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# Mixing Law and Equity Causes of Action Does Not Preclude a Jury Trial

Philip M. Halpern\*

## I. Introduction

Article I, Section 2 of the New York State Constitution guarantees as “inviolable forever” the right to a jury trial in civil cases.<sup>1</sup> This right, guaranteed by both the Constitution and further codified by statute, has been regarded as “fundamental and sacred to the citizen,”<sup>2</sup> but it can nevertheless be waived in various ways.<sup>3</sup> In addition to waiver caused by the failure to demand a jury trial in the note of issue and the express waiver of the right by the parties,<sup>4</sup> a party may also waive a right to trial

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1. N.Y. CONST. art. I, § 2.

2. *Jacob v. New York*, 315 U.S. 752, 752-53 (1942) (Murphy, J.) (“The right of jury trial in civil cases at common law . . . should be jealously guarded by the courts.”).

3. N.Y. C.P.L.R. 4102(a) (McKinney 2015) (“Any party may demand a trial by jury . . . by . . . filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury . . . . If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties.”).

4. A waiver of the right to a jury occurs when the parties fail to appear at the trial, file a written waiver with the clerk or orally waive the right to a jury trial in open court. *Id.* 4102(c). Parties may expressly agree to waive the right to jury trial, and courts will enforce a contractual provision that waives said right. *Gunn v. Palmieri*, 589 N.Y.S.2d 577 (App. Div. 1992); *Chem. Bank v. Summers*, 413 N.Y.S.2d 148 (App. Div. 1979); *Franklin Nat’l Bank of Long Island v. Capobianco*, 266 N.Y.S.2d 961 (App. Div. 1966). The New York Court of Appeals has held that the right to waive constitutional rights, like the right

by jury if a court determines that the matter before it seeks both legal and imperatively required equitable relief arising out of the same transaction—a circumstance which is the subject matter of this article.

Mixing law and equity may, but does not always, preclude a jury.<sup>5</sup> Courts must engage in a detailed analysis to determine whether the right to a trial by jury exists in any given civil action.<sup>6</sup> This article addresses the results of the analysis that has been developed by courts as to the jury waiver resulting from the combination of legal and equitable causes of action arising from the same transaction. Ultimately a rule has emerged from the case law that equitable claims that are “incidental”<sup>7</sup> to legal claims or are separate transactions predicated upon separate time and purpose, but are brought in the same action, do not

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to a trial by jury, will not be interfered with by the Courts. *Wolf v. Assessors of the Town of Hanover*, 126 N.E.2d 537 (N.Y. 1955); *In re Estate of Malloy*, 17 N.E.2d 108 (N.Y. 1938).

5. “It is often said a joinder of legal and equitable claims works a waiver of right to a trial by jury. The statement is too broad.” *Meltzer v. Lincoln Square Apartments Section V*, 515 N.Y.S.2d 208, 209 (Civ. Ct. 1987).

6. *See, e.g., Motor Vehicle Mfrs. Ass’n v. State*, 550 N.E.2d 919 (N.Y. 1990) (analyzing the constitutionality of a provision relating to the New Car Lemon Law providing for an alternative arbitration mechanism). The Court of Appeals explained its analysis in the context of contract law:

Analysis starts by recognizing that judicial remedies for breach of contract may be characterized as either “legal” or “equitable” depending on whether they were available in the common-law courts or in courts of equity. The principal “legal” remedy to enforce a contract is a judgment awarding a sum of money. This is a type of “substitutional” relief “intended to give the promisee something in substitution for the promised performance, as when the court awards a buyer of goods money damages instead of the goods.” The principal “equitable” remedy to enforce a contract is an order requiring specific performance of the contract. This is a type of “specific” relief “intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. The remedy of specific performance allows a court to compel a party to a contract to perform, “if not exactly, at least substantially, what he has undertaken to do.”

*Id.* at 922 (citations omitted).

7. *See infra* Part III for a discussion of the distinction between “incidental” equitable claims and those which are imperatively required to afford full relief to the pleader.

preclude a party's right to a jury trial.<sup>8</sup> Claims which were historically equitable have blended into law such that the line distinguishing the two has become blurred. Trials involve multiple, complex issues and the determination of claims calling for legal relief frequently are predicated upon the same set of facts as those claims calling for equitable relief. All of these factors have led toward divergent results and disagreement among courts and judges concerning waiver of a jury trial in actions mixing law and equity causes of action.

This article addresses the issue of the preclusion of jury trials in actions which contemplate both legal and equitable relief. Part II of this article addresses the constitutional and statutory history of New York Civil Practice Law and Rules ("CPLR") Section 4101 concerning issues triable by a jury and the dichotomy between those actions triable by a jury and equitable actions triable by the court alone. Part III of this article addresses the interplay between CPLR Sections 4101 and 4102, concerning demand and waiver of trial by jury, and the analysis developed by the courts to determine whether a jury trial has been waived in the context of civil actions seeking both legal and equitable relief arising out of the same transaction. Part IV of this article addresses the evolution toward non-jury trial in England and Wales and the policy in favor of non-jury trials in civil actions today.

This article is written to encourage New York advocates to examine closely the analyses developed and the results which have emerged concerning waiver of a jury trial by the joinder of law and equity claims. Trial by jury, so fundamental to the

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8. See *Poley v. Rochester Cmty. Sav. Bank*, 584 N.Y.S.2d 690 (App. Div. 1992) (fraudulent inducement in entering contract is separate from breach of such contract); *Regan v. Martindale*, 421 N.Y.S.2d 209 (App. Div. 1979) (equitable causes of action arose earlier in time than the legal causes of action and thus constituted separate transactions); *Fleischer v. Inst. for Research in Hypnosis*, 394 N.Y.2d 1 (App. Div. 1977) (cause of action for libel is separate from cause of action for republication of such libel). Transactions are also considered "separate transactions" when they involve different instruments, see, e.g., *In re Estate of Aronoff*, 653 N.Y.S.2d 844 (Sur. Ct. 1996); different projects, see, e.g., *First Keystone Consultants, Inc. v. DDR Constr. Servs.*, 880 N.Y.S.2d 223 (Sup. Ct. Queens Cnty. 2008); separate occurrences between the same parties, see, e.g., *Maharam v. Maharam*, 575 N.Y.S.2d 846 (App. Div. 1991); or when the actions, although related, involve separate and distinct parties, see, e.g., *Misra v. Yedid*, No. 603857/03, 2008 N.Y. Misc. LEXIS 9026 (Sup. Ct. N.Y. Cnty. June 5, 2008).

American and New York systems of jurisprudence, should not be deemed waived, and is not waived, merely because litigants seek both legal and equitable relief arising from the same transaction. There is a careful analysis meant to be employed to protect the sacred right to a trial by jury, and an advocate confronted with the issue should make certain that the court properly utilizes it.

## II. Constitutional Roots and History of CPLR Section 4101

To understand the present scope of the right to a trial by jury in civil actions, it is necessary to examine the constitutional and statutory history of the right.<sup>9</sup> The United States Constitution has preserved the right to a jury trial in “[s]uits at common law, where the value in controversy shall exceed twenty dollars . . . .”<sup>10</sup> The New York Constitution provides for trial by jury in civil actions “in all cases in which it has heretofore been guaranteed . . . .”<sup>11</sup> In addition to the constitutional right, this right has been further codified in CPLR Section 4101. The cases in which jury trials are required are generally those actions that evolved through the common law courts versus those developed in the equity courts, which are tried by the court alone.<sup>12</sup>

Courts of equity were the chancery courts and existed historically as an entirely separate department from the Supreme Court, imitating the historical arrangement in place in England.<sup>13</sup> A primary reason for the development of the

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9. *Motor Vehicle Mfrs. Ass’n*, 550 N.E.2d at 921 (“[A]n examination of the constitutional sources which previously ‘guaranteed’ a trial by jury is necessary to determine the scope of the present right.”). Whether N.Y. C.P.L.R. 4101 is constitutional has been called into question, and at least one court has opined that it may be unconstitutional. *Hudson View II Assocs. v. Gooden*, 644 N.Y.S.2d 512, 515 (App. Div. 1996) (“Parenthetically, it may be noted that despite the salutary purpose of CPLR 4101, the arguably unconstitutional deprivation of a jury trial for certain equitable defenses which were statutorily required to be tried by jury prior to the adoption of the 1894 [C]onstitution has not gone completely unnoticed.”) (citations omitted).

10. U.S. CONST. amend. VII.

11. N.Y. CONST. art. I, § 2.

12. *See Hudson View II Assocs.*, 644 N.Y.S.2d at 514 (“[G]enerally, if a matter was historically cognizable at equity, where there were no juries, no right to a jury exists today. If, however, a matter would historically have been decided in the common-law courts before a jury, the right to a jury still exists.”).

13. Letter from Thomas Jefferson to Philip Mazzei (Nov. 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, 1 NOVEMBER 1785–22 JUNE 1786, 67–72 (Julian

chancery courts was to provide a means of redress where the common law provided an inadequate remedy or no remedy at all.<sup>14</sup> In equity, generally the court's power is to direct someone to act or to forbear from acting, which circumstances clearly cannot be redressed by the award of money damages.

In New York, with the passage of the 1846 Constitution, law and equity were merged so that jurisdiction could be had by the same tribunal regardless of the nature of the suit.<sup>15</sup> Legal and equitable jurisdictions were thus combined in the same court, but the principles of each "remain[ed] distinctive and undisturbed."<sup>16</sup> Before the adoption of the CPLR in 1963, the

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P. Boyd ed., 1954), *available at* <http://founders.archives.gov/documents/Jefferson/01-09-02-0056> ("The system of law in most of the United States, in imitation of that of England, is divided into two departments, the Common law and the Chancery.").

14. *See* Phillips v. Gorham, 17 N.Y. 270 (1858). *See also* Wooden v. Waffle, 6 How. Pr. 145, 150 (N.Y. Sup. Ct. 1851) ("Here, then, is cause enough for the existence of the Court in Chancery. Compensation in damages being an utterly inadequate remedy in numerous cases, the prerogatives of the crown, and the principles of Roman jurisprudence were resorted to, for some other mode of redress in such cases. A court with ample equity powers was the result.").

15. *See* N.Y. CONST. art. XIV, §§ 5-6 (1846). "On the first Monday of July, one thousand eight hundred and forty-seven, jurisdiction of all suits and proceedings then pending in the present supreme court [sic] and court of chancery, and all suits and proceedings originally commenced and then pending in any court of common pleas . . . shall become vested in the supreme court hereby established." *Id.* § 5.

16. N.Y. & New Haven R.R. v. Schuyler, 34 N.Y. 30, 46 (1865). The court was clear that a plaintiff is not deprived of any right to jury trial when it mixes claims for legal and equitable relief under the new merged system of law and equity because the principles of equity dictate the mode of trial:

It is a primary consequence of a resort to a court of equity that trial by jury is no matter of right, and wherever the equity of the complainant's bill gives such a court jurisdiction, it draws to the same forum and mode of trial every question, whether its nature be legal or equitable, that can be legitimately considered within its scope....Whenever a plaintiff calls upon the court to exercise its jurisdiction upon principles of equity, he elects thereby his mode of trial and waives any constitutional right of trial by jury that he might at law have demanded.

*Id.*

Field Code of 1848<sup>17</sup> and the Throop Code of 1877<sup>18</sup> provided a statutory basis for the right to juries in civil actions and enumerated the kinds of actions triable by jury.

The 1894 Constitution guaranteed the right to a jury trial in all cases as it had “heretofore been used”<sup>19</sup> and the 1938 Constitution preserved the right to a jury trial only as it was “heretofore . . . guaranteed by constitutional provision.”<sup>20</sup> Taken together, this language guaranteed a jury trial in all those cases to which it would have traditionally been afforded under the common law before 1777 and in the cases to which the legislature extended a right to a jury trial by statute between 1777 and 1894.<sup>21</sup> The effect was to “freeze” the right to a jury trial to those types of cases in which the right was recognized at common law or by statute as of 1894.<sup>22</sup> In addition, it has been held that the right to a jury trial is not strictly limited to those instances in which it was actually used in 1894, but also extends to new cases that are analogous to those traditionally tried by a jury.<sup>23</sup> CPLR Section 4101 provides in relevant part:

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17. NEW YORK CODE OF CIVIL PROCEDURE (John S. Voorhies ed., 2d ed. 1852) (1848) [hereinafter citations to the New York Code of Civil Procedure of 1848 will be cited as FIELD CODE followed by the relevant section number].

18. NEW YORK CODE OF CIVIL PROCEDURE (Weed, Parsons & Co. 1881) (1877) [hereinafter citations to the New York Code of Civil Procedure of 1877 will be cited as THROOP CODE followed by the relevant section number] (as explained by the drafters in the introduction to the Code, the first thirteen chapters, submitted to the legislature by the commissioners in the form of a bill, took effect on September 1, 1877. The other nine chapters passed both houses in 1877 but were vetoed by the governor and did not become law until May 6, 1880).

19. N.Y. CONST. art. I, § 2 (1894) (“The trial by jury in all cases in which it has heretofore been used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.”).

20. N.Y. CONST. art. I, § 2 (1938).

21. See *In re DES Mkt. Share Litig.*, 591 N.E.2d 226 (N.Y. 1992); *In re Estate of Luria*, 313 N.Y.S.2d 12, 15-16 (Sur. Ct. Kings Cnty. 1970) (“A good many statutes were enacted between 1777 and 1894 which extended the right to trial by jury . . . . Among the more common cases were actions for divorce, annulment, partition, claims to real property, mandamus, and . . . ‘discovery’ proceedings, i.e., claims by personal representatives to recover property belonging to the estate.”).

22. *Indep. Church of Realization of Word of God, Inc. v. Bd. of Assessors*, 420 N.Y.S.2d 765, 765 (App. Div. 1979).

23. See *In re DES Mkt. Share Litig.*, 591 N.E.2d at 229; *Indep. Church*, 420 N.Y.S.2d at 765. See also *Colon v. Lisk*, 47 N.E. 302, 303 (N.Y. 1897).

In the following actions, the issues of fact shall be tried by a jury . . . (1) an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only; (2) an action of ejectment; for dower; for waste; for abatement of and damages for a nuisance; to recover a chattel; or for determination of a claim to real property under article fifteen of the real property actions and proceedings law; and (3) any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury.<sup>24</sup>

This section takes much of its language from section 968 of the Throop Code of 1877.<sup>25</sup>

The first subsection reflects the most common action triable by jury, which is an action pleading facts to support a judgment for monetary damages. It is slightly different from the Throop Code's provision, which only required that the complaint demand such judgment. Today, New York courts must engage in an analysis of the pleadings to determine whether the right to a jury trial attaches. The fact that the complaint demands judgment for a sum of money only is not sufficient to make that determination.<sup>26</sup>

The second paragraph is almost identical to Throop Code, with the exception of the nuisance action. Under the Throop Code, an action for a nuisance was to be tried by jury. This did not take into account the pleading of a claim to enjoin a nuisance, which is an equitable action.<sup>27</sup> The CPLR, however, makes clear that only actions "for abatement of and damages for a nuisance" are triable by a jury, precluding a jury trial in those equitable

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24. N.Y. C.P.L.R. 4101 (McKinney 2015).

25. "In each of the following actions, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is directed: 1. An action in which the complaint demands judgment for a sum of money only. 2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel." THROOP CODE § 968.

26. *See infra* Part III.

27. *See Johnson v. Delano*, 150 N.Y.S.2d 529 (Sup. Ct. Nassau Cnty. 1956); *Cogswell v. The N.Y., New Haven & Hartford R.R.*, 11 N.E. 518 (N.Y. 1887).

claims respecting nuisances.<sup>28</sup>

The third paragraph derives from Throop Code section 970, which provides for a jury trial on any issues of fact arising in an action that is not one enumerated in section 968.<sup>29</sup> It is a catch-all provision, underscoring the right to a jury trial conferred by the Constitution and by statute in the many actions that are not specified in paragraphs one and two.<sup>30</sup>

Determining today whether a cause of action calls for equitable relief or legal relief requires tracing the action at hand back to how it would be treated at common law. If the cause of action would have been afforded the right to a jury trial under the common law before the first Constitution, or if between 1777 and 1894 the cause of action was granted the right by statute, then the right to a jury trial should attach today. If it was equitable, then no right should attach. If the cause of action does not have such traceable roots,<sup>31</sup> the courts must first incorporate an analysis to determine which of the traditional actions would have been used to present the claim had the newly-created cause of action at use not been created.<sup>32</sup>

The confusion and difficulty created by the merger of law and equity with respect to the mode and procedure of trying the issues presented by the plaintiff's case are also present in the

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28. N.Y. C.P.L.R. 4101(2).

29. *See* THROOP CODE § 970.

30. A summary proceeding to recover possession of real property is an example. N.Y. REAL PROP. ACTS. § 745(1) (McKinney 2014) ("Where triable issues of fact are raised, they shall be tried by the court unless, at the time the petition is noticed to be heard, a party demands a trial by jury, in which case trial shall be by jury.").

31. An example would be the declaratory judgment action which did not come into existence until the twentieth century. *See* *Kalisch-Jarcho, Inc. v. City of New York*, 533 N.E.2d 258 (N.Y. 1988); *Town Bd. of Town of Greece v. Murray*, 223 N.Y.S. 606 (Sup. Ct. Monroe Cnty. 1927); 43 N.Y. JUR. 2D DECLARATORY JUDGMENTS § 2 (2007).

32. *See* *Solnick v. Whalen*, 401 N.E.2d 190 (N.Y. 1980); *Martell v. N. River Ins. Co.*, 484 N.Y.S.2d 363 (App. Div. 1985); *Indep. Church of Realization of Word of God, Inc. v. Bd. of Assessors*, 420 N.Y.S.2d 765 (App. Div. 1979). In a case presenting a variety of causes of action, the court may not necessarily need to determine how a cause of action would have been presented at common law if the thrust, gravamen or primary character of the facts pled and demand for relief are clearly legal and warranting jury trial, or are clearly equitable to which no right to jury trial would attach.

issues raised by defenses.<sup>33</sup> Prior to the merger of law and equity, if a party desired to assert an equitable issue, it had to be brought as an affirmative suit to be tried by the court alone. After the merger, the Court of Appeals held that an equitable issue could be raised directly by the answer to the action.<sup>34</sup> A defendant no longer had to commence a separate proceeding to assert its equitable defenses seeking affirmative relief. If a plaintiff brought an action that would be considered an action at law, a jury trial right attached to the equitable defenses as well.<sup>35</sup> However, if, in tracing its roots, an action was considered equitable, any defenses raised to the action were to be tried by the court and the defendant was not entitled to a jury.<sup>36</sup>

The procedure and mode of the trial of counterclaims did not get the same treatment as defenses. The Throop Code directed that, with respect to a jury trial of counterclaims, the mode of trial of an issue of fact arising upon a counterclaim would be the same as if the issue had arisen in a direct action for the same cause.<sup>37</sup> In interpreting this provision of the Throop Code, courts held that if the defendant's equitable claim was truly a counterclaim demanding affirmative relief, it was to be tried by the court without a jury; if the counterclaim was merely an equitable defense to the action, it was to be tried by a jury if either party had demanded a jury.<sup>38</sup> The reasoning behind this

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33. *Phillips v. Gorham*, 17 N.Y. 270 (1858). Following a jury verdict for plaintiff, defendant argued on appeal that plaintiff should have procured a judgment declaring the deed at issue be determined to be void before bringing the action to recover possession of land instead of having one trial on all the issues. *Id.* The court explained that under the new merged system, the plaintiff may unite several causes of action, legal or equitable or both, in the same complaint. *Id.* Rejecting the defendant's argument, the court noted that "all the inconvenience, which is alleged as an argument against allowing legal and equitable grounds of claim to be united in a complaint, equally exists against allowing an equitable answer to a legal claim." *Id.* at 275.

34. *See Haire v. Baker*, 5 N.Y. 357, 362 (1851).

35. *See Southard v. Curley*, 31 N.E. 330 (N.Y. 1892); *Pitcher v. Hennessey*, 48 N.Y. 415 (1872); *N.Y. Cent. Ins. Co. v. Nat'l Prot. Ins. Co.*, 14 N.Y. 85 (1856); *Dobson v. Pearce*, 12 N.Y. 156 (1854); *Wooden v. Waffle*, 6 How. Pr. 145 (N.Y. Sup. Ct. 1851).

36. *See Wurster v. Armfield*, 90 N.Y.S. 699 (App. Div. 1904); *King v. Ross*, 51 N.Y.S. 138 (App. Div. 1898).

37. THROOP CODE § 974.

38. *See Strauss & Co. v. Am. Credit Ind. Ins. Co.*, 196 N.Y.S. 708 (App. Div. 1922); *Menado Corp. v. Indem. Ins. Co. of N. Am.*, 279 N.Y.S.2d 84, 86 (Civ. Ct. 1967) (citing *Susquehanna S.S. Co. v. Anderson & Co.*, 146 N.E. 381 (N.Y.

dichotomy stems from the fact that the bringing of an equitable counterclaim is a voluntary act while an equitable defense is necessarily dictated by the nature of the plaintiff's causes of action, and, if not raised right then, the defense would be waived.<sup>39</sup> Parenthetically, CPLR Section 4101 disconnected equitable defenses from the legal action, directing that they be tried solely by the court—hence a number of commentators question its constitutionality.<sup>40</sup>

Some courts believed that juries were not competent to hear cases comprised of multiple issues, especially those involving equitable claims.<sup>41</sup> The concern was that juries were composed of laymen, and it was impossible for all of those impaneled to be able to sift through multiple issues and follow the rules of law as well as the court would.<sup>42</sup> This belief and concern was a driving force in England, where they now have practically instituted juryless civil trials.<sup>43</sup> In New York in the modern era, however, the ability of juries to competently try the facts of complex cases should not be underestimated. It is not the role of the jury to decide the law, select evidence or structure the mode of the trial.

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1925)); *Bennett v. Edison Elec. Illuminating Co.*, 46 N.Y.S. 459 (App. Div. 1897); *Walker v. Am. Cent. Ins. Co.*, 38 N.E. 106 (N.Y. 1894); *Pitcher*, 48 N.Y. at 415.

39. *See Hudson View II Assocs. v. Gooden*, 644 N.Y.S.2d 512 (App. Div. 1996).

40. *See infra* Part III.C.

41. *See Bennett v. Edison Illuminating Co. of Brooklyn*, 58 N.E. 7 (N.Y. 1900) (Parker, J., dissenting) ("In the view of our jurisprudence . . . a jury cannot as well and as safely as a court try equitable issues."); *Guar. Trust Co. v. Robinson*, 64 N.Y.S. 366 (Sup. Ct. Chemung Cnty. 1900) ("It is quite reasonable to suppose that injustice might be done to all parties by the submission to a jury of the various and perplexing questions which would necessarily be raised on the trial of this action"); *Wooden v. Waffle*, 6 How. Pr. 145, 150 (N.Y. Sup. Ct. 1851) ("Could a jury adjust the equities and counter equities in a complicated case, and mete out the precise relief which justice might require? There is a moral impossibility in this. What twelve men would ever agree upon the terms of an equity decree?").

42. As Judge Jerome Frank wrote of the federal civil jury, "while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour." *Skidmore v. Balt. & Ohio R.R.*, 167 F.2d 54, 60 (2d Cir. 1948). "[I]ssues to be tried by a jury were required to be single and decisive. Single, because double and complex issues would tend to embarrass and confuse, and lead to disagreement; and decisive, because otherwise no judgment could follow the finding." *Wooden*, 6 How. Pr. at 150.

43. *See infra* Part IV.

The tasks of presenting the case to the jury in a clear, demystified manner and of arranging the trial and the order of issues to be decided are properly charged to the litigants, their counsel and the court. Because the civil jury—and the litigants’ right to it—is so important, the courts have developed detailed analyses to determine when the right to a jury trial should attach, when the right must not attach and when the right has been waived.

### III. Waiving the Jury: Judicial Analyses

Under the rule of joinder, where a plaintiff has two or more entirely separate claims emanating from separate transactions, he can sue on them in one action.<sup>44</sup> CPLR Section 4102(c) provides that a party has not waived his right to a trial by jury by joining a legal claim with another claim not triable by jury which arose out of a separate transaction.<sup>45</sup> Thus, a plaintiff is entitled to a jury trial on its legal claims for relief when its equitable claims for relief arise out of an entirely separate transaction than that which gave rise to its legal claims.

CPLR Section 4102 works in conjunction with Section 4101 regarding demand and waiver of trial by jury. If an action is triable of right by a jury, a jury trial still must be affirmatively demanded in the note of issue.<sup>46</sup> If a party served with a note of issue not containing the demand wants a jury trial, it must then file a demand for trial by jury.<sup>47</sup> If no party demands trial in one of these ways, trial by jury is waived.<sup>48</sup> As CPLR Section 4101 enumerates the actions triable by jury, CPLR Section 4102 may operate to preclude a jury trial in actions that join a claim for relief that is triable of right by jury with one that is not.<sup>49</sup>

44. N.Y. C.P.L.R. 601 (McKinney 2015).

45. A party does not waive jury trial on a claim which carries the right to jury trial, “by joining it with another claim with respect to which there is no right to trial by jury and *which is based upon a separate transaction.*” *Id.* 4102(c) (emphasis added).

46. *See id.* 4102(a); *Downing v. Downing*, 302 N.Y.S.2d 334 (App. Div. 1969).

47. N.Y. C.P.L.R. 4102(a).

48. *Id.*

49. *See Meltzer v. Lincoln Square Apartments Section V*, 515 N.Y.S.2d 208 (Civ. Ct. 1987). In *Meltzer*, the plaintiff asserted two legal causes of action

A. *Legal and Equitable Claims Arising Out of the Same Transaction*

Where a plaintiff who wants a jury trial pleads law and equity claims which are based upon the same transaction, CPLR Sections 4101 and 4102 come into play, and courts interpreting these rules have created several contours to consider. The general rule has been that the right to a jury trial is waived when a plaintiff mixes legal and equitable claims arising from the same transaction.<sup>50</sup>

Another general rule has evolved: if the equity claims are imperatively required to afford full relief to the pleader, or if the primary thrust of the action is equitable, then there is no right to a jury trial.<sup>51</sup> If on the other hand, the equity claims are incidental to the legal claims, such that money damages alone would afford full relief to the pleader, then the pleading of those

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arising out of the same wrong: breach of the covenant of quiet enjoyment in her lease and the tort of intentional infliction of emotional distress. *Id.* at 208. Plaintiff's lease contained a jury waiver clause, which was null and void as to the second cause of action pursuant to Real Property Law § 259-c, but which the first cause of action was subject to. *Id.* at 209. Plaintiff demanded a jury, and defendant moved to strike on the grounds of contractual waiver. *Id.* The court, faced with an issue of apparent first impression, explained that because there is no right to jury in one of the causes of action and both arise out of the same transaction, plaintiff must be precluded from having a jury trial "because [the court finds] the dichotomy codified in reverse buried in the middle of CPLR 4102(c)." *Id.*

50. *See, e.g.*, *Syndicated Comm'n Venture Partners IV, LP v. Bay Star Capital, LP*, 859 N.Y.S.2d 125 (App. Div. 2008); *Marcus v. Marcus*, 788 N.Y.S.2d 341 (App. Div. 2005); *N.J. Steel Acquisition Corp. v. Von Roll, A.G.*, 590 N.Y.S.2d 719 (App. Div. 1992).

51. *See Greenfield v. Philles Record, Inc.*, 674 N.Y.S.2d 1, 2 (App. Div. 1997) ("With the addition of this cause of action [for rescission], it can no longer be said that money damages would afford a complete remedy, and its interposition therefore did result in a waiver of the right to a jury trial."); *Kurzner v. Sutton Owners Corp.*, 666 N.Y.S.2d 135, 135 (App. Div. 1997) ("The equitable relief sought [for an injunction] is not merely incidental to plaintiffs' legal claims. Nor will money damages alone afford plaintiffs a complete remedy."); *Trepuk v. Frank*, 480 N.Y.S.2d 889, 891 (App. Div. 1984) ("That the complaint herein also seeks, in addition to an accounting, the return of money allegedly converted by the defendant or damages for fraudulent acts violative of the defendant's fiduciary duty, does not in any sense change the reality that the main thrust of this action is one for an accounting."); *Kaufman v. Brenner*, 405 N.Y.S.2d 109, 109 (App. Div. 1978) ("Special Term did not err in vacating defendants' demand for a jury trial since the main thrust of the action is in equity for specific performance.").

incidental equitable claims is no bar to a jury trial.<sup>52</sup> The test to determine whether equitable claims are “incidental”, as stated by the Appellate Division, is:

If, in fact, a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial. . . . That equitable relief under similar circumstances may be available is not the determinant. What is critical is whether the facts pleaded in the particular case “imperatively require” equitable relief or whether under those facts the requested relief of money damages only can also provide full redress.<sup>53</sup>

In other words, and by way of example, a plaintiff who calls

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52. See *Moser v. Devine Real Estate, Inc.*, 839 N.Y.S.2d 843, 849 (App. Div. 2007) (“[T]he relevant inquiry ‘is . . . whether, when viewed in its entirety, the primary character of the case is legal or equitable . . . [T]he crux . . . sound[s] in breach of contract and breach of fiduciary duty, and the request for an accounting to ascertain any monetary damages suffered is incidental to those legal claims.”); *Lex Tenants Corp. v. Gramercy N. Assocs.*, 726 N.Y.S.2d 852, 853 (App. Div. 2001) (“[T]he primary character of the first 14 causes of action in the original complaint . . . was legal in nature, notwithstanding that two of these causes of action originally demanded an accounting.”); *Hebranko v. Bioline Labs. Inc.*, 540 N.Y.S.2d 264 (App. Div. 1989). Equitable claims that have been held to be incidental to legal claims have included causes of action for: (a) an accounting; (b) reformation; (c) reinstatement; (d) rescission; (e) constructive trust; and (f) injunction. For examples of accounting, see *Bressler v. Kalow*, 785 N.Y.S.2d 328 (App. Div. 2004); *Ossory Trading, S.A. v. Geldermann, Inc.*, 606 N.Y.S.2d 221 (App. Div. 1994); *Abrams v. Rogers*, 600 N.Y.S.2d 223 (App. Div. 1993). For examples of reformation, see *Fox v. Skolnick*, 741 N.Y.S.2d 857 (App. Div. 2002); *Harris v. Trustco Bank*, 637 N.Y.S.2d 527 (App. Div. 1996); *Zekry v. Zekry*, No. 102550/2008, 2012 WL 5379388, at \*1 (N.Y. Sup. Ct. Oct. 26, 2012). For an example of reinstatement, see *Schlick v. Am. Bus. Press*, 668 N.Y.S.2d 35 (App. Div. 1998). For examples of rescission, see *Paciello v. Graffeo*, 779 N.Y.S.2d 526 (App. Div. 2004); *Lipson v. Dime Sav. Bank of N.Y.*, 610 N.Y.S.2d 261 (App. Div. 1994); *Ferry v. Poughkeepsie Galleria Co.*, 602 N.Y.S.2d 267 (App. Div. 1993). For examples of constructive trust, see *Ossory Trading*, 606 N.Y.S.2d at 222; *Benn v. Benn*, No. 102344/2007, 2012 WL 4461730, at \*1 (N.Y. Sup. Ct. Apr. 16, 2012). For examples of injunction, see *Poley v. Rochester Cmty. Sav. Bank*, 584 N.Y.S.2d 690 (App. Div. 1992); *Lillianfield v. Lichtenstein*, 694 N.Y.S.2d 600 (Sup. Ct. Kings Cnty. 1999). Courts have found each of these causes of action arising in other cases to be imperatively required. This finding supports the proposition that the true test is whether the equity claims are imperatively required or whether they are incidental to the legal claims such that money damages alone would afford full relief to the pleader.

53. *Murphy v. Am. Home Prods. Corp.*, 527 N.Y.S.2d 1 (App. Div. 1988).

upon the court to order specific performance of a contract for the fifty unique widgets he did not receive will not be fully redressed by fifty dollars—full redress would only be achieved by the court's order to the defendant widget salesman to specifically perform under that contract. Equity is imperatively required to afford complete relief to that plaintiff. This scenario played out in *Daley v. The Related Companies*,<sup>54</sup> where the underlying action concerned the plaintiff's employment contract, which provided for money damages in the event that certain tax shelters were not available.<sup>55</sup> The court reasoned that the plaintiff's ability to take advantage of the tax benefits provided for in the contract would require the court to order specific performance, not merely money damages.<sup>56</sup> The court thus held that the primary relief sought was equitable, as an order of specific performance was imperatively required to afford complete relief to the plaintiff, and because it was the plaintiff who demanded the jury trial, the demand was stricken.

The mixing of imperatively required equity claims with legal claims causes a plaintiff to waive the right to a jury trial; however, where the equitable claims pleaded are merely incidental to legal claims, such that money damages would provide complete relief, the plaintiff is entitled to have his case heard by a jury. The court's holding in the case of *Greenfield v. Philles Record, Inc.*,<sup>57</sup> also a First Department case, sheds light on the distinction between those equitable claims which are merely incidental and those which are imperatively required to afford complete relief to the plaintiff.

In *Greenfield*, the plaintiffs, the former members of the singing group "The Ronettes," brought suit against a record company for breach of contract and conversion, and asserted a cause of action for a constructive trust on money the defendants allegedly retained improperly.<sup>58</sup> The cause of action for imposition of a constructive trust was incidental to the causes of action for breach of contract and conversion, as money damages could afford full relief to the plaintiffs. The plaintiffs would have

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54. *Daley v. Related Cos.*, 623 N.Y.S.2d 248 (App. Div. 1995).

55. *Id.*

56. *Id.*

57. *Greenfield v. Philles Record, Inc.*, 674 N.Y.S.2d 1 (App. Div. 1997).

58. *Id.*

consequently been entitled to a trial by jury, but they then amended their complaint, adding a cause of action for rescission of the contract at issue.<sup>59</sup> Money damages would no longer provide complete relief to the plaintiffs because they also sought ownership of the master recordings. The court held that the equitable claim for rescission was imperatively required to obtain full relief, and therefore, the plaintiffs waived their right to a jury trial.<sup>60</sup>

Whether equitable relief is imperatively required and what constitutes the gravamen, main thrust or primary character of the action, is a mature, discretionary decision predicated upon what the particular pleader primarily seeks. It is simply not enough for the court to count up the number of equitable and legal causes of action to decide this issue. In *Benn v. Benn*,<sup>61</sup> for example, the plaintiff's causes of action were for an accounting, constructive trust, fraud, conversion, piercing the corporate veil, and a declaratory judgment. The trial court applied the proper test and concluded that the plaintiff's breach of contract and tort

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59. *Id.*

60. *Id.* While adding a cause of action that sounds in equity may act to waive trial by jury, the dismissal or withdrawal of a cause of action sounding in equity will not revive the right to demand a jury: "Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury." *Anesthesia Assoc. of Mount Kisco, LLP v. N. Westchester Hosp. Ctr.*, 873 N.Y.S.2d 202, 203 (App. Div. 2009) (citing *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 559 N.Y.S.2d 888, 890 (App. Div. 1990)). The right to a jury trial is not revived when plaintiff amends its complaint to eliminate the equitable cause of action and demand for equitable relief. For example, in *Kaplan v. Long Island Univ.*, 497 N.Y.S.2d 378 (App. Div. 1986), plaintiff brought suit for employment discrimination and included in her prayer for relief reinstatement to her former position and installation as a director. Plaintiff then secured employment elsewhere, amended the complaint to delete the prayer for reinstatement and entered into a stipulation with defendant preserving the right to claim entitlement to a jury trial as well as defendant's right to object thereto. *Id.* at 508-09. When plaintiff filed a note of issue demanding trial by jury, defendant moved before Special Term to strike the demand but the court denied the motion upon the grounds that the amendment deleting the demand for reinstatement eliminated any equitable remedy from the prayer for relief. *Id.* at 509. The First Department disagreed and reversed, holding that the joinder of legal and equitable claims vitiates the right to a trial by jury and that right may not be revived by a subsequent "maneuver" to sever the equitable claim. *Id.*

61. *See Benn v. Benn*, No. 102344/2007, 2012 WL 4461730, at \*1 (N.Y. Sup. Ct. Apr. 16, 2012).

claims for fraud and conversion were the true basis for this lawsuit.<sup>62</sup> The demand for an accounting, constructive trust, piercing the corporate veil and a declaration of title to the apartment in dispute were incidental to the plaintiff's legal claims.<sup>63</sup> Clearly, the *Benn* court did not count the number of causes of action that devolved from equity to reach the results that it did in holding that trial by jury had not been waived.

Likewise, the mere use of a historically equitable procedure does not control the analysis. The interpleader, for example, has equitable origins.<sup>64</sup> In *Geddes v. Rosen*,<sup>65</sup> the court made clear that although the procedure of interpleader developed in equity, the interpleading plaintiff and interpleaded defendants would be entitled to a jury trial because the basic nature of the case was an action at law.<sup>66</sup> Under the proper analysis, neither the designation of the cause of action as one in equity in the note of issue nor the use of interpleader could change the basic nature of the action.<sup>67</sup>

Even further, a meticulous evaluation of the pleadings is necessary because the plaintiff's demands in its prayer for relief are not determinative of the issue, as the Second Department in *Hebranko v. Bioline Laboratories*<sup>68</sup> noted: "Where a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial."<sup>69</sup> The court reasoned that because the gravamen of the action was to recover damages for breach of an indemnity agreement, the character of the action was essentially legal and the fact that a demand in the prayer for relief was "partially equitable in nature" did not alter the result.<sup>70</sup> The result of this court's analysis was controlled by the facts set forth

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62. *Id.* at \*5-6 (citations omitted).

63. *Id.* at \*5.

64. *See* *Travelers Indem. Co. v. Israel*, 354 F.2d 488 (2d Cir. 1965); *Lincoln Life & Annuity Co. v. Caswell*, 813 N.Y.S.2d 385 (App. Div. 2006).

65. *See* *Geddes v. Rosen*, 255 N.Y.S.2d 585 (App. Div. 1965).

66. *Id.* at 590.

67. *Id.*

68. *See* *Hebranko v. Bioline Labs., Inc.*, 540 N.Y.S.2d 264 (App. Div. 1989).

69. *Id.* at 265 (citations omitted).

70. *Id.*

or proved and not the demands in the prayer for relief.<sup>71</sup>

As these cases illustrate, whether equitable relief is sought at all, whether equity claims are imperatively required for full redress and whether the primary character of the action is equitable requires careful analysis, whether it is asserted by the facts, in the prayer for relief or by the catch-all request for “such other and further relief as to this Court seems just and proper.” The foregoing reflects that the short-handed expression that mixing law and equity claims concerning the same transaction waives a right to a jury, truly and materially understates the reality that the pleading of incidental equitable claims does not prevent a plaintiff from demanding and having a jury trial.

#### B. *Jury Demand By Defendant*

The preceding section revealed the results of demands for jury trials that were initiated by plaintiffs in actions in which they had combined claims for legal and equitable relief arising from the same transaction. Under the proper analysis, where equity is imperatively required to afford full redress to the plaintiff, the plaintiff's demand for a jury trial should be stricken; where the equitable causes of action are merely incidental to the legal relief sought, the plaintiffs' demands for a jury trial should be granted. Where the defendant demands a jury trial in an action that combines claims for legal and equitable relief arising from the same transaction, the same analysis must control.<sup>72</sup>

In *Kaufman v. Brenner*,<sup>73</sup> the plaintiff demanded specific performance of a sales agreement or, alternatively, money damages representing the amount it would get from the defendant upon an award of specific performance.<sup>74</sup> The court applied the proper analysis regarding the primary character of

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71. See also *Wainwright & Page, Inc. v. Burr & McAuley, Inc.*, 5 N.E.2d 64 (N.Y. 1936); *Bruff v. Rochester Trust & Safe Deposit Co.*, 193 N.Y.S. 321 (Sup. Ct. Monroe Cnty. 1922).

72. See *Azoulay v. Cassin*, 478 N.Y.S.2d 366, 367 (App. Div. 1984); *Trepuk v. Frank*, 480 N.Y.S.2d 889, 890 (App. Div. 1984); *Azoulay v. Cassin*, 478 N.Y.S.2d 366, 367 (App. Div. 1984).

73. *Kaufman v. Brenner*, 405 N.Y.S.2d 109 (App. Div. 1978).

74. *Id.* at 110 (Suozzi, J., dissenting).

the case and concluded that the “main thrust of the action” was equitable.<sup>75</sup> The court then held that the defendant was not entitled to a jury trial of the plaintiff’s legal causes of action. That the main thrust of the action was equitable vitiated the right to a trial by jury for both parties on all issues.<sup>76</sup> Similarly, in *Downtown Art Co. v. Zimmerman*,<sup>77</sup> the defendant demanded a jury trial in an action in which the plaintiff had joined legal and equitable relief arising out of the same transaction. The First Department affirmed the lower court’s determination that the primary character of the case was equitable because neither party would be fully redressed by an award of money damages, and held that the defendant was not entitled to a jury trial on any issues.<sup>78</sup>

In *Gordon v. Continental Casualty Co.*,<sup>79</sup> the plaintiff attempted to characterize its claims as equitable, but the court utilized the proper analysis and determined that the pleaded facts established a legal claim for relief.<sup>80</sup> The court laid down the general rule with respect to the defendant’s right to a jury trial in actions seeking both legal and equitable relief: “the defendant is entitled to a jury trial if the issues for resolution are legal . . . the defendant is not so entitled if the legal relief is sufficiently incidental to equitable relief such that, at common law, the chancellor had jurisdiction over the entire matter.”<sup>81</sup> In determining that the action was essentially legal, the defendant’s jury demand was granted.<sup>82</sup>

In *L.C.J. Realty Corp. v. Back*,<sup>83</sup> however, a contrary result was reached when the court did not employ a similar analysis concerning the combination of legal and equitable causes of action arising from the same transaction. The plaintiffs’ first cause of action seeking specific performance was grounded in equity and the second, seeking money damages, was grounded in

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75. *Id.* at 109.

76. *Id.*

77. *Downtown Art Co. v. Zimmerman*, 642 N.Y.S.2d 259 (App. Div. 1996).

78. *Id.*

79. *Gordon v. Cont’l Cas. Co.*, 457 N.Y.S.2d 844 (App. Div. 1983).

80. *Id.* at 846.

81. *Gordon*, 457 N.Y.S.2d at 845.

82. *Id.* at 847.

83. *See L.C.J. Realty Corp. v. Back*, 326 N.Y.S.2d 28 (App. Div. 1971).

law.<sup>84</sup> The court did not pass on whether the plaintiffs waived their right to a jury trial and merely noted that by joining these claims the plaintiffs may have waived it—but, the court then brusquely stated that the plaintiffs could not “thereby deprive defendants Back of their right to a jury trial of all issues so triable.”<sup>85</sup> The defendants were granted a jury trial. It is worth noting that these defendants had injected counterclaims, which can appear to change the results flowing from the proper analysis.<sup>86</sup> It is possible that the jury trial was actually granted on the counterclaims that the court found to be primarily legal. As the *Back* case illustrates, contrary results can be reached when the proper analysis is not utilized by the courts.

Once the court determines that the primary character of the action is legal and money damages would afford full relief to the pleader, and any equitable claims are merely incidental, the defendant’s demand for a jury trial should be granted. Without engaging in the proper analysis, it is inaccurate to say that the plaintiff’s complaint cannot deprive the defendant of a jury trial. Where the main thrust of the action is equitable, the defendant does not have a right to a jury on the incidental legal issues arising in the main action. Though the analysis does not change, the results truly become divergent when defenses and counterclaims are interposed.

### C. *Equitable Defenses and Equitable Counterclaims*

Results become divergent following the use of the proper analysis when counterclaims and defenses are pled because CPLR Section 4101 disconnects equitable defenses and equitable counterclaims from the main action<sup>87</sup> and because CPLR Section 4102(c) specifically provides that legal counterclaims that are injected into an equitable action are triable by a jury.<sup>88</sup>

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84. *Id.* at 29.

85. *Id.* (citations omitted).

86. *See infra* Part III.C.

87. N.Y. C.P.L.R. 4101.

88. *Id.* 4102(c). N.Y. C.P.L.R. § 4102(c) makes clear that a party does not waive its right to a jury trial of the issues of fact arising upon a counterclaim, cross-claim or third party claim by asserting it in an action in which there is no right to a jury trial.

Commentators and courts have noted that because certain equitable defenses were statutorily required to be tried by jury prior to the adoption of the 1894 Constitution, the deprivation of a jury trial for all equitable defenses is arguably unconstitutional.<sup>89</sup>

Under CPLR Section 4101, when a plaintiff brings a legal action, the defendant's equitable counterclaims should not be submitted to a jury. Under CPLR Section 4102(c), when a plaintiff brings an action sounding in equity, the defendant's legal counterclaims should be tried by a jury if so demanded.<sup>90</sup> The counterclaims pled by a defendant enjoy the same careful analysis as the claims contained in the plaintiff's complaint.<sup>91</sup> The rule remains: a pleader waives the right to a jury trial by joining legal and imperatively required equitable counterclaims arising out of the same transaction.<sup>92</sup>

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89. *See Hudson View II Assocs. v. Gooden*, 644 N.Y.S.2d 512, 515 (App. Div. 1996) (citations omitted); David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 4101 (McKinney 2015).

90. Siegel, *supra* note 89. In the Second Department case of *Vinlis Construction Co. v. Roreck*, 260 N.Y.S.2d 245 (App. Div. 1965), the plaintiff brought an action for an accounting and filed a note of issue. More than a year later, plaintiff served a supplemental complaint adding its second and third causes of action. *Id.* at 247. The plaintiff did not serve a new note of issue, so the defendant could not avail himself of the statutory right to serve a jury demand within 10 days after the service upon him of a note of issue without a jury demand. *Id.* The court held the defendant did not waive his right to a trial by jury with respect to the second and third causes of action contained in the supplemental complaint. *Id.* *See also Heller v. Hacken*, 338 N.Y.S.2d 943 (App. Div. 1972).

91. N.Y. C.P.L.R. 3019(d) ("A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint"). The right to jury trial where a legal counterclaim is interposed in an equitable action is statutory, not constitutional, as the practice of counterclaim in an equitable action was unknown at common law, so issues raised in such a manner are not within the provisions of the New York Constitution. *See S. Klein, Inc. v. New Deal Bldg. Corp.*, 14 N.Y.S.2d 323 (Sup. Ct. Kings Cnty. 1939).

92. *See Herbil Holding Co. v. Mitrany*, 783 N.Y.S.2d 611 (App. Div. 2004); *Cadwalader Wickersham & Taft v. Spinale*, 576 N.Y.S.2d 24 (App. Div. 1991). The court in *Cadwalader* held that the analysis employed for the plaintiff's action is the same analysis to be applied to a counterclaim. There, the plaintiff brought an action seeking payment of fees for services it rendered to the defendants, an action setting forth facts which would permit a judgment for a sum of money only. *Cadwalader*, 576 N.Y.S.2d at 25. The defendants interposed a counterclaim seeking recovery of fees paid to the plaintiff that were in excess of the reasonable value of plaintiff's services. *Id.* The defendants

Where a plaintiff brings a law claim, some courts have held that the defendant waives its right to a jury trial on the main action when it brings related imperatively required equitable counterclaims.<sup>93</sup> In *Seneca v. Novaro*,<sup>94</sup> the plaintiff brought an action to recover a debt due to him—a legal action. The defendant answered by defense and counterclaim, alleging that the plaintiff, in breach of his fiduciary duty, held thirty shares of stock as security for the repayment of the debt and prematurely sold the stock for a fraction of its market value.<sup>95</sup> The defendant sought an accounting and demanded a jury trial.<sup>96</sup> The court determined that the gravamen of the defense and counterclaim sounded in equity and held that when a defendant interposes an equitable counterclaim related to the legal action, the defendant has waived a jury trial even on the main claim.<sup>97</sup>

Other courts have held that the defendant's right to a jury trial on the main claim is preserved on the theory that a contrary holding would only encourage the defendant to bring his equitable claim separately.<sup>98</sup> In *International Playtex, Inc. v. CIS Leasing Corp.*,<sup>99</sup> the plaintiff brought an action sounding in law and demanded a non-jury trial. The defendants asserted

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sought an accounting and discovery to aid in itemizing plaintiff's charges as well as to compute the overpayment alleged by their counterclaim. *Id.* The defendants demanded a jury trial, and the plaintiff moved before the Supreme Court to strike the demand. The pleading of an accounting, an equitable action, the plaintiff argued, operated to waive the defendants' right to a jury trial of the counterclaim. The Supreme Court had granted the plaintiff's motion, but the order was subsequently reversed. *Id.* The proper question to be raised by the court that is deciding whether the defendant has the right to a jury trial on a counterclaim is "whether, when viewed in its entirety, the primary character of the case is legal or equitable." *Id.* (citing *Murphy v. Am. Home Prods. Corp.*, 527 N.Y.S.2d 1 (App. Div. 1988)). Because the court found that the primary character of the action was legal and the primary character of the counterclaim was legal, a jury trial was proper.

93. See *Nationscredit Fin. Servs. Corp. v. Turcios*, 865 N.Y.S.2d 556 (App. Div. 2008); *Compact Electra Corp. v. Connell*, 359 N.Y.S.2d 686 (App. Div. 1974); *STP Assocs., LLC v. Drasser*, 941 N.Y.S.2d 541 (Dist. Ct. Nassau Cnty. 2011).

94. See *Seneca v. Novaro*, 437 N.Y.S.2d 401 (App. Div. 1981).

95. *Seneca*, 437 N.Y.S.2d at 402.

96. *Id.*

97. *Id.*

98. *Hudson View II Assocs. v. Gooden*, 644 N.Y.S.2d 512 (App. Div. 1996).

99. *Int'l Playtex, Inc. v. CIS Leasing Corp.*, 495 N.Y.S.2d 864 (App. Div. 1985).

equitable counterclaims related to the main action and demanded a jury trial.<sup>100</sup> In deciding whether the injection of equitable counterclaims waives the defendants' right to a jury trial on the main action, the court noted that to preserve the right to a jury trial on the main action the defendants would have to have commenced a separate action to assert the equitable counterclaims, which flies in the face of judicial economy, predictability and consistency.<sup>101</sup> The court held the defendants' assertion of related equitable counterclaims should not operate as a waiver of the right to a jury trial on plaintiff's or defendants' legal claims.<sup>102</sup>

Frequently, when a plaintiff brings an action joining claims for legal and equitable relief, it is because the facts of the transaction giving rise to the legal claims are the same set of facts as those that gave rise to the equitable claim. When the defendant's counterclaims put the same transaction at issue, the facts giving rise to the counterclaims raise issues which are likely to be the same as those at issue in the main action and also in the plaintiff's reply to those counterclaims. When the facts to be heard in situations like that are so "intertwined" some courts have held that one trial of all issues before a jury is warranted.<sup>103</sup>

The right to a trial by jury is fundamental to the New York system of jurisprudence and whether litigants have waived that right warrants a detailed analysis. What the foregoing indicates is that there is a careful and complex analysis that is meant to be employed by the courts when faced with suits sounding in both law and equity, whether in plaintiff's pleading or by defendant's answer, and whether through defense, cross-claim or counterclaim.

In England, however, non-jury civil trials have become the default. There is no careful analysis to be employed. Even though there are categories of cases triable of right by a jury, the ultimate decision rests with the discretion of the judges.

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Mercantile & Gen. Reinsurance Co. v. Colonial Assurance Co.*, 624 N.E.2d 629 (N.Y. 1993); *Hudson View II Assocs.*, 644 N.Y.S.2d at 516; *John W. Cowper Co. v. Buffalo Hotel Dev. Venture*, 471 N.Y.S.2d 913 (App. Div. 1984).

## IV. The English Non-Jury System in Civil Actions

Since the American system of jurisprudence took its form from the English system,<sup>104</sup> it is valuable to consider the ways in which the English system evolved and considered in comparison to the American, specifically New York, the system of jury trial in civil actions. In England, juries will not be impaneled in the majority of civil actions unless there is some other overriding reason to use a jury.<sup>105</sup>

Many have professed that the jury trial has roots in England, possibly from even before the Norman Conquest in 1066.<sup>106</sup> The practice of jury trial was codified by the Magna Carta in 1215<sup>107</sup> and evolved over the subsequent centuries.<sup>108</sup> The use of juries remained strong in England until the middle of the nineteenth century, when judges were given the right to refuse a demand for a jury.<sup>109</sup>

Juryless trials were introduced by the County Courts Act of 1846, where trial by judge alone for the recovery of small debts proved so popular that the option of a juryless trial was sought to be introduced into the superior courts, principally in the High

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104. Letter from Thomas Jefferson to Philip Mazzei, *supra* note 13.

105. *Lewis v. Comm'r for Police*, [2012] EWHC 1391 (QB).

106. See Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993); Edward L. Rubin, *Trial by Battle, Trial by Argument*, 56 ARK. L. REV. 261, 272 (2003).

107. MAGNA CARTA para. 29 (1297), *translation available at* [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta/translation.html](http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html) (last visited Mar. 5, 2014). The Magna Carta states:

No freemen is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land.

*Id.*

108. See Rubin, *supra* note 106, at 272-77, for a discussion of the evolution of the jury trial in England.

109. Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7 (1999).

Court,<sup>110</sup> which heard the more complex cases.<sup>111</sup> The general opinion concerning juries appeared to be that they were composed of unintelligent laypersons, largely inadequate to discharge judicial functions.<sup>112</sup> The Common Law Procedure Act of 1854 began chipping away at the institution of jury trials, providing that in the superior courts, the litigants could agree to dispense with the jury.<sup>113</sup> The Supreme Court of Judicature Act of 1873 reiterated that principle and provided an additional escape from jury trial, that is to say, even absent the consent of the parties a judge could order juryless trial if a matter required “any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury.”<sup>114</sup>

World War II brought about further restrictions by the Administration of Justice (Emergency Provisions) Act of 1939, which extended the discretion of the court to all civil cases, providing that there should be no trial by jury “unless the court or a judge is of the opinion that the question ought to be tried with a jury.”<sup>115</sup> Needless to say, though these were only

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110. Senior Courts Act, 1981, c. 54, para 45(1) (Eng.).

111. Michael Lobban, *The Strange Life of the English Civil Jury 1837-1914*, in *THE DEAREST BIRTHRIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW* 173 (John W. Cairns & Grant McLeod eds., 2002).

112. Joshua Getzler, *The Fate of the Civil Jury in Late Victorian England: Malicious Prosecution as a Test Case*, in *THE DEAREST BIRTHRIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW* 217, 220 (John W. Cairns & Grant McLeod eds., 2002) (quoting the Common Law Commissioners of 1852-1853).

113. Common Law Procedure Act, 1854, 17 & 18 Vict., c.125 (Eng.) “The Parties to any Cause may, by Consent in Writing, signed by them or their Attorneys, as the Case may be, leave the Decision of any Issue of Fact to the Court . . . and the Proceedings upon and after such Trial, as to the Power of the Court or Judge, the Evidence, and otherwise, shall be the same as in the Case of Trial by Jury.” *Id.* at para 1.

114. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, para 57 (Eng). The Rules of 1883 further clarified that the default mode of trial was without jury: “In every cause or matter, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, or under Rule 2 of this Order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury.” Rules of the Supreme Court, 1883, Order XXXVI, para 7(a). Basically, trial by judge alone became the prime mode of trial, with the exceptions of allowing trial by jury on application if convenient, and allowing it as of right where reputation was at issue. Lobban, *supra* note 111, at 186.

115. Robert Wyness Millar, *A Septennium of English Civil Procedure*,

temporary provisions, what followed was a sharp fall in the proportion of jury trials.<sup>116</sup> There are now only about two dozen civil jury trials per year in England and Wales,<sup>117</sup> and in the Queen's Bench Division, which is the only area that sits juries in the High Court, there have been only seven jury trials since 2010.<sup>118</sup>

Today, in all civil cases in England whether a case will be tried by a jury rests in the discretion of the judge. The Supreme Court Act preserves the right to a trial by jury in only four types of civil cases: fraud, libel and slander, malicious prosecution and false imprisonment, and even then, the judge, upon certain grounds in his discretion, may reject the jury demand.<sup>119</sup> In all other civil cases, whether trial will be by jury rests solely in the discretion of the court. That discretion has been exercised in favor of juryless trials. In fact, it has been said that the civil jury took a death blow in personal injury actions,<sup>120</sup> which do not carry a qualified right to a jury trial, with the decision in *Ward v. James*.<sup>121</sup> The Court of Appeal in that case held: "So important is it that the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances."<sup>122</sup>

Even in those matters to which a qualified right to a jury trial attaches, the court has broad discretion to dispense with a jury, where it determines the trial will require the prolonged examination of documents or the case deals with complex or technical matters.<sup>123</sup> The trend has been toward juryless trials as "[c]ontemporary practice has an eye, among other things, to proportionality; the greater predictability of the decision of a professional judge; and the fact that a judge gives reasons."<sup>124</sup>

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1932-1939, 25 WASH. U. L. REV. 525, 537-38 (1940).

116. Lobban, *supra* note 111, at 209 n.180.

117. Getzler, *supra* note 112, at 218 n.6.

118. Letter from Bob Weston, Data Quality Manager, Her Majesty's Courts & Tribunals Serv. Performance, Analysis & Reporting Team, to Shari Hochberg (July 15, 2014) (on file with author).

119. Supreme Court Act, 1981, c. 54, para 69 (Eng.).

120. Lloyd-Bostock & Thomas, *supra* note 109, at 13.

121. *Ward v. James*, [1966] 1 Q. B. 273 (Eng.).

122. *Id.*

123. *Id.* See also Getzler, *supra* note 112, at 221-22.

124. *Lewis v. Comm'r for Police*, [2012] EWHC 1391 (QB) (Eng.) (quoting *Times Newspapers Ltd. v. Armstrong*, [2006] EWCA 519 (Eng.)).

In a recent defamation case, *Lewis v. Commissioner for Police*,<sup>125</sup> the plaintiff argued for jury trial on the grounds that the case involved prominent figures in public life and questions of great national interest.<sup>126</sup> The court accepted that the plaintiff was a prominent figure as of the date of the trial, that the integrity of the Commissioner of Police of the Metropolis was at issue, and that this constituted an exceptional case.<sup>127</sup> Nevertheless, the court held, trial would be by judge alone.<sup>128</sup> Justice Tugendhat expressed his reasoning for ordering a juryless trial under the specific circumstances.<sup>129</sup> One important reason was that the trier of fact would be charged to determine the meaning of the words that were alleged to be defamatory; the test being what meaning would the hypothetical reader attribute to the words.<sup>130</sup> This, Justice Tugendhat wrote, “may cause difficulties even to lawyers who understand the purpose of that unfamiliar rule.”<sup>131</sup>

It is evident from the history and evolution of the civil jury trial in England that juries are disfavored for a variety of reasons, among them the lack of uniformity in judgment, the fear that juries are not able to understand the evidence, the inability to determine the jury’s reasoning in the verdict and the high cost of the jury. In New York, whether or not these concerns are not present, the right to a jury trial is constitutionally protected, and it is the job of the litigants, attorneys and the court to ensure that the civil jury has the right tools to make reasoned determinations.

## V. Conclusion

Historically, juries were not to be impaneled for equitable actions. Today, statutes purport to dictate that an action at law coupled with equitable issues cannot to be tried by jury. In practice, sometimes mixing claims for law and equity precludes

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125. *Id.*

126. *Id.* (citing *Rothermere v. Times*, [1973] 1 WLR 448 (Lawton, LJ)).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Lewis*, [2012] EWHC 1391 (QB) (Eng.).

131. *Id.*

a litigant's right to a jury trial and sometimes it does not. Finding that a waiver has resulted can only happen following a detailed analysis of the pleadings. The cases holding that the mere joinder of claims for legal and equitable relief waive the litigants' right to a jury trial are devoid of the proper analysis and may be reflective of the concerns that the learned judges in the 19th and early 20th centuries expressed. But those same concerns that ostensibly brought about the trend toward non-jury civil trials in England are just not recognized in New York in the modern era. The people are guaranteed a right to a trial by jury in civil actions and that sacred right should not be disturbed without great care and rumination. The courts must engage in the proper analysis to determine whether litigants have in fact waived their right to a trial by jury by joining causes of action for legal and equitable relief.

It is clear that claims which were historically equitable continue to blend into law such that the line distinguishing the two has become blurred. Because of the significant import of predictability and consistency, so long as the courts engage in a standard practice applying the same analysis concerning waiver of the right to a jury trial, any disagreement among courts and judges concerning the treatment of certain causes of action may dissipate.

Even though the civil litigation system in New York derived from the English system, the right to a trial by jury in civil actions is protected both by the Constitution and by statute. Trial by jury, so fundamental to the American system of jurisprudence, should not be deemed waived merely because the litigants have demanded, or have asserted facts giving rise to, both legal and equitable relief. New York courts must engage in the proper analysis to ensure this constitutional and statutory right has not been undermined. Thus, the short-handed expression that mixing law and equity waives the right to a jury trial misstates the reality that where the pleader's claims are primarily legal in character and money damages affords full relief, the pleading of incidental equitable claims is no bar to a jury trial.