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TURNING BACK THE CLOCK ON THE TRIAL OF EQUITABLE DEFENSES IN NEW YORK

BERNARD E. GEGAN*

Nearly twenty years ago, the New York Appellate Division, Third Department, decided that the beneficiary of a life insurance policy does not have a right to a trial by jury of the insurer's affirmative defense that the deceased insured had misrepresented his medical history when he applied for the policy.\(^1\) Two years ago, the New York Court of Appeals was presented with a similar issue in the context of a commercial insurance policy and reached the same result—misrepresentation by the insured was an issue for the court to decide.\(^2\)

This writer is unable to agree with the result reached in these cases and is convinced that they deprived insurance claimants of their statutory and constitutional right to a jury trial. The difficulty attending disagreement with the two cases is compounded because they adopted different reasons for reaching the same result. The two lines of reasoning are not inconsistent, merely different. Indeed, the court of appeals in Mercantile & General Reinsurance Co. v. Colonial Assurance Co.\(^3\) cited the earlier case of

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* Whitney Professor of Law, St. John’s University. The author wishes to thank his colleagues Vincent Alexander and Steven McSloy for their helpful comments on an earlier draft of this article. This article expands on an essay published by the author on the first page of the New York Law Journal on April 7, 1994.

3 Id.
Tober v. Schenectady Savings Bank with apparent approval. Thus, anyone who would undertake to disagree must address two distinct rationales for denying a jury trial; if either ground withstands examination, the result is justified.

The starting point for analysis is section 4101 of the New York Civil Practice Law and Rules ("CPLR"), which deals with the right to a jury trial in civil cases. In language derived from the original Code of Procedure ("Field Code") of 1848, the statute sets forth the types of actions in which trial by jury is available as a matter of right. The enumeration is more explicit than the constitutional guarantee which historically provided that the right to a jury trial was to be preserved inviolate in all cases in "which it has been heretofore used." When this language was included in the Constitution of 1846, which abolished the separate courts of law and equity and merged their former powers into a single supreme court, it effectively guaranteed jury trial in all actions that would have been brought in the common-law court before the merger and excluded from the guarantee all cases that previously would have been bills in equity.

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5 See N.Y. Civ. Prac. L. & R. 4101 (McKinney 1992) (hereinafter citations to the New York Civil Practice Law and Rules will use the abbreviation "CPLR" followed by the relevant section number). A right to trial by jury on issues of fact is conferred in the following types of actions:
   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.

Id.
6 Id.
7 N.Y. Const. of 1846, art. I, § 2. The same guarantee was contained in the first constitution when New York passed from colony into statehood, see N.Y. Const. of 1777, art. XLI, and was repeated again in 1821, see N.Y. Const. of 1821, art. VII. The guarantee was reiterated when the 1846 Constitution was superseded by the 1894 Constitution. See N.Y. Const. of 1894, art. I, § 2. The present constitution, adopted in 1938, limits the guarantee to "all cases in which it has heretofore been guaranteed by constitutional provision." N.Y. Const. art. I, § 2.
8 See Moffat v. Mount, 17 Abb. Pr. 4, 5 (N.Y. Sup. Ct. Gen. T. 1863) ("The practice of courts of equity in awarding issues . . . does not confer on either party an absolute right to a trial by jury.")
The historic and current statutory classification of an action "for a sum of money only" places an action by the beneficiary of an insurance policy to recover the proceeds squarely within the jury trial guarantee. On this point there is no disagreement. CPLR 4101, however, distinguishes issues of fact raised by new matter pleaded as an affirmative defense from issues of fact necessary to establish the elements of the plaintiff's action. Even though the action may command the right to trial by jury, the statute expressly states "that equitable defenses and equitable counterclaims shall be tried by the court." This is the nub of the controversy. When an insurance company defends an action for payment of a policy with allegations that the insured made material misrepresentations to induce the insurer's consent to the contract, is the insurer raising an "equitable defense"? For separate reasons, both the New York Appellate Division, Third Department, and the New York Court of Appeals concluded that the insurer is raising an equitable defense. This writer will present his reasons why that conclusion was erroneous.

I. STATUTORY HISTORY

CPLR 4101 appears to present an inconsistency of drafting technique. In designating the types of actions entitled to jury trial, the statute does not simply refer to "legal" actions, or actions formerly brought in the common-law court; instead, it attempts to enumerate the specific types of actions intended to be covered. When the section deals with the trial of issues raised by an affirmative defense, however, it adopts the compendious method of referring to "equitable" defenses. This has been the structure of the New York civil practice statute since the Field Code of 1848, adopted as a result of the merger of law and equity in the Constitution of 1846. More precisely, the Field Code enumerated the kinds of actions triable by jury, but neither mentioned nor dis-
tinguished actions at law from actions in equity or different types of defenses. The Code simply stated that the defendant’s answer could contain “as many grounds of defence as he shall have.” In addition, when determining the right to a jury trial, the Code made no attempt to split the right to jury trial between issues raised by the complaint and defensive issues raised by the answer. The sole determinant of the right was the nature of the plaintiff’s action. If it fell within the statutory enumeration, the Field Code required a jury trial for issues of fact. An issue of fact was created “upon a material allegation in the complaint controverted by the answer; or, upon new matter in the answer controverted by the reply; or, upon new matter in the reply.” It was apparently assumed by the drafters of the Field Code that if any type of defense could be raised it would be tried in the same manner as all of the other issues in the action. Such an assumption would be quite consistent with the Code commissioners’ stated purpose to “propose an extension of the right of trial by jury to many cases, not within the constitutional guarantee.”

In 1851, the New York Court of Appeals decided that the Field Code eliminated the old practice under the dual-court system whereby a defendant at law was required to bring a bill in equity for an injunction against the common-law action if he wished to raise some exclusively equitable ground to defeat the law action. The Court held that under the new merged system an equitable issue could now be raised directly by the answer to the action. Equitable issues that were substantive defenses to legal claims but were formerly affirmative suits in equity now became defenses in form as well as substance. The “equitable defense” was born. The following year, the legislature hastened to ratify this holding. It renumbered and amended the original section

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14 N.Y. CODE OF PROC. § 129 (1848) (renumbered in 1852 as § 150).
15 N.Y. CODE OF PROC. § 208 (1848) (renumbered in 1852 as § 253).
16 N.Y. CODE OF PROC. § 205 (1848) (renumbered in 1852 as § 250).
17 FIRST REPORT, supra note 13, at 185.
19 See Charles E. Clark, Trial of Actions Under the Code, 11 CORNELL L. Q. 482, 491-93 (1926) (discussing history of equitable defenses); Walter W. Cook, Equitable Defenses, 32 YALE L.J. 645, 645 (1923) (stating that New York Court of Appeals did not share doubts as to whether Field Code related to equitable defenses); E. W. Hinton, Equitable Defenses Under Modern Codes, 18 MICH. L. REV. 717, 723 (1920) (“[T]he Court of Appeals . . . assumed that an equitable defense was available as a matter of course because the code in terms had abolished the forms of action and the distinction between actions at law and suits in equity.”).
dealing with the contents of the answer by including, for the first time, an explicit reference to equity, stating: "The defendant may set forth by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

This brief sketch of how the Field Code developed shows that what appears to be dissonance in draftsmanship came about incrementally and without thought about the future consequences to the right to trial by jury. The choice to enumerate the type of actions triable as of right by jury, instead of simply tracking the "heretofore used" language of the constitutional guarantee, was seemingly made to expand the right. Further, the express reference to equitable defenses was added in 1852 to reaffirm a progressive decision on the contents of the answer, without affecting the right to a jury trial of all issues of fact arising within the action. The legislature, however, created an ambiguity by introducing the counterclaim as a permissible part of the answer. The allegations contained in a counterclaim were probably not meant to be included in the types of controverted allegations originally designated by the statute as raising an "issue of fact" in the main action and, thus, would not come within the right to jury trial that attached to such issues of fact. If any legislator gave the matter consideration, of which we have no evidence, it was probably assumed that counterclaims would be treated as independent actions for jury trial purposes. This appears to have been assumed by the courts thereafter, and was made explicit when the Field

20 N.Y. CODE OF PROC. § 150 (1852) (new matter emphasized).
21 This aspect of the 1852 amendment was undoubtedly in response to Haire v. Baker, 5 N.Y. 357 (1851). In that case, while allowing defendant to plead an equitable defense in the answer as a "defence admitted at law," id. at 362, the court held that the Code did not permit a defendant to obtain affirmative relief against the plaintiff and, consequently, sustained plaintiff's plenary equitable action, seeking reformation of a deed. Id.
22 Prior to the 1852 amendment allowing counterclaims, one court observed:
It is settled, I believe, that an equitable defence may now be set up in the answer in an action purely legal, ejectment, for instance; but it is clear that in such an action the answer can not go beyond a defence and insert facts with a view to affirmative relief, for the conclusive reason that the mode of trial would be different. The defence must be tried by a jury; the claim to relief by the court.
23 See Cavalli v. Allen, 57 N.Y. 508, 509 (1874) (stating that where plaintiff sought action of ejectment to recover possession of real property, issues as to legal title were tried by jury but court reserved, for its own determination, issues presented in defendant's answer seeking affirmative equitable relief); Gill v. Pelkey, 43 N.E.
The decision in 1877 to place jury trial of counterclaims expressly on a separate footing from the mode of trying the original action highlights, by contrast, the accepted understanding of how defenses were to be tried. As part of the original action, they were tried with all the other issues in the manner dictated by the type of action. If an action was for a sum of money only, jury trial attached to all issues of fact, including facts alleged in an equitable defense. If an action was historically equitable, defenses raising purely legal issues were tried by the court. Neither the

24 See 1877 N.Y. Laws ch. 416. The Throop Code provided:
Where the defendant interposes a counterclaim, and demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereon is the same as if it arose in an action brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

25 See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 105 n.77 (2d ed. 1947). Judge Clark argued years later that § 974 of the Throop Code did not entail the negative inference that equitable defenses were triable in the same manner as the action. Id. Viewed in isolation, the statute is not logically conclusive on this point, but is reinforced by other evidence of contemporary understanding. The early controversy over whether equitable defenses should be allowed at all, which the court settled, see Haire v. Baker, 5 N.Y. 357 (1851), and which the legislature promptly ratified, see supra note 20 and accompanying text, arose because many judges believed that juries were unsuited for trying traditionally equitable issues. See Hill v. McCarthy, 3 N.Y. Code R. 49 (N.Y. Sup. Ct. 1850); Crary v. Goodman, 9 Barb. 657, 663-64 (N.Y. Sup. Ct. Gen. Term 1851), rev'd, 12 N.Y. 266 (1855).

26 See CLARK, supra note 25, at 95-110 (discussing effects of Throop Code of Civil Procedure).
Throop Code nor the Civil Practice Act changed the Field Code in this respect. It was not until the advent of the CPLR in 1963 that equitable defenses were separated out from the action and made triable by the court.

When the CPLR was enacted in 1963 it appears that very little thought was given to a serious constitutional problem. The conventional interpretation of the “heretofore used” clause in the Constitution of 1894 is that it raised to constitutional status all jury trial rights previously existing by force of statute alone. The 1938 Constitution, under which we currently operate, did not create any new constitutional rights to jury trial, but carried forward all previously established constitutional rights. Thus, if the Field Code of 1848 and the Throop Code of 1877 made equitable-based action to quiet title, absent request for affirmative relief in defendant’s answer, defendant is not entitled to jury trial.

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29 See CPLR 4101 (McKinney 1992).


31 N.Y. Const. art. I, § 2; see also 4 JAC B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE § 4101.08 (1994).

The right to jury trial today is constitutionally protected, first, in actions of the type in which trial by jury was “heretofore used” as a matter of right at the time of the adoption of the first constitution in 1777 and, second, in those actions in which a right to trial by jury was created by a statute enacted between 1777 and the adoption of the 1894 constitution.

ble defenses to "legal" actions triable by jury, that right presumably became constitutionally vested by virtue of the 1894 Constitution. This constitutional right was preserved in the 1938 Constitution and continues to this day. Where, then, did the legislature obtain the power to eliminate jury trial of equitable defenses in 1963 when it enacted the CPLR? The statement made in the leading text that there is no constitutional problem because there was no statutory right to jury trial of equitable defenses prior to 1894 seems to be little more than wishful thinking.

The constitutional issue has never been addressed in any reported case since the CPLR was enacted over thirty years ago, and the mere passage of time may bury the issue under the weight of inertia. In any event, this is not the place to pursue the constitutional argument at length and, thus, the remainder of this article will accept for the sake of argument the validity of CPLR 4101.

32 WEINSTEIN ET AL., supra note 31, ¶4101.38. The view that no constitutional difficulty exists traces back to the advisory committee that recommended enactment of the CPLR. In the ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, SECOND PRELIMINARY REPORT, 1958 LEG. DOC. NO. 13, AT 217, THE COMMITTEE STATES: "THE PROPOSAL [NOW CPLR 4101 (MCKINNEY 1992)] RAISES NO CONSTITUTIONAL QUESTION BECAUSE TRIAL BY JURY IS NOT REQUIRED FOR EQUITABLE ISSUES." THE BREADTH OF THIS STATEMENT IS BELIED BY THE SAME REPORT (AT 565) WHERE JURY TRIAL IN PARTITION, ORIGINALLY THE CREATURE OF EQUITY, IS SAID TO HAVE ACHIEVED CONSTITUTIONALLY PROTECTED STATUS UNDER THE 1894 CONSTIUTION BY VIRTUE OF A STATUTORY JURY TRIAL RIGHT CREATED BY THE 1877 CODE OF CIVIL PROCEDURE § 1544 (NOW N.Y. REAL PROP. ACTS. LAW § 907 (MCKINNEY 1979)).

33 This writer wishes to note his sympathy with the wish behind the thought. If CPLR 4101 was properly interpreted, it would work far better than the pre-1963 rule that threw all equitable defenses into the lap of the jury. Clearly, if a plaintiff sues for reformation of a contract, his complaint states a cause of action in equity under the historical test and neither party has a right to jury trial. If, however, the positions of the parties are reversed and the party claiming reformation is sued as a defendant for breach of the contract as written, the pre-CPLR rule allowed the defendant a jury trial on his reformation defense because the plaintiff's action was "legal." See Bennett v. Edison Elec. Illuminating Co., 58 N.E. 7 (N.Y. 1900) (holding that where plaintiff sued on written contract, defense requesting reformation was triable by jury); Southard v. Curley, 31 N.E. 330 (N.Y. 1892) (judgment reversed for erroneous instruction to jury on equitable defense to contract action). The common-law jury is poorly adapted to try the facts of a reformation claim, especially given the heightened burden of proof involved and the operation of the parol evidence rule. Why should the same issue be triable by jury when raised by a defendant in his answer, but not when raised by a plaintiff in his complaint?

and will focus on what is meant by an “equitable defense” under the statute.

II. SUBSTANCE AND PROCEDURE

For reasons partly historical and partly pragmatic, the dividing line between law and equity today — for jury trial purposes — turns at times on the substantive grounds for relief and at times on either the type of relief sought or the procedure involved. A claim for the recovery of money obtained for breach of a fiduciary duty exemplifies the former. Despite the literal language of the statute, the historically equitable ground for relief dictates a bench trial.\(^{35}\) Further, a vendor’s action for specific performance of a land sale contract does not cease to be equitable because the decree orders the purchaser to pay money.\(^{36}\) Similarly, a recent scholarly opinion by Judge McLaughlin for the Second Circuit\(^{37}\) reasoned that promissory estoppel as a substantive ground for enforcing a money promise was triable by jury as a legal claim, but that promissory estoppel as a ground for avoiding the statute of frauds was triable by the court as an equitable issue.\(^{38}\) On the other hand, although a land purchaser’s action for specific performance may present only conventional legal issues of contract law, the character of the relief sought stamps the action as equitable.\(^{39}\) Likewise, conventional legal issues arising in the procedural context of interpleader are traditionally tried by the court because of the historically equitable character of the procedure.\(^{40}\)

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\(^{38}\) See id. at 825.

\(^{39}\) See Rindge v. Baker, 57 N.Y. 209, 213-14 (1874) (stating that plaintiff is not limited to action for specific performance where there is separate action for breach of contract by way of performance), cert. denied, 115 S. Ct. 737 (1995); Bensinger v. Erhardt, 77 N.Y.S. 577 (App. Div. 1902); Danaher v. Hildebrand, 131 N.Y.S. 127, 128-29 (Sup. Ct. 1911) (“Where a title involves legal questions as to the construction or legal effect of written instruments, they can and should be determined in an action for specific performance.”); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2302, at 13 (1971).

A. Procedure

How does the dichotomy between substance and procedure relate to the issue under examination? In *Tober v. Schenectady Savings Bank*, the New York Appellate Division based its conclusion on the type of relief sought, wholly apart from the grounds for granting or withholding it. When the beneficiary sued to recover life insurance proceeds, the court held the insurer's defense of misrepresentation in the procurement of the policy to be an equitable defense because the defendant was "really asking for rescission of the insurance contract." In one of the most extraordinary nonsequiturs in legal literature, the court concluded that "an action for rescission of a life insurance policy is equitable in nature . . . and is specifically excluded from trial by jury by CPLR 4101.

It is true that an action brought to obtain a decree rescinding a contract is equitable according to the accepted historical test. It is a type of relief unknown to the common law and which could be obtained only from the chancellor. In theory, however, an action to obtain a decree of rescission is not the same as rescission *per se*. There are many pre-merger cases illustrating actions for judgments at common law in which rescission of a contract was the necessary predicate of the cause of action. For instance, where a seller of goods was defrauded into consenting to a sale on credit, he could unilaterally rescind and sue at law to replevin the goods. In such a case, the rescission was not sought as a remedy to be awarded by the court but rather the rescission was unilater-

aff'd, 210 N.E. 362 (N.Y. 1965) (finding that interpleaded defendants were entitled to jury trial).

42 Id. at 39-40.
43 Id. at 39.
44 Id. (citations omitted).
46 See supra note 45.
48 See *Root*, 13 Wend. at 571 (stating that fraudulent purchaser receives no title from vendor); *Masson*, 1 Denio at 73 (holding that person fraudulently induced into contract may avoid contract and claim return of any advance); *Ash*, 1 Hill at 305 (stating that no title passes when sale is procured by fraud).
ally elected by the plaintiff in self-help.\textsuperscript{49} The common-law court simply recognized the efficacy of the plaintiff's prior rescission.\textsuperscript{50} Therefore, with the annulment of the special contract, the buyer's possession of the goods became unlawful as against the plaintiff and replevin was awarded.\textsuperscript{51} Under the traditional rule, as a condition precedent to bringing the action, the plaintiff was required to tender to the defendant a return of anything of value received from him in the sale.\textsuperscript{52} This being done, the plaintiff established an unconditional right to the goods at common law.\textsuperscript{53}

As with the relation between law and equity in other contexts, the equitable action for a decree of rescission was not available where the legal remedy based on rescission was adequate.\textsuperscript{54} In \textit{Schank v. Schuchman},\textsuperscript{55} the plaintiff had purchased goods and services from the defendant by several contracts over a period of time.\textsuperscript{56} The plaintiff, alleging the contracts had been fraudulently induced by the defendant's bribing of the plaintiff's agent, sought a decree rescinding the contracts and an award of the total amount previously paid.\textsuperscript{57} The New York Court of Appeals held that no equitable remedy was necessary because the plaintiff, a victim of fraud, had a complete and adequate remedy at law predicated on a rescission of the sales contracts.\textsuperscript{58} The court further

\textsuperscript{49} See Masson, 1 Denio at 74 (stating that election to void contract resides with plaintiff).
\textsuperscript{50} Id. at 73.
\textsuperscript{51} Cf. Whitbeck v. Van Ness, 11 Johns. 409 (N.Y. Sup. Ct. 1814). Without proof of fraud in the inducement, neither replevin nor general assumpsit would have been available; the seller would have been bound by the special contract. Id. at 411.
\textsuperscript{52} Kammerman v. Curtis, 33 N.E.2d 550 (N.Y. 1941); E.T.C. Corp. v. Title Guar. & Trust Co., 2 N.E.2d 284 (N.Y. 1936). Unlike the common-law courts, whose judgments were required to be unconditional, courts of equity had discretion to render a conditional decree; tender prior to suit was therefore not required because the final decree could adjust the \textit{restitutio in integrum}. Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75 (1881); Allerton v. Allerton, 50 N.Y. 670 (1872). Whatever basis the traditional distinction ever had vanished with the merger and the rule for all types of actions was belatedly conformed to the old equity rule by CPLR 3004 (originally enacted as 1946 N.Y. Laws ch. 683).
\textsuperscript{53} See supra note 52.
\textsuperscript{54} Buzard v. Houston, 119 U.S. 347 (1886).
\textsuperscript{55} 106 N.E. 127 (N.Y. 1914).
\textsuperscript{56} Id. at 127.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 129; see Cable v. United States Life Ins. Co., 191 U.S. 288 (1903); Phoenix Mut. Life Ins. Co. v. Bailey, 80 U.S. (13 Wall.) 616 (1871); Home Ins. Co. v. Stanchfield, 12 F. Cas. 449 (C.C.D. Minn. 1870) (No. 6660); Biermann v. Guaranty Mut. Life Ins. Co., 120 N.W. 963 (Iowa 1909); Bankers Reserve Life Co. v. Omherson, 143 N.W. 735 (Minn. 1913); Globe Mut. Life Ins. v. Reals, 79 N.Y. 202 (1879). See
opined that the legal remedy would be limited to the excess of the price paid over the fair value.59

An action brought by an insurer to rescind an outstanding insurance policy and order that it be cancelled is subject to the same test. Is the legal remedy adequate? The purpose of such an action is ostensibly to provide the insurer immediate protection from the beneficiary using the fraudulently induced policy against the insurer at law in the future. The allowance of this action amounts to a preemptive strike by a potential law defendant against a potential law plaintiff. Courts have invariably recognized that in the context of a beneficiary's action at law, the misrepresentation issue would be tried by a jury, while in the context of the insurer's action for a decree of rescission, the same issue would be tried by the judge.60 Consequently, the test based on the adequacy of the legal remedy is all that protects the beneficiary's right to choose a forum in which a jury can be had as a matter of right. Numerous cases have rejected the insurer's attempt to preempt the beneficiary's action at law by suing in equity for rescission,61 often mentioning the right to trial by jury as a value worth preserving.62


59 Shank, 106 N.E. at 129. Writing for the court, Judge Cardozo stated:
The plaintiffs are simply seeking to get back a sum of money paid under a contract, not affecting real estate, which they have elected to declare a nullity. To render that relief effective, it is not required that a court of equity should anathematize the closed transactions. The cause of action is at law, and the legal remedy is adequate.


See, e.g., id. at 620 (“Suits in equity . . . shall not be sustained . . . in any case where plain, adequate, and complete remedy may be had at law . . . .”); Biermann v. Guaranty Mut. Life Ins. Co., 120 N.W. 963, 964 (Iowa 1909) (“Where a court of law has already obtained jurisdiction of a controversy involving an alleged fraud, equity will not interfere.”).

62 Cable, 191 U.S. at 288 (finding that no remedy can be more complete than right to defense at law which secures right to trial by jury); Bailey, 80 U.S. (13 Wall.) at 623 (1871) (stating that trial by jury gives "nearly perfect and complete remedy"); Home Ins. Co. v. Stanchfield, 12 F. Cas. 449 (C.C.D. Minn. 1870) (No. 6660); Biermann, 120 N.W. at 963 (explaining that if equity was allowed to interfere it would deprive plain-
The only modern justification for allowing a preemptive equity action by the insurer against the beneficiary may be the existence of incontestability clauses in life insurance policies. One traditional clause limited the insurer's right to avoid the policy because of misrepresentation to two years after the policy was issued.63 Even where the insured died within two years, the time limit on contest continued to run.64 A notice of cancellation sent to the beneficiary would not stop the period from running; for the purpose of the incontestability clause, contest meant joinder of issue in court.65 Thus, if the insured died within the two year period the beneficiary could wait until the period of contestibility had expired before suing for the proceeds—any time within the six year statute of limitations. Under these circumstances, the insurer's legal remedy could be lost and the preemptive action in equity would be proper because it was necessary to preserve its defense.66

As with any equitable remedy, the courts exercised judicial discretion in entertaining actions in equity for rescission. If the insurer waited a reasonable interval after notifying the beneficiary that the claim was rejected, its action for rescission would

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64 Piasecki v. Metropolitan Life Ins. Co., 154 N.E. 637, 637 (N.Y. 1926) (“The policy should be incontestable on the simple condition that two years shall have elapsed from the specified date, and not that it should be incontestable only if insured should have lived until two years after the risk attached . . . .”).
65 Killian v. Metropolitan Life Ins. Co., 166 N.E. 798, 800 (N.Y. 1929). A “contest” is described by the court as joinder of the disputed issues in court and a notice of rejection is not included in this definition. Id. at 799. It is merely a notice that a contest will ensue, but it is not a contest itself. Id.

I have not overlooked the opinion in Markowitz v. Metropolitan Life Ins. Co. . . . . . That opinion was written before the decision of the United States Supreme Court in Mutual Life Ins. Co. . . . of New York v. Hurni Packing Co., . . . which holds squarely that the incontestability clause continues in effect after the death of the assured for the benefit of the beneficiary.

probably be viewed as being brought for the legitimate purpose of protecting its rights from being lost through expiration of the period of contestability. On the other hand, if the period were not in imminent danger of expiring, the rescission action might be rejected as an unjustified attempt to forestall the beneficiary’s right to a jury trial—particularly where the insurer was quick on the draw and sued for rescission without so much as a prior notice of cancellation in response to the beneficiary’s proof of loss.67

New York cases reveal considerable tactical jockeying for position. Contrary to precedent solidly established in other cases,68 a few cases have held that the beneficiary’s interposition of a counterclaim for the proceeds in the insurer’s equitable action for rescission was a waiver of the right to jury trial and, thus, constituted consent to have the misrepresentation issue determined by the court.69 To circumvent these holdings, other beneficiaries who were sued for rescission began a second independent action for the proceeds. When the actions were consolidated and scheduled for trial, judicial responses varied. One simple view was: first come, first serve; since the insurer sued first, the beneficiary’s action would be stayed.70 Other cases, even where the insurer sued first, balanced competing considerations such as the beneficiary’s interest in obtaining a jury trial and the insurer’s patience in the face

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70 See New York Life Ins. Co. v. Marcin, 299 N.Y.S. 832 (Sup. Ct. 1937); Wolff v. Mutual Life Ins. Co., 276 N.Y.S. 339, 340 (Sup. Ct.), aff’d, 271 N.Y.S. 1006 (App. Div. 1934) (“[A]s the rescission action is the earlier one, it should be tried first, and the law action will be stayed pending the disposition of the equity action.”).
of a dilatory beneficiary.\textsuperscript{71} Two influential cases that sustained the insurer's right to sue in equity emphasized the trial court's power to exercise discretion in sequencing the trials.\textsuperscript{72}

The \textit{Tober} case is unique in that in all of the earlier cases that denied jury trial, the insurer had commenced an action for rescission first. In none of the cases decided before \textit{Tober} had a New York court allowed an insurer to trump the beneficiary's right to jury trial by interposing a counterclaim for rescission where the beneficiary had previously commenced an action at law for the proceeds. In this situation the insurer's remedy at law was unquestionably adequate—the insurer could contest the beneficiary's claim by raising misrepresentation as a defense in the pending action.\textsuperscript{73}

\textsuperscript{71} See, e.g., Prudential Ins. Co. of Am. v. Haney, 296 N.Y.S. 576, 579 (Sup. Ct. 1937) (holding beneficiary's right to jury trial is "not absolute and may be lost by dilatory tactics," staying action, and trying insurer's rescission action first); Mutual Life Ins. Co. v. Kessler, 290 N.Y.S. 891 (Sup. Ct. 1936) (awarding beneficiary jury trial; noting insurer could not, without giving notice of intention to contest life insurance policy, deprive beneficiary of jury trial); Mutual Life Ins. Co. v. Marzec, 262 N.Y.S. 558 (Sup. Ct. 1932) (staying insurer's rescission action until jury trial of beneficiary's action for proceeds).

\textsuperscript{72} See American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937). The \textit{Stewart} case is no longer authoritative because of modern federal cases holding that a legal issue raised as a counterclaim to an action in equity must ordinarily be accorded a jury trial. See Dairy Queen Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Phoenix Mut. Life Ins. Co. v. Conway, 183 N.E.2d 754 (N.Y. 1962). In the \textit{Conway} case, the New York Court of Appeals noted that since the insurer's rescission action was equitable, the insured's breach of contract counterclaim was not constitutionally triable by jury. \textit{Conway}, 183 N.E.2d at 755. The statutory right to jury trial of a legal counterclaim, now found in CPLR 3019(d), 4102(c) (McKinney 1992), was first created by the Code of Civil Procedure (the Throop Code) in 1877, 1877 N.Y. Laws ch. 416, § 514. In \textit{MacKellar} v. Rogers, 17 N.E. 350, 351 (N.Y. 1888), the New York Court of Appeals held that the right was statutory only, not constitutional, because legal counterclaims had never been allowed in equity actions prior to the then operative constitution of 1846. Modern cases have reiterated this holding. See, e.g., \textit{supra} note 30. The court in \textit{Conway} relied on these reiterations in concluding that the insured's counterclaim fell outside the constitutional guarantee. \textit{Conway}, 183 N.E.2d at 755. However, this position overlooks the "heretofore used" clause in the New York Constitution of 1894 art. 1, § 2. The holding of \textit{MacKellar} was correct when decided in 1888. But, the statutory right created in 1877 presumably became constitutionally vested in 1894 and is preserved in article 1, § 2 of the current Constitution of 1938. See \textit{Weinstein, et al., supra} note 31, ¶ 4101.07; \textit{Siegert, supra} note 24, § 377; \textit{see also} Forrest v. Fuchs, 481 N.Y.S.2d 250, 253 (Sup. Ct. 1984) (stating that "the right has been imbedded in New York's Constitution").

It should be noted that since the rationale for allowing the insurer to seek a decree of rescission in equity was the danger of losing its misrepresentation defense through lapse of time, the 1921 amendment\(^7\) to the New York statutory standard life insurance policy should put an end to most such actions. By the amendment, a life insurance policy may be written so as to become incontestable only if it is in effect for two years during the lifetime of the insured.\(^7\) Thus, if the insured dies within two years after the policy is issued, there is no further danger that the insurer may lose a defense through the beneficiary's delay in bringing suit.\(^7\) Consequently, the insurer "need not, and indeed could not bring an equity action for rescission if the insured was then dead."\(^7\)

This discussion has shown that "rescission" is an omnibus term used variously to describe both a legal theory by which executed contracts are avoided and a specific procedural remedy in court. When used as a theoretical predicate for an action by a defrauded seller to replevin goods or recover their value, the grounds and procedure of the remedy are historically legal. When invoked defensively by an insurer to avoid its contractual obligation, the procedural context is neutral with respect to the distinction between law and equity.\(^7\) As with any defense to a legal claim


\(^7\) The concept of "rescission" would be completely superfluous were it not for the insurer's obligation to return the premiums. Where the promise of both parties is wholly executory, it should suffice to speak simply of the promisor's power of avoid-
grounded in contract, it may be characterized as legal or equitable according to the substantive ground invoked by the promisor. The remainder of this article will demonstrate that fraud and material misrepresentation are legal grounds, while mutual mistake is probably an equitable ground.\footnote{See Evans v. S.J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963) (Friendly, J.); Alcoa S.S. Co. v. Byan, 211 F.2d 576, 578 (2d Cir. 1954) (Clark, J.); Harper v. City of Newburgh, 145 N.Y.S. 59 (App. Div. 1913); Rill v. Darling, 253 N.Y.S.2d 184 (Sup. Ct. 1964). The \textit{Rill} case is of special interest because it extends the equitable exclusion from jury trial stated in CPLR 4101 to equitable replications as well as to the expressly mentioned equitable defenses and counterclaims. \textit{Id.} at 185-86. This is a progressive interpretation that eluded some federal courts when they were first confronted with the federal Law and Equity Act of 1915 that first allowed equitable defenses to actions brought at law. \textit{Id. Compare} Keatley v. United States Trust Co., 249 F. 286 (2d Cir. 1918) (noting necessity for strict interpretation of distinction between legal and equitable procedure) \textit{with} Plews v. Burrage, 274 F. 881 (1st Cir. 1921) (advocating same liberal interpretation as \textit{Rill} gave New York statute).}

The one context in which “rescission” is necessarily equitable for historically procedural reasons is where an action is brought for the purpose of obtaining a decree to that effect. As explained by Judge Cardozo in \textit{Schank}, an action in equity for rescission lies only when the petitioner’s legal remedy is inadequate.\footnote{Schank v. Shuchman, 106 N.E. 127, 128 (N.Y. 1914).} In the context of an insurance contract, the insurer’s right to plead and prove its misrepresentation defense in the beneficiary’s action is ordinarily an adequate remedy.

The \textit{Tober} court both misconstrued and misapplied this law. The adequate legal remedy of interposing a defense in the beneficiary’s action for the proceeds was viewed as the equivalent of an action for rescission. The many cases denying the equitable rem-
edy because the legal remedy was adequate were turned topsy-turvy by characterizing the legal remedy as another form of equitable remedy. The new maxim to be drawn from the Tober case is that the legal remedy shall be denied when the equitable remedy is adequate. Roscoe Pound once observed that reform in the law is often produced because courts are ignorant of what was done in the past.\textsuperscript{81} If denying a jury trial to plaintiffs in life insurance cases is law reform, then Pound could wish for no better example of his theory.

B. Substance

When the New York Court of Appeals was confronted with the jury trial issue in 1993, the action took a shape in which insurers had occasionally circumvented the claimant's right to jury trial for procedural reasons, discussed previously. In Mercantile & General Reinsurance Co. v. Colonial Assurance Co.,\textsuperscript{82} a company that had issued business reinsurance brought an action to rescind the policy on the ground of material misrepresentations by the insured.\textsuperscript{83} The defendant insured apparently failed to raise the issue as to whether the action for rescission was premature or whether the insurer had an adequate remedy at law. The insured simply counterclaimed for proceeds allegedly due and for consequential damages to its business arising from the insurer's refusal to honor its contractual obligations. In this position, the trial judge presumably could have exercised his discretion to try the action for rescission first, postponing trial of the counterclaim for breach of contract.\textsuperscript{84} Under New York precedents, a prior trial of the rescission action could have been heard by the court alone as an equity case.\textsuperscript{85} A finding of material misrepresentation would have been res judicata, rendering the legal counterclaim moot.\textsuperscript{86}

\textsuperscript{81} Roscoe Pound, The Formative Era of American Law 11 (1938). In reference to the early judges in the newly settled western states, U.S. Supreme Court Justice Samuel Miller once said that they "did not know enough to do the wrong thing, so they did the right thing." \textit{Id.} at 11 (quoting Justice Miller).

\textsuperscript{82} 624 N.E.2d 629 (N.Y. 1993).

\textsuperscript{83} \textit{Id.} at 629-30.

\textsuperscript{84} See CPLR 4011 (McKinney 1992); Forrest v. Fuchs, 481 N.Y.S.2d 250, 253 (Sup. Ct. 1984).

\textsuperscript{85} See supra note 47 (listing precedents demonstrating that prior trial of rescission action could have been heard first).

\textsuperscript{86} See Forrest, 481 N.Y.S.2d at 254; see also Williamsburgh Sav. Bank v. Solon, 32 N.E. 1058 (N.Y. 1893) (ruling equity action finding that town's bonds are valid is conclusive in bondholder's later action at law on interest coupon). \textit{Compare} Parklane
and thereby accomplishing what Professor Siegel aptly criticizes as “back door divestiture of the right to jury trial.” Instead, the court ordered both claims tried simultaneously before a jury, which returned a verdict for the insured in excess of $14 million. In response to interrogatories, the jury found that no material misrepresentation or concealment had occurred and that the insurer was in breach. The trial judge chose to treat the verdict as advisory with respect to the rescission action and found, contrary to the jury, that there had been material misrepresentations, thereby granting a judgment rescinding the policy. This, of course, nullified the damage award. The Appellate Division, First Department, reversed the trial court and reinstated the jury’s verdict. It held that where there is a right to jury trial on a legal cause of action by one party, that verdict must be given conclusive effect on a common issue, such as misrepresentation, which is critical to the other party’s equitable counterclaim. On further appeal, the court of appeals reversed the Appellate Division and reinstated the trial court’s judgment rescinding the insurance contract.

Hosiery Co. v. Shore, 439 U.S. 322 (1979) (holding that equity action finding has collateral estoppel effect in subsequent legal action) with Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) (denying collateral estoppel where legal action had been erroneously dismissed and equitable action was thereby improperly given temporal priority).

87 SIEGEL, supra note 24, § 378. Utilizing a bifurcated trial will not be dispositive of the jury trial issue in all cases. For example, if the insured brings the initial action for breach of contract and the insurer defends or counterclaims on the ground of material misrepresentation, an advance trial addressing the misrepresentation issue should be conducted before a jury. In this scenario, equity traditionally did not intervene because the defendant’s legal remedy was adequate. See Bowie v. Sorrell, 209 F.2d 49 (4th Cir. 1953) (recognizing that granting of separate trials of separate issues is within sound discretion of trial judge); Gregory v. Garrett Corp., 589 F. Supp. 296 (S.D.N.Y. 1984) (holding that where jury has made preliminary determination of invalidity of releases before tort liability was tried, court had power to require return of consideration before such trial).


91 Id. at 105.


93 Id. at 1017-18.

The New York Court of Appeals passed by the opportunity to reexamine the power of the trial court to effectively circumvent a party's right to jury trial by sequencing a prior trial of an equitable counterclaim, or the appropriate priority to be given the jury’s verdict when legal and equitable counterclaims are tried simultaneously. The court simply acquiesced without comment in the Appellate Division’s major premise that a jury verdict on an issue common to simultaneously tried legal and equitable claims trumps the trial judge’s power to treat the verdict as advisory on the equitable claim. The court of appeals, however, parted company with the Appellate Division with respect to its minor premise that the issue of material misrepresentation was truly common to both the insured’s claim for contract damages at law and the insurer’s claim for rescission in equity.\(^9\) According to the court of appeals, the jury’s verdict on the breach of contract claim only entailed a finding that the contract was “facially valid,”\(^9\) not whether it might be subject to avoidance for misrepresentation. Indeed, the court stated that the jury’s verdict and the judge’s finding were perfectly compatible; rescission presupposes an otherwise valid contract—otherwise there would be nothing to rescind and the concept would be superfluous.\(^9\) Thus, the validity of the contract as a legal question for the jury was held to be distinct from its voidability for misrepresentation, an equitable question for the court under CPLR 4101.\(^9\)

The distinction drawn by the New York Court of Appeals appears to be between proof that would render a contract void and proof that would render a contract voidable. This, in turn, involves the ancient distinction between the effect of fraud in the factum at law and fraud in the inducement in equity. Where a contract right or property ownership depended on a party’s consent, the party who had allegedly consented could avoid the effect of his manifested assent at common law by pleading *non est fac-

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\(^9\) See id. at 629-30.

\(^9\) See id. at 630. The court observed that the judge’s “finding of material misrepresentation is not inconsistent with a [jury] finding that the parties entered into a contract . . . [but] [t]o the contrary, the very essence of a rescission action is to set aside a contract that is otherwise valid and binding.” Id. at 630.

\(^9\) Id.

\(^9\) Although the insured’s breach of contract claim was made as a counterclaim to the insurer’s rescission action, the Court of Appeals analyzed the misrepresentation issue as arising as an equitable defense and counterclaim to the insured’s damage claim.
tum, i.e., it was not his act. This plea could be sustained only by proof that the party was misled into misunderstanding the essential nature of what he was doing. For example, in 1582, an illiterate man named Thoroughgood executed a deed in fee simple of his land to one William Chicken upon the assurance of a third party who asserted, “Goodman Thoroughgood, the effect of it is this, that you do release to William Chicken all the arrearages of rent that he doth owe you and no otherwise.” Since Thoroughgood had been deceived as to the nature of the document, the deed was held void at law as against a successor of Chicken. If, however, the party knew what he was signing, his plea of non est factum would fail, even if he had been defrauded about the consideration he was receiving in exchange. Thus, if a person signed a promissory note or bond in payment for a jewel, he remained bound at common law even if the seller knew that the jewel was a fake.

Since the common-law judges refused to extend the plea of non est factum to the type of fraud called fraud in the inducement, or consideration, it fell to the Chancellor to afford a remedy to the fraud victim. If one’s consent to a legally valid obligation had been induced by fraud (or, later, innocent misrepresentation), the Chancellor would enjoin the fraud-feasor from enforcing his legal right in the common-law court. The common-law judges did not at first take the Chancellor’s interference lying down. They saw

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101 Id. at 410. This old case has been relied upon to show that, in contrast to equity, a document void at law confers no rights on anyone, even an innocent third-party purchaser for value. See Pimpinello v. Swift & Co., 170 N.E. 530, 532 (N.Y. 1930) (“In relying upon the word of one who had been his trusted lawyer, surely the plaintiff was less careless than was Thoroughgood in relying on the word of a stranger.”); c.f. Marden v. Dorthy, 54 N.E. 726, 728 (N.Y. 1899).


103 See Walsh, supra note 59, at 492-93; James B. Ames, Specialty Contracts and Equitable Defences, 9 Harv. L. Rev. 49 (1895). The distinction between fraud in the factum at law and fraud in the inducement in equity is summarized in 5 Samuel Williston & George J. Thompson, A Treatise on the Law of Contracts § 1488, at 4154-55 (Rev. ed. 1937):

Fraud may induce a person to assent to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case the act of the defrauded person is operative though voidable; in the second case the act of the defrauded person is void, because he does not know he is doing and does not intend to do this act.

Id.
their independence threatened by an official closely identified with Royal prerogative; and in 1616, Sir Edward Coke, Chief Justice of the King's Bench, attempted to indict those responsible for seeking Lord Chancellor Ellesmere's injunction in the case of the jewel swindle mentioned above.\textsuperscript{104} This dispute precipitated a constitutional crisis resulting in the famous decree of King James I that permanently secured the primacy of equity when its rules conflicted with those of the common law.\textsuperscript{105} Thus, for many years a deed or contract might either have been void at law for fraud in the factum, or valid at law but voidable in equity for fraud in the inducement. The cost and delay of requiring two judicial proceedings to settle one dispute eventually led to the abolition of separate courts of law and equity and creation of the familiar merged system in which equitable defenses can be raised directly, in the same forum, against an action brought on a traditionally legal ground.\textsuperscript{106}

Since the common-law courts in England used juries and the Chancellor did not, the difference between legal and equitable rules became the dividing line affecting the constitutional right to jury trial in civil cases under the merged system. Throughout the United States, including New York, constitutional provisions preserved inviolate the right to trial by jury in all cases in "which it has been heretofore used."\textsuperscript{107} When the court in \textit{Mercantile & General Reinsurance}\textsuperscript{108} applied CPLR 4101 in holding the inducing misrepresentation to be an equitable defense separate from the legal validity of the insurance contract, it did so in subservi-

\textsuperscript{106} See N.Y. Const. of 1846, art. VI, § 3. The powers formerly possessed by the separate courts of law and equity were vested in the reorganized supreme court, id., and implemented by § 69 of the Field Code, which abolished the use of rigid forms of action as well as the distinction between law and equity. Thenceforth there was only a single form: the civil action. Section 150 of the Code was amended by 1852 N.Y. Laws ch. 392 to expressly permit equitable defenses and counterclaims in any action, ratifying the practice already sanctioned in Haire v. Baker, 5 N.Y. 357 (1851), and Dobson v. Pearce, 12 N.Y. 156 (1854) (trial took place before 1852 amendment).
\textsuperscript{107} N.Y. Const. of 1846, art. I, § 2. The same guarantee was contained in New York's first constitution, N.Y. Const. of 1777, art. XLI, and N.Y. Const. of 1821, art. VII, and was repeated when the 1846 constitution was superseded in 1894 with N.Y. Const. of 1894, art. I, § 2.
\textsuperscript{108} 624 N.E.2d 629 (N.Y. 1993).
ence to the constitutional guarantee, which it cited in its opinion. 109

Had our legal and political history been different, and had our state constitutional guarantee been adopted in 1616, immediately after the Coke-Ellsemere controversy, the result in the case under consideration would have been unexceptionable. At that time, fraud in the inducement of a contract was of exclusively equitable cognizance, and would have fallen outside our constitutional guarantee of jury trial. It was only possible for a defense of fraud to come before a jury when fraud in the factum rendered a contract "void," as in the Thoroughgood case. 110 This is presumably what the New York Court of Appeals meant when it confined the effect of the jury's verdict to whether the insurance contract was "facially valid." 111

Two facts of legal history, however, alter the case. First, the "heretofore used" clause of the New York State Constitution refers to neither the use of juries in the seventeenth century nor even as of 1791, the timeline for applying the Seventh Amendment to the United States Constitution. 112 Except for the present constitution, adopted in 1938, 113 which simply carried forward the jury trial guarantee as it previously existed, 114 the earlier New York constitutions each updated the timeline for applying the guarantee. Hence, the "heretofore used" test does not refer merely to the colonial period antedating the first New York Constitution of 1777; it refers at least to the use of juries at the time of the merger of law and equity in 1846 and, according to the most recent dictum of the New York Court of Appeals, to their use as of 1894. 115 The

109 Mercantile & Gen. Reinsurance Co. v. Colonial Assurance Co., 624 N.E.2d at 629-30 (holding issues pertaining to equitable defense or counterclaim to be determined by court).


113 N.Y. Const. art. I, § 2.

114 Thus, the 1938 Constitution did not automatically bestow constitutional status upon rights to jury trial that had been created by statute after 1894. See 4 Weinstein, ET AL., supra note 31, ¶ 4101.07 (1992) (discussing judicial construction of coverage of prior constitutions).

115 See Wynehamer v. People, 13 N.Y. 378, 427 (1856) ("‘[H]eretofore’... means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to
second important fact of legal history is that rules that were originally applied only in equity did not always remain so. Even prior to the merger, there was a constant process of absorption from equity to law, often accompanied by a withering away of equitable jurisdiction. One example out of several is the right of a contract assignee. Assignments were not recognized at early common law, only in equity. Eventually, by use of legal fiction, the assignee was given the right to sue at law and equity at length declined to entertain bills brought by assignees because the remedy at law had become adequate. This process was complete in New York before 1846, with assignees suing at law and receiving

cases which, at that earlier period, were triable by jury.); Conderman v. Conderman, 44 Hun 181, 182 (N.Y. App. Div. 1887) ("The right of trial by jury ... was an existing right at the time of the adoption of the Constitution of 1846 ... "). The historical reference embedded in the several constitutions only embraces the previous use of juries as of right, not their occasional advisory use in equity actions. See Sheppard v. Steele, 43 N.Y. 52, 57 (1870); In re Gurland, 146 N.Y.S.2d 830, 833-34 (App. Div. 1955). Where, however, a statute's enactment created a new right to jury trial, utilization of the "heretofore used" clause in a subsequently adopted constitution operated to upgrade the existing statutory right into a new constitutionally vested right. See Moot v. Moot, 108 N.E. 424, 425 (N.Y. 1915) ("The measure of the right of trial by jury preserved by the State Constitution (article 1, § 2) ... is the right to a jury trial in such cases as it existed at the time of the adoption of the Constitution of 1846."). But see Motor Vehicle Mfrs. Ass'n v. State, 550 N.E.2d 919 (N.Y. 1990) (implying that "heretofore used" clause refers to use of juries as of 1894). The court apparently adopted the analysis of Surrogate Sobel in In re Luria's Estate, 313 N.Y.S.2d 12 (Sur. Ct. 1970):

[The] modified heretofore clause—"Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." The net effect of this modified provision was to continue under the constitutional guarantee all common law rights to jury trial prior to 1777 and all such statutory rights enacted prior to 1894. Excluded however [sic] from the guarantee were all new statutory rights to jury trial enacted between the years 1894 to 1938.

Id. at 15 (citations omitted).

116 See Bryant Smith, Legal Relief Against the Inadequacies of Equity, 12 Tex. L. Rev. 109 (1934) (discussing ramifications of legal encroachments into field of equity).


119 Hammond v. Messenger, 9 Sim. 327, 59 Eng. Rep. 383 (V.C. 1838). "The Plaintiff is the assignee of the debt . . . therefore his remedy is naturally at law. In order to give jurisdiction in such a case to a Court of Equity, the Plaintiff must shew that there is some legal bar existing which prevents his suing at law." Hammond, 59 Eng. Rep. at 385; see Hayward v. Andrews, 106 U.S. 672 (1882) (discussing when claimant may proceed in equity upon ground of assignment).
Because of this development, no one has ever challenged the right of a contract assignee to a jury trial under the "heretofore used" guarantee of the 1846 Constitution, and all succeeding constitutions. Similarly, estoppel in pais, originally the creation of equity, became absorbed into the common law at an early date.

Bearing in mind that our current body of law under the merged system consists of doctrines that migrated from equity to law at various times, a particular issue cannot be excluded from the constitutional right to jury trial merely by proving that it had its origin in equity. An issue lies outside the guarantee only if it remained exclusively equitable when the constitutional guarantee was adopted. As a leading text notes: "Many matters such as duress, fraud and illegality, which had once been cognizable only in equity, were familiar defenses to a legal action by the end of the eighteenth century." When this historical test is applied to the distinction between fraud in the factum and fraud in the induce-

120 See, e.g., Muir v. Schenck, 3 Hill 228 (N.Y. Sup. Ct. 1842) (claimant suing at law over conflict of equitable claims); Taylor v. Bates, 5 Cow. 376 (N.Y. Sup. Ct. 1826) (assignee suing at law); Briggs v. Dorr, 19 Johns. 95 (N.Y. Sup. Ct. 1821) (plaintiff in common law court suing for interest in assignment); Carter v. United Ins. Co., 1 Johns. Ch. 463 (N.Y. Ch. 1815) (dismissing plaintiff assignees' suit in equity to recover proceeds of insurance policy on grounds that plaintiff assignees have adequate remedy at law).

121 See WALSH, supra note 59, at 93 n.28. While insisting that the rights of an assignee remain "equitable" for substantive law purposes, Walsh notes that since "issues of fact in these cases were, of course, tried by jury at law long before the era of our constitutions, the right to jury trial in such cases, no doubt, would be enforced." Id.

122 For a discussion of how estoppel in pais was transformed from an exclusively equitable doctrine into one concurrently legal and equitable, see Dickinson v. General Accident Fire & Life Assurance Corp., 147 F.2d 396, 397 (9th Cir. 1945) ("The issue of estoppel in pais...while equitable in origin, has long been one cognizable as of course in the courts of common law."); Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co., 202 F. 692, 697 (8th Cir. 1912) ("Estoppel in pais is a creature of equity. But...it is equally available in actions at law even in the federal courts."); Carrollton Furniture Mfg. Co. v. American Credit Indem. Co., 115 F. 77, 81 (2d Cir. 1914) (concluding that "the court should have submitted to the jury the facts on which the estoppel is predicated"); Martell v. North River Ins. Co., 484 N.Y.S.2d 363, 366 (1985) ("Estoppel in pais is not inconsistent with and may be asserted in an action at law.") (citations omitted).

123 CLARK, supra note 25, at 91-95; FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 8.2, 8.9 (4th ed. 1992); E. W. Hinton, Equitable Defenses Under Modern Codes, 18 Mich. L. Rev. 717, 723 (1920) ("Even under the Common Law Procedure Act, it does not appear that the law courts ever assumed to take over the whole field of equity jurisdiction.").

124 JAMES ET AL., supra note 123, § 8.2, at 415 (footnote omitted).
ment, the answer is that the latter was received into the common-law system before the merger in 1846.

1. Fraud

Although at early common law contracts under seal could not be impeached because of fraud in the inducement,125 such fraud was recognized as a defense to simple contracts by the eighteenth century.126 Indeed, fraud in the inducement was recognized as a freestanding tort in 1789;127 this subsequently made it impossible to argue that it was not a defense at law to an executory contract.128 Merchants fraudulently induced to sell goods on credit were allowed to rescind at law and recover the goods from a fraudulent buyer or the buyer's transferee, except where the transferee was a good-faith purchaser for value.129 Early New York common-law cases followed the English rule and did not recognize fraud in

125 Ames, supra note 103, at 51 ("Startling as the proposition may appear, it is nevertheless true that fraud was no defence to an action at law upon a sealed contract."). Prior to the Law and Equity Act of 1915, which allowed equitable defenses to be pleaded in actions brought on the law side of the federal courts, fraud in the inducement of a sealed contract was generally not allowed as a defense at law despite the progressive efforts of (then) Circuit Judge William Howard Taft in Wagner v. National Life Ins. Co., 90 F. 395 (6th Cir. 1898). See Edwin H. Abbot, Jr., Fraud as a Defence at Law in the Federal Courts, 15 COLUM. L. REV. 489 (1915) (discussing availability of fraud as legal defense in federal courts). Federal courts within the same circuit often disallowed the defense against a contract under seal, yet permitted it to be raised against simple contracts. Compare Whitcomb v. Shultz, 223 F. 268 (2d Cir. 1915) (disallowing defense of fraud in the inducement where contract under seal sued upon in federal court at law) with Such v. Bank of State of New York, 127 F. 450 (C.C.S.D.N.Y. 1904) (allowing contract not under seal to be avoided at law in federal court for settlement induced by fraud).


128 See 5 WILLISTON & THOMPSON, supra note 103, § 1487, at 4153. "It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or rescission of the bargain." Id.; see also Smith v. Ryan, 84 N.E. 402, 403 (N.Y. 1908) ("Where . . . the fraud is of such a nature as would sustain a common-law action of deceit, it may safely be said that the contract may be avoided either at law or in equity, at the election of the defrauded party . . . ").

129 See, e.g., Pierce v. Drake, 15 Johns. 475 (N.Y. Sup. Ct. 1818); Beecker v. Vrooman, 13 Johns. 302 (N.Y. Sup. Ct. 1816); Willson v. Foree, 6 Johns. 110 (N.Y. Sup. Ct. 1810). The significance of rescission at law in these cases lies in course of the rule that if the credit sale was not avoided, the seller could not sue in replevin or general assumpsit and would be bound by the credit terms of the special contract. See, e.g., Whitbeck v. Van Ness, 11 Johns. 409 (N.Y. Sup. Ct. 1814) (holding seller bound by
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the inducement as a defense to sealed contracts until 1829,\(^{130}\) when a statute enacted in that year was interpreted as changing the rule.\(^{131}\) Thereafter, fraud in the inducement was a defense at law to all contracts, sealed or otherwise. The acceptance of fraud in the inducement as a defense at common law was recognized by the New York Chancery Court prior to the merger. In 1843, Chancellor Walworth affirmed the Vice-Chancellor's refusal to enjoin a pending common-law action on nonnegotiable notes allegedly induced by fraud.\(^{132}\) The Chancellor observed that:

If the complainant has any defence to these notes, therefore, it is one which is equally available in the suit at law as in this court . . . . [T]he vice chancellor very properly dissolved the injunction,

credit terms where seller accepted note of third person as payment without buyer's indorsement).


\(^{130}\) See, e.g., Jackson v. Hills, 8 Cow. 290 (N.Y. Sup. Ct. 1828) (holding lease under seal cannot be assailed at law on grounds of fraud or misrepresentation as to its consideration or inducement); Dale v. Roosevelt, 9 Cow. 307 (N.Y. 1827) (holding fraudulent inducement is no defense to action at law on sealed instrument); Dorr v. Munsell, 13 Johns. 430 (N.Y. Sup. Ct. 1816); Vrooman v. Phelps, 2 Johns. 177 (N.Y. Sup. Ct. 1807); cf. Van Valkenburgh v. Rouk, 12 Johns. 337 (N.Y. Sup. Ct. 1815) (holding that fraud in factum is good defense at law).


In a case that arose just prior to the statutory change, the disfavor in which the old rule had fallen is evidenced in the court's opinion in Stevens v. Squire, 4 Wend. 469 (N.Y. Sup. Ct. 1830). In referring to the rule that sealed contracts could not be attacked at law for fraud in the inducement, the court said that "[t]he remedy is with the legislature. I confess I can see no very good reason why this defence should be excluded from a court of law, and the party sent into a court of equity; but so the point has always been decided." Id. at 473.

\(^{132}\) Crane v. Bunnell, 10 Paige Ch. 333 (N.Y. Ch. 1843).
and left him to defend himself as he could before the court of law and a jury.\textsuperscript{133} 

It is true that New York cases have occasionally referred to fraud in the inducement as an “equitable” defense.\textsuperscript{134} Without doubt, this usage reflects the historical origin of the defense, without reference to its reception into the common law prior to the Constitution of 1846. This simplified usage was harmless enough in the years prior to 1963 when the CPLR was enacted. In those early years, nothing of consequence turned on the distinction between defenses that originated in equity and were never recognized at common law, and those that had worked over into the common-law system prior to the adoption of the “heretofore used” guarantee in the Constitution of 1846. Prior to the CPLR, all these defenses were triable in the same manner as the action itself.\textsuperscript{135} In requiring “equitable defenses” to be tried by the court, not the jury, the CPLR must be interpreted in a manner conforming to the constitutional guarantee. This means that we must discriminate between the two kinds of equitable defenses described above. In light of legal history, no one can legitimately argue today that fraud in the inducement is an equitable defense in the sense constitutionally permitted to be covered by CPLR 4101.\textsuperscript{136} To do so would deprive the nonconsenting party of a right to jury trial “heretofore used.”\textsuperscript{137}

\textsuperscript{133} Id. at 341.


\textsuperscript{135} See supra note 27.

\textsuperscript{136} This statement assumes that CPLR 4101 is constitutional with respect to defenses that remained equitable at the time the Constitution of 1846 was adopted and that were accorded jury trial solely by virtue of statute prior to the Constitution of 1894. Although conventional wisdom has it that the “heretofore used” clause in the 1894 Constitution operated to upgrade previously enacted statutory jury trial rights to constitutionally protected status, no actual case necessarily so holds and several older cases hold the contrary. See supra notes 31, 72 and accompanying text. Because the currently accepted view has such potentially drastic consequences with respect to the constitutionality of CPLR 4101, this writer prefers to leave the effect of the 1894 Constitution an open question and base the conclusions in this article on the well established effect of the Constitution of 1846.

\textsuperscript{137} In demonstrating that fraud in the factum and fraud in the inducement were both cognizable at law before the Constitution of 1846 and were consequently within the jury trial guarantee, it is not this author’s intent to equate them for all purposes. When an equitable doctrine such as fraud in the inducement works its way into the common law, it does not shed its substantive equitable characteristics. For example, an apparent document, such as a release, that is shown to be void because of fraud in the factum, confers no rights on any person, even an innocent party who paid value
2. Innocent Misrepresentation in General

The situation with respect to nonfraudulent material misrepresentation is not so clear. Since fraud as a tort required proof of scienter, the linkage of tort law to contract law generally prevented courts from recognizing innocent misrepresentation as a legal defense to contract claims prior to the merger in 1846. The only relief available to one whose consent to a disadvantageous contract had been induced by the promisee's innocent material misrepresentation appears to have been in equity. Therefore, if we use 1846 as the date for dividing defenses into those that remained exclusively equitable and those that had become concurrently legal, innocent misrepresentation in general would have to be classified as an equitable defense to a contract claim.

One alternative line of reasoning, which has received little attention, would be to recognize an ongoing dynamic relation between law and equity. Just because a particular issue was exclusively equitable before the merger is no reason why it must remain so forever. In one sense, of course, legal innovations after the merger cannot strictly be categorized as legal or equitable. Since the relation between law and equity no longer involves two

therefor. Pimpinello v. Swift, 170 N.E. 530 (N.Y. 1930). On the other hand, a release tainted by fraud in the inducement practiced by a third person not in privity with the releasee is enforceable if the releasee acquired his legal right for value and without notice of the fraud. Talmadge v. United States Shipping Bd., 66 F.2d 773 (2d Cir. 1933), cert. denied, 291 U.S. 669 (1934); cf. Fairbanks v. Snow, 13 N.E. 596 (Mass. 1887) (holding that whether plaintiff knew defendant entered into contract under duress caused by third party is material fact) (Holmes, J.). The distinction between the two types of fraud may be relevant for other purposes, such as the requirement that any consideration be relevant as a condition of avoidance. Compare Gilbert v. Rothschild, 19 N.E.2d 785 (N.Y. 1939) with Gregory v. Garrett Corp., 589 F. Supp. 296 (S.D.N.Y. 1984). Different burdens of proof are also implicated in the distinction.


distinct institutions, there is no actual place for doctrine to mi-
grate from or to. As the great historian Maitland remarked, “The
day will come when lawyers will cease to inquire whether a given
rule be a rule of equity or a rule of common law: suffice it that it is
a well-established rule administered by the High Court of Just-
tice.” Accordingly, it might be supposed that the old phenome-
non of doctrine migrating from equity to law might cease after the
merger. Nevertheless, so long as the constitutional right to jury
trial in civil cases is based on historical practice derived from the
dual court systems of law and equity, the old concepts continue to
“rule us from their graves.”

The post-merger migration of previously equitable doctrine into conventional legal categories is
seen constantly in the expansion of legal causes of action — par-
ticularly quasi-contract — with a concomitant expansion of fac-
tual disputes subject to trial by jury. As Judge Andrews wrote
over one hundred years ago in Roberts v. Ely:

The action for money had and received to the use of another is
the form in which courts of common law enforce the equitable
obligation. The scope of this remedy has been gradually ex-
tended to embrace many cases which were originally cognizable
only in courts of equity. Whenever the defendant has in his pos-
session money which he cannot conscientiously retain from an-
other, the latter may recover it in this form of action, subject to
the restriction that the mode of trial and the relief which can be
given in a legal action are adapted to the exigencies of the partic-
ular case, and that the transaction is capable of adjustment by
that procedure without prejudice to the interests of third per-
sons. No privity of contract between the parties is required ex-
cept that which results from circumstances.

With respect to nonfraudulent misrepresentation, the most
important modern case is Seneca Wire & Manufacturing Co. v.
A.B. Leach & Co. The defendant sold corporate bonds to the
plaintiff upon the representation that they were listed on the New
York Stock Exchange. When the corporation went into receiver-
ship a few months later, the plaintiff discovered that they had not

141 Id. at 296. “The forms of action we have buried, but they still rule us from
their graves.” Id.
142 20 N.E. 606 (N.Y. 1889).
143 Id. at 607-08; accord DeBrauwere v. DeBrauwere, 96 N.E. 722 (N.Y. 1911)
(holding that subrogation right formerly enforceable only in equity is sufficient to sus-
tain action at law).
144 159 N.E. 700 (N.Y. 1928).
been listed. It tendered the bonds back to the defendant and sued for restitution of the price. As a garden variety quasi-contract action, the case was tried before a jury but the court dismissed the complaint at the close of plaintiff's case because there was no proof that the defendant knowingly misrepresented the listing of the bonds. The New York Court of Appeals reversed and granted a new trial. It held that, while scienter is necessary for a tort claim for damages, an innocent misrepresentation was sufficient for an action in rescission and restitution. The court cited earlier cases in equity for this proposition, but it held that the rule was the same in an action at law:

As no equitable relief was required, it was inappropriate, if not impossible, for the plaintiff to maintain an action for rescission in equity. All it wanted was the return of its money. Action at law was, therefore, proper. The proof required was no different from that which would be required in equity. No reason exists for a distinction. . . . It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, and this rule applies to actions at law based upon rescission as well as to actions for rescission in equity.146

A new trial was ordered because the materiality of the misrepresentation presented a jury question.

The process of absorbing equity into law is gradual and selective, not wholesale or automatic simply according to the nature of the relief sought. As Judge Andrews observed in the passage previously quoted,147 the mode of trial at law must be suited to the nature of the claim. A vendor's action for specific performance of a land sale contract does not become an action at law simply because the object is recovery of money.148 The merits potentially implicate such a mix of flexible principles (e.g., laches, hardship,

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146 Seneca Wire, 159 N.E. at 702 (citations omitted).
147 See supra note 143 and accompanying text.
clean hands)\textsuperscript{149} that trial by a lay jury would be difficult to administer. Similarly, the holding of the \textit{Seneca Wire} case, that misrepresentation is recognized at law as a ground for rescission and restitution, does not extend to a like claim based on mistake. Such a claim involves a balancing of equities best left to the court.\textsuperscript{150} At the root of the \textit{Seneca Wire} case is the insight that the issue of material misrepresentation is functionally suitable for jury determination. Fraud actions for damages are routinely tried before juries. Rescission or avoidance for misrepresentation presents an even more clean-cut issue because there is no need to draw any inference as to state of mind as there is in fraud cases requiring proof of scienter.

The same prudence shown by the courts in selectively borrowing from equity to extend the scope of legal actions should be exercised with respect to extending legal defenses by the same process. At an earlier point, this Article supported the policy of CPLR 4101 over the previous practice of trying all equitable defenses before a jury and an example was given of reformation of contracts. It was pointed out that if a plaintiff seeking reformation did not get a jury trial, it made no sense for a defendant to get one where he invoked reformation as a defense to an action on the written contract.\textsuperscript{151} Under CPLR 4101, neither gets a jury trial, and that is the way it should be. The nature of the evidence and the special burden of proof for reformation would pose a difficult task for a lay

\textsuperscript{149} \textit{Walsh}, supra note 59, at 283, 472-88. Factors as those stated in the text are oftentimes styled “equitable defenses.” They are such in the sense that they influence the granting or withholding of equitable remedies (i.e., specific performance or injunction). They have no effect on legal rights or remedies. The kind of equitable defense covered by CPLR 4101 consists of facts that, prior to the merger, would have justified equitable interference with an action at law. Crary v. Goodman, 12 N.Y. 266 (1853). The difference between the two classes of equitable defenses is explained by Judge Cardozo in Golde Clothes Shop v. Loew’s Buffalo Theatres, 141 N.E. 917, 918 (N.Y. 1923) (“The defendant does not make out an equitable defense unless upon the same facts, in the days when equitable defenses were unknown in actions of ejectment . . . it might have maintained a suit in equity to enjoin the prosecution of the remedy at law.”) (citations omitted).

\textsuperscript{150} See \textit{supra} note 79. Compare the issue of mistake in the terms of a written contract. Prior to the merger, such a mistake was not correctable at law. Cheriot v. Baker, 2 Johns. 546 (N.Y. Sup. Ct. 1807). The remedy was in equity. Gillespie v. Moon, 2 Johns. Ch. 585 (N.Y. Ch. 1817); see also Goode v. Riley, 28 N.E. 228 (Mass. 1891) (Holmes, J.) (emphasizing nonjury determination). \textit{Compare} Dow v. Whetton, 8 Wend. 160 (N.Y. Sup. Ct. 1831) (holding that in courts of law parol evidence is only proper to show misrepresentation, but in courts of equity it may be used to show mistake) \textit{with} Phoenix Fire Ins. Co. v. Gurnee, 1 Paige Ch. 278 (N.Y. Ch. 1818).

\textsuperscript{151} See \textit{supra} note 33.
The proper mode of trying a misrepresentation defense involves the other side of the coin. Under *Seneca Wire*, a plaintiff seeking restitution of money paid under a contract induced by misrepresentation gets a jury trial. It is submitted that the same principle of post-merger development applicable to causes of action also applies to defenses, and that misrepresentation should now be acknowledged as a legal defense for the procedural purpose of jury trial. If the jury is competent to try the issue when the victim of misrepresentation is suing to get his purchase money back, it makes no sense to say it is not a jury question when a defendant is resisting the other party's contract claim to recover the same money from him.

Notwithstanding the argument in favor of recognizing innocent misrepresentation as a legal defense to a contract claim, for the purpose of jury trial, the question at best must be considered open; no court could be criticized as demonstrably wrong if it decided that, according to the historical test, innocent misrepresentation in general was an equitable defense under CPLR 4101. However, the two New York cases criticized in this article are both insurance cases; and the proper characterization of an insurer's misrepresentation defense presents a distinct issue to be separately discussed.

3. Innocent Misrepresentation in Insurance Law

Contract law is not and has never been monolithic. Despite the great unifying efforts of treatise writers such as Williston and the first *Restatement*, different types of transactions generate their own peculiar satellite rules. Contracts involving labor and employment, sales of goods, real estate transactions and insurance, among others, each possess unique characteristics at the margin of the great central core of contract doctrine. However late we may date the general recognition of innocent misrepresentation as a ground of avoidance "at law," there is abundant evidence in the common-law reports of its early recognition in the context of insurance.

A "warranty" in insurance law is a term of the insurance contract by which the insured agrees that, if the fact warranted is

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152 See supra text accompanying notes 145 and 146.
untrue, the policy is void. The effect of an insurance warranty is generally the same as that of an express condition in contract law. Just as with express conditions, warranties in insurance contracts were strictly enforced. If the fact warranted proved to be untrue, the insurer was allowed to avoid the duty of payment without regard to the intent of the insured and, in theory, without regard to the materiality of the fact warranted, although some attempt was made to soften the rigor of the rule through interpretation.

Traditionally, a representation, unlike a warranty, is not a term of the contract, at least not an express term. It induces the contract, but is not a formal part of it. The importance of representations in insurance law was probably born out of the need for some residual category in which to place those statements by the insured that could be found by interpretation to be other than a warranty. Representations were so closely related to warranties, however, that by Lord Mansfield's time it was settled that no intentional fraud need be proved by the insurer to defeat the policy claim. What had to be proved, and what made representations different from warranties, was the element of materiality — did the misrepresentation of fact, without regard to the intent of the insured, induce the insurer to undertake a risk it would not otherwise have undertaken?

Since a representation was a statement made to induce the contract, not a term of the contract, early text writers struggled to reconcile the role of innocent misrepresentation in insurance law with the then generally accepted notion of scienter as an element of fraud at law. The rationalization that found most favor with

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153 Edwin W. Patterson, Warranties in Insurance Law, 34 Colum. L. Rev. 595, 601 (1934).
155 Vance, supra note 77, at 411.
156 Id. at 412, 416; see, e.g., Sager v. Friedman, 1 N.E. 2d 971 (N.Y. 1936); Grattan v. Metropolitan Ins. Co., 92 N.Y. 274 (1883); Burritt v. Saratoga County Mut. Fire Ins. Co., 5 Hill 188 (N.Y. Sup. Ct. 1843).
159 See Vance, supra note 77, at 392-93.
the courts in England and New York viewed the insurance contract as containing an "implied condition" that "all representations, on the faith of which the contract was entered into, shall be substantially in accordance with the facts."\(^{160}\)

While the earliest common-law cases establishing the effect of innocent misrepresentation involved the then important business of marine insurance, the same rule was applied in New York to all types of insurance. If there was a genuine issue of fact, either as to the truth of the representation or as to its materiality, the question was for the jury to decide. This was so in the cases decided in the common-law court before the merger of law and equity\(^6\) and continued to be the practice thereafter.\(^{162}\) Any attempt to oust the role of the jury by characterizing the defense of material misrepresentation in an insurance case as an "equitable defense"\(^{163}\) is unhistorical and, consequently, unconstitutional.

The only significant change in the law subsequent to the constitutional guarantee of jury trial in 1894, or, for that matter, in 1846, is one not directly relevant to the jury trial issue. Notwithstanding the requirement of materiality with respect to misrepresentations, the strict rule of compliance with warranties continued as part of the common law of insurance. Life insurance policies, in particular, routinely incorporated information supplied about the applicant's medical history as a warranty, thereby eliminating materiality as a consideration when litigating claims. To put an end to this harsh practice, New York enacted a statute in 1906 providing that, in the absence of fraud, any warranty in a


\(^{163}\) Just as with fraud, see supra note 134 and accompanying text, courts have referred to nonfraudulent misrepresentation as an "equitable" defense. American Sur. Co. v. Patriotic Assurance Co., 150 N.E. 599, 602 (N.Y. 1926). Such comments should be taken simply as referring to the historical origin of the rule, not to whether it had become recognized at common law prior to the 1846 constitutional guarantee. See Metropolitan Life Ins. Co. v. Howie, 56 N.E. 908 (Ohio 1900).
policy of life insurance could only operate as a representation. By effectively changing all warranties into representations, this statute did not change a legal defense into an equitable one, but merely changed the substance of the insurer's legal defense.

Until the Tober and Mercantile & General Reinsurance cases, no New York court had ever held that the issue of material misrepresentation presented anything other than a jury question when raised as a defense to an action for insurance proceeds. The real battleground between insurance companies and claimants has always been whether the evidence in any particular case presented a genuine question of fact on which rational people might differ, or whether the defense (as to which the insurer has the burden of proof) was established beyond peradventure, in which case the court could rule as a matter of law. On this battleground, those who view the jury in a populist sense as the buffer between the letter of the law and its impact on individuals are pitted against those of more conservative views who mistrust the potentially lawless sympathies of lay jurors and look to judges to keep them in line with the law as written. The latter group has reason to be satisfied with the New York decisions.

There is, thus, additional irony in a holding that would remove from the jury the limited number of cases that survive the courts' disposit-

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164 1906 N.Y. Laws ch. 326 (formerly N.Y. Ins. Law § 58, now N.Y. Ins. Law § 3204(c)). This provision also applies to accident and health insurance policies and annuity contracts. Id.


tion to rule the defense established as a matter of law on motion for summary judgment or directed verdict.

CONCLUSION

If the New York Court of Appeals in the Mercantile & General Reinsurance case was correct in holding that fraud or misrepresentation in the inducement of a contract is per se an equitable issue, outside the jury's province, then courts and lawyers have been wasting their time in many cases by jockeying for position to have the issue joined either in a contract action by the beneficiary, with a jury, or a rescission action by the insurer, without a jury.

Where fraud or misrepresentation is one among several issues in the case, courts have always understood that there may often be a tension between adjudicative efficiency on the one hand and the right to a jury trial on the other. In enforcing the seventh amendment to the United States Constitution, the federal courts have subordinated the possible gain in efficiency to the constitutional right. In ordering a simultaneous trial of the equitable and legal cross-claims in the instant case, the trial judge was following the progressive trend exhibited in several recent New York cases. Upon review, the New York Appellate Division recognized that the appropriate consequence of the procedure adopted by the trial judge was that the jury verdict on the misrepresentation defense to determining the insured's contract claim was binding on the judge by "internal" collateral estoppel when he decided the insurer's rescission claim. By turning the clock back to the distinction between law and equity in the seventeenth century and confining the jury's role in the insured's contract claim to whether fraud in the factum made the contract void, the court of appeals finessed the collateral estoppel rule, but jettisoned an important purpose of conducting the simultaneous trial of both claims. There

168 Trial by jury of an issue common to conflicting legal and equitable claims is secure in the federal courts under the Seventh Amendment and cannot be circumvented through the device of ordering the equity claim tried first, or by a judicial finding contrary to the jury's verdict on a common issue of fact. See Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Roscello v. Southwest Airlines Co., 726 F.2d 217 (5th Cir. 1984); General Inv. Co. v. Ackerman, 37 F.R.D. 38, 40 (S.D.N.Y. 1964).

is little point in avoiding a “back door divestiture” of the right to jury trial if at the same time the right is divested through the front door by holding fraud in the inducement a nonjury equitable defense.

Although the Mercantile & General Reinsurance case involved two commercial entities, most issues of alleged misrepresentation in insurance cases arise in disputes between the company and the beneficiary of a life or disability insurance policy, as in the Tober case. Everyone familiar with trial practice appreciates the significance of the difference between jury and nonjury trials in such cases. With this in mind, some readers may applaud the recent cases on pragmatic grounds. Many today view the civil jury as an anachronism impeding the efficient dispatch of judicial business. The framers of our constitution were not of this mind when they drafted the guarantee. The belief that animated the constitutional rule is vividly caught in the opinion of a great New York chancellor. In 1815, the Court of Errors reversed a common-law judgment that trespassed on the jury's prerogative of passing on the materiality of an insurance applicant's nondisclosure.170 Chancellor Kent wrote for a unanimous court:

The case before us is, comparatively, of trifling consequence; but the distinction [between questions of law and fact] I have suggested goes to the very root and essence of trial by jury; and may, indeed, become of inestimable value, and, perhaps, of perilous struggle, when the present generation shall have ceased to exist.

I am disposed to hand to posterity the institution of juries as perfect, in all respects, as we now enjoy it; for I believe it may, in times hereafter, be found to be no inconsiderable security against the systematic influence and tyranny of party spirit, in inferior tribunals.171

It is respectfully submitted that the recent New York cases have overlooked the historic relation between law and equity and have squandered the constitutional legacy that Chancellor Kent's generation handed down to posterity. It is to be hoped that the New York Court of Appeals will revisit the question with a more careful examination of how fraud and misrepresentation fit into the jury trial guarantee based on historical usage. Until the New York rule denying jury trial of these defenses is corrected by judicial reexamination or constitutional revision, insurance claimants

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171 Id. at 519.
affected by it would do well to have their cases heard in federal court on diversity grounds if at all possible. There, under the protection of the seventh amendment to the United States Constitution, their right to jury trial is secure.\footnote{See supra note 167; see also Ben Cooper, Inc. v. Insurance Co. of Pa., 896 F.2d 1394, 1401 (2d Cir.), \textit{vacated}, 498 U.S. 964 (1990); Ettleson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir.), \textit{cert. denied}, 320 U.S. 777 (1943). Ettleson's holding with respect to jury trial is unaffected by Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988), which overruled Ettleson's holding with respect to the direct appealability of orders granting equitable stays.}