 409 P.2d 899 (1966).
[51] 243 Ore. 498, 414 P.2d 802 (1966).

whether the supreme court could review the facts de novo, a procedure available only in equity, the supreme court had to label the action one way or the other. After admitting that the Oregon cases had gone both ways the court decided that because the plaintiff had received no benefits which he would have had to restore as a condition of bringing suit at law and because no resort to the powers of equity was needed the action was at law. There was really very little to go on in making the decision in this case. The parties had apparently not concerned themselves with the question, no jury was demanded, and the Oregon authorities cited by the court implied that on the facts there might be concurrent jurisdiction. Compelled to decide, the supreme court chose law largely because the remedy at law would be identical with equitable relief.

The Supreme Court of Tennessee in *Warren v. Crockett*[52] recognized rescission of a release for mutual mistake as being strictly equitable but cognizable in a court of law where no objection is raised. The court relied upon a Tennessee statute permitting a law court to determine equitable matters where no objection is taken by demurrer.[53] It is interesting that the statute gives the parties power to confer equitable jurisdiction upon a court of law despite the existence of a separate court of chancery, but even more interesting was the supreme court's conclusion that the questions of fact raised in the equitable proceeding should be tried by a jury. The statute contains no such requirement. The historical test of the right to jury trial would not compel it. It indicates an attitude similar to Mr. Justice Black's in *Fitzgerald*, that even where no right to a jury exists, convenience may dictate its use.

Carter v. Suggs[54] is a recent Florida case where the plaintiff sought to obtain a decree recognizing the existence of a partnership, an accounting as to the value of plaintiff's interest in the partnership and an equitable lien on the partnership assets to secure payment to the plaintiff of the value of his interest. The trial court found no partnership but did find that the plaintiff had performed valuable services for the defendants and declared a lien on real property of the defendants to assure payment to the plaintiff of the reasonable value of his services. The first district court of appeal reversed, holding that the matter should have been tried on the law side of the court and that the defendant was entitled to a jury trial. Although recognizing that if the matter had been properly in equity the chancellor could have retained jurisdiction of the quantum meruit action, the court held that the finding of no partnership precluded

[52] 211 Tenn. 173, 364 S.W.2d 352 (1962).
[53] TENN. CODE ANN. § 16-511 (1956).
[54] 190 So. 2d 784 (Fla. Ct. App. 1966).

further equitable jurisdiction. This is no departure from the general rule and adequately protects the right to jury trial in suits in quasi contract.[55]

But in *Corak Construction Corp. v. Scott*[56] the Florida District Court of Appeal for the Third District held that an action for restitution of a deposit made under a real estate contract was an equitable one and that the civil court of record had no jurisdiction. The action was brought in the civil court of record, a court without equity power and limited to actions wherein the amount claimed is less than $5,000. The complaint alleged damages of $4,990 and that the defendant had refused to return plaintiff's $4,500 deposit. After finding that the plaintiff had rescinded the contract and thus was not entitled to damages for breach, the civil court of record awarded return of the deposit. This would seem a good example of an action for money had and received and well within the court's limited jurisdiction. The district court of appeal in reversing and ordering the transfer of the suit to the equity side of the circuit court considered the case as one for rescission of a contract which it held to be exclusively equitable. In as much as the plaintiff had vacated the property at the time of the suit and the defendant had resold it, it would seem that the remedy at law would be in all respects the same as the remedy in equity. The jury trial issue was not presented, but the jurisdictional issue was of sufficient importance to require careful consideration.[57]

New York has long accentuated the distinctions between law and equity by insisting, despite the code provision for one form of civil action, that a complaint conform to a "theory of the pleadings." If a complaint was framed in equity and equitable relief alone was demanded, a motion to dismiss made before answer would be granted if the facts merely entitled the plaintiff to some form of legal relief.[58] The reason for the rule was to protect the defendant's right to jury trial. In *Lane v. Mercury Record Corporation*[59] the appellate division, first department, abandoned this rule on the ground that liberal construction of the new Civil Practice Law and Rules required it and that section 4103 had eliminated the jury trial issue by allowing a party the right to demand a jury at any stage of a trial when it

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[55] *Cf.* Beck v. Barnett Nat'l Bank, 117 So. 2d 45 (Fla. Ct. App. 1960).

[56] 184 So. 2d 460 (Fla. Ct. App. 1966).

[57] *See also* Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635 (1934); Paularena v. Superior Court, 231 Cal. App. 2d 906, 42 Cal. Rptr. 366 (1965).

[58] Terner v. Glickstein & Terner, Inc., 283 N.Y. 299, 28 N.E.2d 846 (1940); National Comm. on the Observance of Mother's Day, Inc. v. Kirby, Block & Co., 17 App. Div. 2d 390, 234 N.Y.S.2d 432 (1962). *But see* Union Guardian Trust Co. v. Broadway Nat'l Bank & Trust Co., 138 Misc. 16, 245 N.Y.S. 2 (Sup. Ct. 1930).

[59] 21 App. Div. 2d 602, 252 N.Y.S.2d 1011 (1964).

appeared that the relief required should so entitle him. *Lane* was a suit for an accounting for royalties which might well have resulted in a judgment for money only. Presumably, although the action would be heard as a suit in equity without a jury, if the defendant felt, at some point in the trial, that the proof failed to meet jurisdictional requirements for equity, he could then demand a jury trial. It would seem a rather awkward procedure and a waste of time to try the case all over again before a jury. It would appear simpler to classify the action as one at law from the beginning.

By relying upon *Fur & Wool*, the New York courts might have so expanded the scope of equity that the right to jury trial would have been severely limited. At first it appeared that they might do so. In 1929 the appellate division, first department, in *Von Wilmowsky v. Prindle*, [60] held that allegations of fraud and conversion stated "a good cause of action, not only in law, but for equitable relief."[61] *Fur & Wool* was quoted at length and the jurisdiction in equity of special term was affirmed. In the following years *Fur & Wool* was relied upon by a variety of New York courts to sustain equitable jurisdiction where the remedy at law would seem to have been adequate by any test.[62] However, it was usually interpreted as requiring at least a confidential relationship as a prerequisite. In recent years it appears to have become a dead letter, not overruled, merely ignored. It may be that the enactment of the Civil Practice Law and Rules has made the distinction between law and equity less meaningful or perhaps the New York courts have quietly receded from the position of *Fur & Wool*.[63]

A sampling of cases from other jurisdictions indicates that, although there is no uniformity, where the remedies at law and in equity are substantially equivalent the case will generally be considered as being at law, particularly where a jury trial has been demanded.

Michigan has moved from the position of *Fur & Wool* to one more consistent with *Dairy Queen*. In 1938, in *Detroit Trust Co. v. Struggles*,[64] the Michigan Supreme Court followed *Fur & Wool*

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[60] 225 App. Div. 597, 234 N.Y.S. 18 (1929).

[61] *Id.* at 598, 234 N.Y.S. at 20.

[62] La Vaud v. Reilly, 295 N.Y. 280, 67 N.E.2d 242 (1946); Warn v. Warn, 5 App. Div. 2d 952, 171 N.Y.S.2d 164 (1958); Rhodes v. Little Falls Dairy Co., 230 App. Div. 571, 245 N.Y.S. 432 (1930); Melnek v. County Trust Co., 192 N.Y.S.2d 38 (Sup. Ct. 1959); Majestic Loose Leaf, Inc. v. Cannizzaro, 10 Misc. 2d 1040, 169 N.Y.S.2d 566 (Sup. Ct. 1957); American Guar. & Liab. Ins. Co. v. Wtulich, 128 N.Y.S.2d 135 (Sup. Ct. 1953). *But see* Pelkey v. Pelkey, 236 App. Div. 55, 258 N.Y.S. 562 (1932).

[63] *See* Vinlis Constr. Co. v. Roreck, 23 App. Div. 2d 895, 260 N.Y.S.2d 245 (1965).

[64] 283 Mich. 471, 278 N.W. 385 (1938).

in holding that where there had been a conversion of pledged stock by the defendant the plaintiff could sue in equity to establish a constructive trust on other stock into which the converted stock had been traced. There was no confidential relationship and the stock was not unique, but the court held that the matter was properly in equity despite a demand by the defendant for a jury trial. In 1961, in *Style v. Greenslade*,[65] a personal injury action in which the defense of release was interposed, the Michigan Supreme Court held that the issue of fraud in the procurement of the release must be tried to the court as an equity question and that it was error to submit the question to a jury. But in *Romero v. King*,[66] in 1962, the same court cast doubt upon *Style* as being inconsistent with *Dairy Queen* and *Beacon Theatres*.

In *McGuire v. Hammond*,[67] a 1966 Kentucky Court of Appeals case, the court expressed approval of *Dairy Queen* but denied a jury trial in a taxpayer's suit against numerous defendants on the ground that the case involved a complicated accounting and was thus cognizable only in equity.

However, in 1964 the Supreme Court of Minnesota in *Landgraf v. Ellsworth*[68] relied heavily on *Dairy Queen* in holding that denial of a jury trial was reversible error in a suit for an accounting of commissions due under an employment contract. The court was strongly motivated by the recent enactment of rules of procedure identical with the federal rules.

Ohio, according to *Boswell v. Ruppert*,[69] would seem to be unaffected by *Dairy Queen, Beacon Theatres* and *Fitzgerald*. This was a suit by the seller of stamps for the balance of the purchase price due on a contract of sale. The defendant alleged fraud and sought rescission. The trial court treated the case as being one for specific performance and denied a jury. The court of appeals reversed, holding that the action was basically one for breach of contract and that the jury should have been allowed. But by approving the trial of the equitable counterclaim before the submission to the jury the court was inconsistent with the attitude of the United States Supreme Court.

In *Grandon v. Ellingson*[70] the Supreme Court of Iowa considered as equitable a suit to recover a $15,000 deposit made under a contract to buy a bowling alley which provided for a return of the deposit in the event that the plaintiff failed to obtain a particular loan. The

[65] 364 Mich. 679, 112 N.W.2d 92 (1961).
[66] 368 Mich. 45, 117 N.W.2d 124 (1962).
[67] 405 S.W.2d 119 (Ky. 1966).
[68] 267 Minn. 323, 126 N.W.2d 766 (1964).
[69] 115 Ohio App. 201, 184 N.E.2d 461 (1961).
[70] 144 N.W.2d 898 (1966).

case was treated as an action for specific performance despite the fact that it was primarily one to recover money. Of perhaps greater interest is the treatment accorded the defendant's counterclaim for damages. Although a jury trial of the counterclaim was demanded the court applied the general rule that equity having taken jurisdiction properly might retain it and try all issues legal and equitable.

In *Sweeney v. Happy Valley, Inc.*,[71] a recent Utah case, the plaintiff creditor sought an accounting and damages based upon the market value of certain lots sold by the defendant wherein the plaintiff was entitled to a percentage of the price. The plaintiff demanded a jury. The trial court denied the demand for jury and awarded a recovery based upon the actual sales price of the lots. In affirming, the supreme court held that it is within the discretion of the trial judge to determine whether a matter is predominately equitable, and despite the fact that this decision may affect the right to jury trial it will not be reversed unless patently in error.

In 1934, the Supreme Court of Oklahoma, in *Conner v. Fisher*,[72] recognized a suit against an express trustee for an accounting as being an action at law. No jury had been requested, and the question arose in considering the weight to be given the trial judge's findings of fact. If the case had been in equity the appellate court would have been justified in reviewing the facts, but it held the case to be a law action because all that was sought was money, and therefore the appellate court felt bound by the judgment of the trial court reasonably supported by the evidence. In 1958 the same court, in *Jones v. Goldberger*,[73] upheld the right to a jury where similar remedies existed on both sides of the court. In this case the plaintiff sued to recover a deposit paid under a contract to buy a business alleging that the contract was induced by fraud. On these facts an action seeking a rescission and return of the deposit would be in equity but one based upon a rescission and seeking the same relief would be at law. The court recognized that in either case the right to return of the deposit would hinge upon the finding of fraud and so in both courts the right to rescind would be in issue. Although the case had been tried to a jury in the lower court, the court had directed a finding for the defendant. If in equity this would be conclusive, but if at law, and if there were facts sufficient to go to the jury, it would be error. The supreme court, in reversing, decided in favor of law, and upheld the right to jury trial. In 1961, however, *Southard v. MacDonald*,[74] a decision of the same

[71] 18 Utah 2d 113, 417 P.2d 126 (1966).
[72] 169 Okla. 197, 36 P.2d 501.
[73] 323 P.2d 344 (Okla.).
[74] 360 P.2d 940 (Okla.).

court, cast some doubt on the Oklahoma position. This was a suit for partition in which a contingent fee contract awarding an attorney 40 percent of the land involved was attacked as being void for fraud. The plaintiff demanded a jury trial, but the supreme court held that although a statute authorized a jury trial in actions for recovery of specific real property, this case was primarily an equitable one to cancel a contract and no right to a jury trial existed.

Naturally the federal courts have tried to follow the policy laid down in *Beacon Theatres* and *Dairy Queen*, but it has not always been easy. Illustrating the difficulty in drawing the line between law and equity, even under the federal rules, is a series of cases dealing with the liability of a client, Simler, to his attorney, Conner. In the first action the client sought a declaratory judgment as to whether he owed his attorney merely the reasonable value of the attorney's services or whether he was bound by a contingent fee contract. A summary judgment was awarded the attorney. The client appealed and the Court of Appeals for the Tenth Circuit reversed and sent the matter back to be tried by a jury.[75] The Supreme Court of the United States at first denied certiorari,[76] but on rehearing granted it,[77] and remanded the case to the Tenth Circuit for reconsideration in the light of *Southard v. MacDonald*.[78] The Tenth Circuit, acting on the remand and construing *Southard* as controlling, sent the case back to the trial judge to be determined by the court without a jury.[79] The plaintiff next obtained certiorari from the Supreme Court which held that in diversity cases the right to jury trial is to be determined by federal law and that *Southard* was thus not controlling.[80] A further finding was made that the case was essentially a legal claim to determine an amount of money and that the Tenth Circuit was again in error for not having sent the matter back for jury trial.[81] Of course this is precisely what the Tenth Circuit had done in its first hearing of the matter.

Wirtz v. Jones[82] was a suit to enjoin violations of the minimum wage provisions of the Fair Labor Standards Act and to compel payment of back wages owing to defendant's employees. Defendant sought a jury trial arguing that the suit to compel payment of money was an action at law, for restitution. The Court of Appeals for the Fifth Circuit held that the matter was not legal, but concerned an equitable vindication of a public right. *Dairy Queen* and *Beacon*

75 Simler v. Conner, 282 F.2d 382 (1960).
76 Conner v. Simler, 365 U.S. 844 (1961).
77 Conner v. Simler, 367 U.S. 486 (1961).
78 360 P.2d 940 (Okla. 1961).
79 Simler v. Conner, 295 F.2d 534 (1961).
80 Simler v. Conner, 372 U.S. 221 (1963).
81 *Id.*
82 340 F.2d 901 (5th Cir. 1965).

Theatres were distinguished on the ground that they were actions to protect private rights whereas the instant case was to correct an offense against the public interest.

In *Swofford v. B. & W., Inc.*,[83] a patent infringement case, the Court of Appeals for the Fifth Circuit held that the plaintiff was entitled to a jury trial on the issues of infringement and damages, but not so entitled on the question of exemplary damages and attorney's fees. The plaintiff had sought an injunction and an accounting. The defendant argued that this was traditional equitable relief and that no jury should be required. The court relied heavily on *Dairy Queen* and held that an accounting, "although a creature of equity, is a rule of administration and not of jurisdiction."[84] Stating that equity's award of damages, historically without a jury, was to avoid a multiplicity of suits and was at one time administratively sound, the court went on to hold that today, under a merged system where multiplicity can be avoided by one civil action in which some issues are tried to the court and others to the jury, it is no longer necessary or desirable, and that the right to jury trial should be protected despite the fact that traditionally no jury would have been available.

A possible limitation on *Dairy Queen* and *Beacon Theatres* is to be found in *Katchen v. Landy*[85] wherein the United States Supreme Court distinguished those two cases in holding that a bankruptcy court might order surrender of a preference by a creditor, who had filed a claim in the proceeding, without according him a right to jury trial. Had no claim been filed by the creditor the trustee would have had to sue in a plenary suit and the right to a jury would have existed. Justices Black and Douglas dissented.

Conclusions

It would seem that the importation of the jury into matters where traditionally equity assumed jurisdiction to avoid a multiplicity of suits has gone a long way in welding law and equity into one unified body of law. Now that a court may act without regard to labels and give either kind of relief in one action and administer justice more effectively by using the best procedures of both of the former courts, a true merger appears much more imminent. In like fashion the difference in the scope of appellate review between the two courts which was considered in *Bollenback v. Continental Casualty Co.*[86] should no longer present any difficulty. The taking of testimony in

[83] 336 F.2d 406 (5th Cir. 1964).
[84] *Id.* at 411.
[85] 382 U.S. 323 (1966).
[86] 243 Ore. 498, 414 P.2d 802 (1966).

equity is no longer solely by affidavit and the reason for allowing an equitable appeal to be virtually a trial de novo no longer exists. The application of equitable principles to suits at law was begun by *Moses v. Macferlan*[87] and should continue to draw the two bodies of law closer together as was exemplified in *Mortimer v. Loynes*[88] which used the best features of both of the former courts. But so long as some courts are forbidden to apply equitable remedies, and so long as jurisdiction is expressed in terms of legal as distinguished from equitable power, a true merger will, of course, be impossible.[89] Perhaps a merger of that extent is not called for. But where the remedies at law and in equity would formerly have been concurrent it seems unwise to have to split hairs to decide the jurisdiction of a particular court as was done in *Corak*,[90] and a better yardstick would seem to be the amount involved if there is a money claim, or the value of the property affected if the suit is not one to recover money. Where there never was concurrent jurisdiction there is rarely any difficulty in distinguishing a legal remedy from an equitable one. Injunction, reformation, specific performance and the like are usually easy to recognize as equitable and to limit such remedies to a particular court imposes no great burden. But even here it might be more sensible to distinguish inferior from superior courts in terms of the importance of the judgment in dollars and cents rather than by reference to equitable or legal relief. Courses in equity will still have to be taught but they will be more effectively taught as a part of the total remedy available rather than as the esoteric study of the practices of extinct courts. History is a useful means of acquiring perspective but justice is a more proper goal for modern law.

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87 97 Eng. Rep. 676 (K.B. 1760). See notes 43-44 *supra*.

88 74 Cal. App. 2d 160, 168 P.2d 481 (1946). See note 49 *supra*.

89 *See, e.g.*, Corak Constr. Corp. v. Scott, 184 So. 2d 460 (Fla. Ct. App. 1966); Circulation Associates, Inc. v. Mother's Manual, Inc., 53 Misc. 2d 225, 278 N.Y.S.2d 137 (N.Y. City Ct. 1967).

90 Corak Constr. Corp. v. Scott, 184 So. 2d 460 (Fla. Ct. App. 1966).