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IS THERE A CONSTITUTIONAL RIGHT TO JURY TRIAL OF EQUITABLE DEFENSES IN NEW YORK?

BERNARD E. GEGAN†

This article is dedicated to the memory of Benjamin N. Cardozo, whose insight into the law made the crooked straight and the rough places plain.

INTRODUCTION

The subject of this article is the constitutionality of section 4101 of the New York Civil Practice Law and Rules (CPLR), which, in addition to setting forth the traditional legal actions triable by jury as of right,¹ also provides “that equitable defenses and equitable counterclaims shall be tried by the court."² Under the former Civil Practice Act,³ which the CPLR replaced in 1963,⁴ all defenses, whether legal or equitable, were triable in the same manner as the plaintiff’s action;⁵ only counterclaims

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¹ CPLR 4101 provides for a jury trial in:
   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.


⁴ See N.Y. C.P.L.R. 10005 (McKinney 1981) (setting forth the effective date of the act as Sept. 1, 1963). One year before this act took effect, there was an amendment to the New York State Constitution that changed the structure of the courts and judicial administration. See N.Y. CONST. art. VI, §§ 1, 37.

⁵ See Act of May 21, 1920, ch. 925, §§ 422, 425, 1920 N.Y. Laws
were accorded a mode of trial of their own, independent of the action.\(^6\)

Thus, for example, if a plaintiff brought an action on a written contract calling for the defendant to pay $1,000 for a service, the defendant might answer that the true agreement was for a payment of $100 and that the written contract was the product of a drafting mistake. Because the plaintiff's action was for a sum of money only, it was triable by jury as of right. Prior to the CPLR, the issue of fact raised by the defense was also triable by jury as of right, notwithstanding its equitable character. Under the CPLR, the equitable defense is triable by the court alone.

The legislature was assured by the New York State Advisory Commission on Practice and Procedure that recommended the CPLR that there was no constitutional problem with the revised rule.\(^7\) The leading treatise on New York Practice echoed this assurance,\(^8\) and few voices have questioned it in the years since 1963 when the CPLR was adopted.\(^9\) The constitutional question, however, took on a greater urgency in 1996 when the Appellate Division, First Department, in *Hudson View II Associates v. Gooden*,\(^10\) stated that CPLR 4101 was indeed unconstitutional in providing for a

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\(^{19, 157}\) (repealed 1962).


\(^7\) See N.Y. STATE ADVISORY COMM. ON PRACTICE AND PROCEDURE, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, Legis. Doc. No. 13, at 217 (1958) (stating "[t]he proposal [which is now CPLR 4101] raises no constitutional question because trial by jury is not required for equitable issues").

\(^8\) See 8 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE: CPLR ¶ 4101.38, at 41–78 (1999) ("The right to a jury trial on equitable defenses is not constitutional, as it was not available prior to 1777 and was not afforded by statute enacted prior to 1894.").

\(^9\) In his Practice Commentary to section 4101 of McKinney's CPLR, Professor Siegel suggested that "the language of CPLR 4101 about equitable 'defenses' being triable by the court may be too sweeping, and run afoot of the constitutional right to trial by jury, which depends on common law antecedents." See David D. Siegel, Practice Commentaries to N.Y. C.P.L.R. 4101, at 191 (McKinney 1992). This author has discussed the topic briefly and questioned the power of the legislature to repeal jury trial of equitable defenses. See Bernard E. Gegan, *Turning Back the Clock on the Trial of Equitable Defenses in New York*, 68 ST. JOHN'S L. REV. 823, 829–30 (1994).

\(^{10}\) 644 N.Y.S.2d 512 (App. Div. 1st Dep't 1996).
non-jury trial of equitable defenses raised in cases in which the plaintiff's action was triable by jury. Because the court concluded that the equitable defenses in the case before it did not fall within that category, its brief examination of the constitutional question must be regarded as dictum, but it is dictum of a most deliberate character. It now seems inevitable that the constitutional question must soon be decided once and for all. Because the issue is a complex one involving some obscure legal history, it may be of service to examine it in depth.

I. THE CONSTITUTIONAL RIGHT TO JURY TRIAL

Any statute that restricts the right to jury trial must comply with the existing New York Constitution of 1938, which states that: “Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . .” In order to identify what rights to a jury trial were constitutionally guaranteed prior to the adoption of the constitution of 1938, it is necessary to take a step back and

11 See id. at 515.
12 The court's opinion is somewhat vague on a critical point. The plaintiffs, owners of housing projects, sued the managers for damages for breach of contract, conversion, and for their removal as general partners and managing agents. See id. at 513. The court correctly noted that this joinder of legal claims with an equitable claim based on the same transaction resulted in plaintiffs' waiver of jury trial on all legal claims, but that the defendants retained the right to jury trial of the legal claims, presumably breach of contract and conversion. See id. at 516. The court said that the defendants set up legal and equitable defenses to plaintiffs' causes of action together with counterclaims for the reasonable value of their services. See id. The court concluded that the counterclaims were legal, not equitable, so that no waiver could result from their assertion. See id. The remaining question was how to try the equitable defenses, the substance of which the court left unspecified. As stated in the above text, the court said that with respect to the legal actions enumerated in section 968 of the Code of Civil Procedure and its successor, section 4101 of the CPLR, see supra note 1, jury trial of equitable defenses “would be constitutionally protected to the present time” because they were triable by jury under the statute prior to the constitution of 1894. Hudson View II Assocs. 644 N.Y.S.2d at 514.

It is not totally clear why the court concluded that defendants were not entitled to a jury trial of their equitable defenses. This conclusion is understandable if said defenses were set up only in relation to the equitable claim for defendants' removal as managing agents, because an equitable defense to an equitable claim was never triable by jury. But if the unspecified equitable defenses were set up in relation to the legal claims for breach of contract and conversion, then the court's conclusion is not consistent with its position on the constitutional question. Unfortunately, the opinion does not specify which defenses related to which claims.

13 N.Y. CONST. art. I, § 2.
consider its predecessor, the constitution of 1894. That constitution contained slightly different language. It provided that: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever..." The same language appears in all previous New York state constitutions, including the constitution adopted in 1846, its predecessor of 1821, and the first constitution of 1777.

The key reference in each of these constitutional provisions are the words "heretofore used." To what period does "heretofore" refer? And what is meant by "used"? The easiest way to approach an answer is to look at the first constitution of 1777 through which New York passed from colony to statehood. The only possible meaning of "heretofore" was as a reference to the period immediately preceding the adoption of that constitution. Since there was no previous written constitution, the reference to "used" must have meant the time honored custom of using juries in the common law courts, but not in the courts of equity. Equity's discretionary use of juries in an advisory role was not covered by the guarantee, which applied only to the use of juries as a matter of right in the law courts.

The problem with which this article is concerned arises because the period covered by "heretofore used" did not remain static. Unlike the Seventh Amendment to the United States Constitution, which has remained unchanged since 1791, the practice in New York has been to supersede the existing...

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14 N.Y. CONST. art. I, § 2 (1894).
15 See N.Y. CONST. art. I, § 2 (1846).
16 See N.Y. CONST. art. VII, § 2 (1821).
17 The language used in 1777 was slightly different: "trial by jury, in all cases, in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate forever." N.Y. CONST. art. XLI (1777).
18 See Malone v. Saints Peter & Paul's Church, 64 N.E. 961, 962 (N.Y. 1902) (noting that the word "used" referred to common law customs).
19 See In re Gurland, 146 N.Y.S. 830, 833 (App. Div. 2d Dep't 1955) (holding that there was no right to a jury trial under the Mental Hygiene Law if the right was not previously conferred as part of the common law).
20 The Seventh Amendment to the United States Constitution states that:
In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

constitution periodically and replace it with an entirely new one. As each successive constitution was adopted, the "heretofore used" clause was said to be applicable to each newly adopted constitution.\textsuperscript{21} The periodic updating of the timeline for applying the guarantee was coupled with holdings that "used" in the constitutional formula included the use of juries established by statutory enactment as well as immemorial common law tradition. Thus, for example, a case not triable by jury at common law, but made triable by jury for the first time by statute passed in 1830, was held to be within the guarantee contained in the constitution of 1846.\textsuperscript{22}

The practical effect of this process was that a right to jury trial created by the legislature remained subject to modification or repeal only as long as it remained solely a statutory right. If the statute remained on the books when the next constitution was adopted, it was promoted to a constitutional right beyond the legislature's power to diminish. The drafters of the 1938 constitution realized that it was not a very good idea to constitutionalize all statutory jury rights by the routine use of "heretofore used."\textsuperscript{23} Accordingly, they ended the pattern of using that formula and adopted the language quoted above.\textsuperscript{24}

Although the new article I, § 2 did not create any new constitutional jury rights, it also did not eliminate any that had previously achieved constitutional status by virtue of the "heretofore used" clauses of previous constitutions, including, presumably, the predecessor constitution of 1894. Recent dictum of the New York Court of Appeals summarizes the current wisdom: "Consequently, all cases afforded a jury trial under the common law prior to 1777 and all cases to which the Legislature extended a right to a jury trial prior to 1894 come

\textsuperscript{21} See WEINSTEIN ET AL., supra note 8, ¶ 4101.07, at 41-24 to 41-25.

\textsuperscript{22} See Wynehamer v. People, 13 N.Y. 378 (1856); see also Conderman v. Conderman, 44 Hun 181 (N.Y. Sup. Ct. Gen. T. 5th Dep't 1887) (concerning the issue of adultery in a divorce case).


\textsuperscript{24} See N.Y. CONST. art. I, § 2 (providing for jury trial "in all cases in which it has heretofore been guaranteed by constitutional provision").
within the present constitutional guarantee in article I, § 2."

Although the effect of the 1894 constitution will be revisited at the end of this article, it is appropriate for now to discuss the effect of the 1894 constitution as summarized by the Court of Appeals. So the central issue may be stated simply: Was there a statutory right to jury trial of equitable defenses to ordinary legal actions prior to 1894? If so, it achieved constitutionally guaranteed status by force of the 1894 constitution and, therefore, could not have been taken away when the legislature enacted the CPLR in 1963. On the other hand, if equitable defenses only became triable by jury after 1894, e.g., when the Civil Practice Act took effect in 1921, then pursuant to the present constitution, the right remained statutory only and was validly modified by CPLR 4101.

II. THE EQUITABLE DEFENSE IN NEW YORK CIVIL PRACTICE

Prior to the merger of law and equity under the New York Constitution of 1846 and the Code of Procedure of 1848 (Field Code), there was no such thing as an equitable defense. During the long period prior to the merger, if a defendant in a law action alleged new matter that the common-law court would recognize as sufficient to overcome the plaintiff's case, it of course could be pleaded as an affirmative legal defense. If the defendant, however, wished to raise some new matter that the common-law court would not recognize, but which the Chancellor would act upon, he was required to commence a separate suit in equity to obtain an injunction against the continuance of the action at law.

Recall the previous example of an action at law on a written contract calling for payment of $1,000 for services rendered, in which the defendant alleges that the true agreement was for $100 and that the written contract was the product of a drafting mistake. The common law court would not entertain this plea, so the defendant was driven to sue in equity for relief. If the

26 See Cheriot v. Barker, 2 Johns. 346, 351 (N.Y. Sup. Ct. 1807) (stating that the court will not entertain the defense of mistake when the contract is otherwise clear and explicit).
27 See Many v. Beekman Iron Co., 9 Paige Ch. 188, 196 (N.Y. Ch. 1841) (holding that a bill in the chancery court is required to reform a written contract); Gillespie v. Moon, 2 Johns. Ch. 585, 595 (N.Y. Ch. 1817) (Chancellor Kent) (noting that
Chancellor, working without a jury, determined that the petitioner's allegations were true, he would order the plaintiff to discontinue his action, under penalty of contempt if he refused. Although the facts found by the Chancellor did not render the legal right invalid, his position was that they were of such nature as to make it against good conscience for this plaintiff to take advantage of them. A fragile peace with the common law judges was maintained by the courteous fiction that the Chancellor did not act "in rem," upon the legal right itself, but "in personam," upon the conscience of the party asserting the legal right. In sum, the facts found by the Chancellor were courts of equity grant relief for claims of mistake and fraud). After the merger of law and equity in 1846, actions for reformation brought in the supreme court were tried by the court without a jury. See, e.g., Johnson v. Taber, 10 N.Y. 319 (1852) (transferring a pending bill in equity, brought before the merger, to a (non-jury) special term of the supreme court).

The fiction had its true believers, as indicated by the following statement: "It is only by a figure of speech that a person who has not the legal title to property can be said to be the equitable owner of it. What is called equitable ownership or equitable title or an equitable estate is in truth only a personal claim against the real owner . . . ." C. C. Langdell, A SUMMARY OF EQUITY PLEADING 210–11 (2d ed. 1883). These figures of speech and legal fictions are further elucidated in Lon L. Fuller, Legal Fictions 90–91, 129 n.64 (1967) (discussing the simultaneous existence of legal and equitable rules on the same subject).

At early common law, the "fiction" had Langdellian reality. In a case decided in 1459, the Chancellor ordered a party to surrender a legally valid debt because it would be unconscionable for him to enforce it. See J.R. v. M.P., Y.B., 37 Hen. VI, 13 (C.P. 1459), translated & reprinted in Edward D. Re & Stanton D. Krauss, Cases and Materials on Remedies 24 (3d ed. 1992). The party refused and was jailed in Fleet prison for contempt. See id. His action at law on the debt was nevertheless allowed to proceed. See id.

When the Chancellor was closely identified with Royal prerogative, there came a time in 1616 when the fragile truce broke down. The events stirred up by the Watergate burglars produced no greater constitutional crisis than the judicial crisis precipitated when Chief Justice Coke attempted to indict the subordinate chancery officials responsible for issuing an injunction against a plaintiff in the law court. This crisis placed the matter before the King who, after consulting with the highest legal and political officials, upheld the lawfulness of the chancery's actions. Thereafter, the equity rule would trump the legal rule when they differed. See Walsh, supra note 28, §§ 5, 6. Later the same year, Coke was dismissed from his place as Chief Justice of the Kings Bench. His compliant successor avowed that he would not be "a heady judge . . . busy in stirring questions, especially of jurisdictions." 2 Lord Campbell, The Lives of the Chief Justices of England 9 (1873). Lord Chancellor Ellesmere crowed over Coke's dismissal as "a Lesson to be
defensive in substance, but required the defendant to bring a bill in equity, thereby reversing the parties in the law action.

This awkward situation was occasionally alleviated when the common-law court opened its eyes and adopted rules that were previously recognized exclusively in equity. This happened, for example, with regard to the issue of fraud in the inducement of contracts. Although originating as an exclusively equitable doctrine that warranted an injunction against the fraudfeasor's action at law, most common-law courts eventually accepted it as a valid defense in the law court, thus, rendering resort to equity unnecessary. With regard to other matters that remained the exclusive province of equity, however, the argument continued to build upon the words of Pomeroy: "Nothing could be devised more cumbrous than this double litigation to enforce one right and to end one controversy."

A. The Origin of the Field Code

Under the spur of the indefatigable David Dudley Field, New York became the first jurisdiction to reform the old system of separate courts of law and equity. Under the constitution of 1846, the old chancery court was abolished and its functions transferred to the new supreme court, which was to have "general jurisdiction in law and equity." The constitution of

learned of all, and to be remembered and feared of all that sit in Judicial places."
John P. Dawson, Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616, 36 ILL. L. REV. 127, 138 n.44 (1941) (citations omitted). Of course, the comparison to Watergate must be qualified. In 1616, the judge lost his job; in 1974, the man who would be king lost his.


31 See Case v. Boughton, 11 Wend. 107, 109 (N.Y. Sup. Ct. 1833) (allowing failure of consideration as a defense to an action to recover on a sealed instrument); Seaman v. Fonereau, 93 Eng. Rep. 1115, 1115 (K.B. 1743) (holding that in an action brought by an insured, the insurer can defend on the basis of fraud when obtaining the insurance); see also Van Epps v. Harrison, 5 Hill 63 (N.Y. Sup. Ct. 1843) (stating that fraud is not a complete bar to an action brought for the contract price if the buyer retains the goods); Crane v. Bunnell, 10 Paige Ch. 333, 341-42 (N.Y. Ch. 1843) (refusing in a suit in equity to enjoin a pending law action on a contract debt allegedly obtained by fraud, because the remedy at law was adequate).


34 N.Y. CONST. art. VI, § 3 (1846); see also In re Steinway, 53 N.E. 1103, 1104 (N.Y. 1899) (tracing the history of the New York Supreme Court).
1846 further mandated that the legislature was to appoint three commissioners “to revise, reform, simplify and abridge” court practice. The legislature complied, and the commissioners responded expeditiously with their report and recommended code on February 29, 1848. Later that year, the legislature enacted the Code of Procedure, thereafter widely known as the Field Code, after its principal sponsor.

Neither the commissioners' report nor the Field Code temporized with the old dual system. The only acknowledgment of the difference between law and equity came in the form of a forceful negation:

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

No reference to law and equity was made in the sections dealing with the contents of the complaint or answer, in which the defendant was permitted to “set forth in his answer, as many grounds of defence as he shall have.”

The same studied indifference to law and equity appears in the sections dealing with the mode of trial of civil actions. The key section on jury trial provided: “Whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury [unless waived or referred].” The commissioners' notes to

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35 N.Y. CONST. art. VI, § 24 (1846).
36 See N.Y. STATE COMMRS ON PRACTICE AND PLEADINGS, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF PROCEDURE at v (Albany 1848) [hereinafter FIRST REPORT OF THE COMMISSIONERS].
37 See Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497; see also Mildred V. Coe & Lewis W. Morse, Chronology of the Development of the David Dudley Field Code, 27 CORNELL L.Q. 238 (1942) (providing a summary of the process taken to enact the Field Code).
38 Act of Apr. 12, 1848, ch. 379, § 62, 1848 N.Y. Laws 497, 510. This famous statute was renumbered to § 69 as the result of sections added in 1849. See Act of Apr. 11, 1849, ch. 438, § 69, 1849 N.Y. Laws 613, 630. The latter section number will be used because that is the reference invariably cited by the cases. In successive incarnations, it appears in the Code of Civil Procedure (1876) as § 3339; in the Civil Practice Act (1921) as § 8; and in N.Y. C.P.L.R. 103(a) (McKinney 1990).
40 Act of Apr. 12, 1848, ch. 379, § 208, 1848 N.Y. Laws 497, 536 (renumbered to
this section state:

A trial by jury is secured, by the constitution, to the parties, if they require it, where there are issues of fact in the courts of law, excepting only those where the trial involves the examination of a long account. We propose an extension of the right of trial by jury to many cases, not within the constitutional provision.41

What did the commissioners mean by the last sentence? How did the new statute extend the right to jury trial to "many cases" beyond the constitutional requirement, which, as they noted, previously applied only to "issues of fact in the courts of law" under the old system? Could they have intended to have the statutory language taken literally? Could they have intended the reference to the recovery of real property to include actions for specific performance or constructive trust as well as ejectment? Could they have intended the reference to personal property to cover mandatory injunctions issued for that purpose, as well as legal replevin? Could their reference to "money only" have included money recoverable on grounds previously equitable as well as on grounds previously legal? It is interesting to read the commissioners' own introductory comments to the Field Code article on trials. After discussing the constitutional guarantee, and the old modes of practice in courts of law and equity, the commissioners stated:

There remains then but the case of a trial by jury. And the enquiry is narrowed down to this: can it be adopted in both classes of cases? Or in other words, where an uniform mode of pleading is used, will not the trial by jury be applicable as well to that class of cases heretofore denominated equitable, as to that denominated legal?42

After discussing the practical considerations, the commissioners answered their own question: "We think, therefore, we are warranted in concluding, that there is nothing

§ 253 by Act of Apr. 11, 1849, ch. 438, § 253, 1849 N.Y. Laws 613, 666). Compulsory reference, now governed by N.Y. C.P.L.R. 4317(b) (McKinney 1992), usually involves a complaint presenting a long account, as to which there is no right to trial by jury. See Steck v. Colorado Fuel & Iron Co., 37 N.E. 1, 1 (N.Y. 1894). A compulsory reference cannot be had where there is a right to a jury trial. See Untermeyer v. Bernhauer, 11 N.E. 847 (N.Y. 1887); WEINSTEIN ET AL., supra note 8, ¶ 4917.08, at 43–42 to 43–43.

41 FIRST REPORT OF THE COMMISSIONERS, supra note 36, at 185.
42 Id. at 179.
in the nature of the questions, nor in the number and variety of
them, which should prevent a uniform mode of trial in all cases,

whether they be such as have been heretofore denominated legal
or equitable."

These comments make a convincing case that the framers of
the original Field Code had a more radical and far-reaching idea
of the fusion of law and equity than was ever acknowledged by
the courts, who interpreted the statutory provision for jury trial
as no more extensive than the constitutional guarantee.

Actions for the recovery of money were held not to be subject to
jury trial if the grounds of recovery were historically equitable.
The same treatment was also given to actions for the recovery of
real and personal property on equitable grounds.

B. How Were Equitable Defenses Tried Under the Field Code?

As noted above, the original Field Code of 1848 did not
expressly distinguish between types of defenses; nor did it say

43 Id. at 180.

44 See Emery v. Pease, 20 N.Y. 62, 64–65 (1859) (discussing whether an action
for accounting is equitable); McGurty v. Delaware, L. & W. R. Co., 158 N.Y.S. 285,
287–88 (App. Div. 4th Dep't 1916) (discussing the plaintiff's right to a jury trial
under the New York Constitution and under section 968 of the Code of Civil
that a plaintiff's right to a jury trial in an “accounting” action is not absolute); see
also WEINSTEIN ET AL., supra note 8, ¶ 4101.10, at 41–31 to 41–32.

45 See Woodruff v. Germansky, 135 N.E. 601, 602 (N.Y. 1922) (ruling on a land
vendor's action for specific performance); Dykan v. United States Life Ins. Co., 68
N.E. 362, 363 (N.Y. 1903) (concerning a suit to recover money paid for an annuity
on the grounds that the recipient was aware of the applicant's “unsound mental
condition”); Rindge v. Baker, 57 N.Y. 209, 219–21 (1874) (ruling on a land vendor's
action for specific performance); Crary v. Smith, 2 N.Y. 60, 62 (1848) (same); see
also Bensinger v. Erhardt, 77 N.Y.S. 577, 579–81 (App. Div. 1st Dep't 1902)
(explaining the difference between an action at law for damages and an action in
equity for the price); In re De Stuer's Estate, 99 N.Y.S.2d 739, 743–45 (Sur. Ct. N.Y.
County 1950) (surveying a land vendor's remedies against a defaulting purchaser);
see generally George L. Clark, Some Problems in Specific Performance, 31 HARV. L.
REV. 271 (1917).

46 See Flanigan v. Skelly, 85 N.Y.S. 4, 6 (App. Div. 3d Dep't 1903) (holding that
a written decision is required in an action to rescind a deed induced by fraud); Karp
v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 786 (Sup. Ct. Bronx County
1945) (requiring a purchaser under a land contract to seek specific performance,
rather than ejectment), aff'd, 59 N.Y.S.2d 919 (App. Div. 1st Dep't 1946); McDonald
Newton, 46 Barb. 173, 173 (N.Y. Sup. Ct. Gen. T. 1862) (precluding the remedy of
ejectment based upon plaintiff's equitable title).
anything about the manner of trying different types of defenses. The only reference to the mode of trial was in connection with the type of action brought by the plaintiff. If it was for the “recovery of money only, or of specific real or personal property,” a jury trial was required as to “an issue of fact.” An issue of fact was created “[u]pon a material allegation of the complaint controverted by the answer[,] or, [u]pon new matter in the answer controverted by the reply[,] or, [u]pon new matter in the reply.” No provision at all was made for counterclaims.

Given the statutory mandate requiring jury trial of all “issues of fact” in the enumerated actions under the Field Code, the notion that issues of fact raised by affirmative defenses were included in the mandate on a par with those raised by a simple denial of the allegations in the complaint, appears to have been too obvious to warrant any further discussion. But what if, under the new Field Code, the defendant attempted to raise as a defense to a traditionally legal action, some issue that had theretofore been investigated exclusively by the Chancellor? Take, for example, an action of ejectment, which is triable by jury. Suppose the defendant answered with a plea that the deed, under which the plaintiff made his claim, was subject to reformation because of a mistake in drafting, or that some other traditionally equitable ground existed for overcoming the legal title held by the plaintiff.

Clearly, if the positions of the parties were reversed, and the claimant asserting equitable title came into court as a plaintiff seeking a decree reforming or setting aside the deed, the case would be tried by the court. Was all of the parol evidence

47 See supra note 39 and accompanying text.
50 When the Court of Appeals finally dealt with the question of whether an affirmative defense in a legal action came within the constitutional guarantee providing for a jury trial, it easily answered the question in the affirmative. See Imbrey v. Prudential Ins. Co., 36 N.E.2d 651, 655 (N.Y. 1941) (finding that the Appellate Division erred in directing a verdict against the plaintiff where the plaintiff was entitled to a jury trial of “questions of fact” introduced by the defendant).
concerning mistake in contravention of the written deed to go before the jury under the Field Code, because of the fortuitous procedural circumstance that the legal title holder commenced the action of ejectment and the equitable title claim was asserted by way of a defense? This question was expressly examined soon after the adoption of the Field Code in two cases. In both cases, the lower courts concluded that the legislature did not intend that equitable defenses could be set up in actions in which juries were used.

In *Crary v. Goodman*, in a trial at circuit before a jury in 1850, the trial judge refused to admit the defendant's evidence of mistake because "no equitable rights . . . could be interposed as a defense to the action, founded as it was on the legal title." A judgment for the plaintiff was affirmed by the General Term which held that the mode of trial of the ejectment action and the claimed defense could not be had before the same court. "The issue joined upon the allegations in the complaint touching the plaintiff's title, was triable by a jury. That joined upon the special matter set up in the answer, touching the equitable interest of the defendant, was triable by the court." The conclusion was that the two issues "are not in contemplation of the code to be litigated in the same action.

In *Hill v. McCarthy*, the same question was raised at special term when a plaintiff seeking ejectment moved to strike the defense of equitable title, founded upon a contract of purchase. As in the *Crary* case, the court noted that if the holder of the alleged equitable title had come forward as a plaintiff to perfect his title the "suit would have to be tried by the Court without a jury . . . . The question arises then, shall the defendant be permitted to do indirectly what he could not do directly, and that is, demand to have his equity, or to divert a

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53 Id. at 658.
54 Id. at 663. The Court noted that if the defendant had sued to establish his equitable title, the case would have been tried by the court, because "[w]e are not to suppose that the legislature entertained the absurd design of making the matter presented by a complaint, triable by one tribunal, and the same matter, when presented by an answer, triable by another." Id. at 664.
55 Id. at 664.
57 See id. at 49.
legal title tried before a jury." The court recognized that all issues of fact in the ejectment action would have to be sent to the jury and went on to say that questions that arise in an equity action "are quite unsuitable to the deliberations of a jury," and that the defense should be excluded from plaintiff's action and the defendant was left with a "plenary suit to divert the plaintiff's legal title." The court nevertheless admitted that "some judges have attained a different conclusion in reference to just such a case," and denied the motion to strike so that the question could be raised at the trial at circuit and reviewed by the Court of Appeals.

The reference in Hill to a difference of opinion is confirmed by Burget v. Bissell, which allowed an equitable defense to an action for trespass to chattels, and also acknowledged "some contrariety of opinion, if not conflict of decision." The unsettled character of the question was also noted, but not decided in Barton v. Sackett.

In accord with Hill, Cochran v. Webb permitted a defendant in an ejectment action to commence a cross action against the ejectment plaintiff seeking to establish and enforce an equitable title. The cross action was permitted, because the equitable relief could not be had in the ejectment action and:

for this reason among others, that under the code the equitable issue requires a different mode of trial from that arising on the allegations in the complaint. Issues which under the old system were called legal are triable by jury; those that were

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58 Id. at 50.
59 Id.
60 Id. at 51.
61 See id.
63 Id. at 195.
64 3 How. Pr. 368 (N.Y. Sup. Ct. Dutchess County 1848). In Hunt v. Farmers' Loan & Trust Co., 8 How. Pr. 416, 418–19 (N.Y. Sup. Ct. Monroe County 1850), the court stated, somewhat ruefully:

It is no longer necessary, in my judgment, to bring an action in the nature of a suit in equity, to restrain proceedings in an action in the nature of a suit at law. Whatever equities may exist between the parties which should prevent a recovery by the plaintiff, of his legal claim, may now be set up as a defence to the action, and the defendant is no longer put to his bill in equity, for relief. This, I believe, is one of the advantages of the new system, as claimed by its friends; and if it be an improvement, I am disposed to give the system credit for it, as it certainly stands in need of every thing that can be said in its favor.
denominated equitable are to be tried by the court.\textsuperscript{66}

It is a fascinating historical fact that some judges were so uncomfortable with the idea of placing equitable issues before juries that some of the earliest reported cases concluded that they could not be pleaded as defenses to "legal" actions at all. Obviously, if this conclusion had been allowed to stand, one of the principal objects of the merger of law and equity would have been frustrated. A reading of these early Field Code cases leaves no doubt that the prospect of using juries to try equitable defenses to traditionally legal claims was at the heart of the debate over whether they should be allowed at all. No one even suggested that the equitable defense could be allowed, but not tried by a jury.

In 1851, the Court of Appeals had the opportunity to address the controverted question, in the case of \textit{Haire v. Baker}.\textsuperscript{67} In \textit{Haire}, a parcel of land had been sold and conveyed subject to an existing mortgage, the amount of which had been deducted from the purchase price.\textsuperscript{68} By mistake, the mortgage was not excepted in the deed from the covenant against encumbrances.\textsuperscript{69} The grantee suffered a foreclosure and then commenced an action at law against the grantor for breach of the covenant.\textsuperscript{70} Perhaps influenced by the decision in \textit{Hill},\textsuperscript{71} the grantor did not plead the facts relating to the mistake in his answer, but brought a separate action seeking equitable relief in the form of an injunction against the grantee's action on the covenant and requested that the deed be reformed to reflect the parties' intent that the mortgage be excluded from the covenant.\textsuperscript{72} The case went to the Court of Appeals on a judgment sustaining the grantee's demurrer to the grantor's equity complaint.\textsuperscript{73} The demurrer was grounded in a Field Code provision authorizing the dismissal of an action where another action was pending between the same parties for the same

\textsuperscript{66} Id. at 654.
\textsuperscript{67} 5 N.Y. 357 (1851).
\textsuperscript{68} See id. at 359.
\textsuperscript{69} See id.
\textsuperscript{70} See id.
\textsuperscript{71} 3 Code Rep. 49 (N.Y. Sup. Ct. Madison County 1850); see also supra notes 56–61 and accompanying text.
\textsuperscript{72} See \textit{Haire}, 5 N.Y. at 361–62.
\textsuperscript{73} See id. at 362.
cause. This, in turn, depended on whether the relief sought in the second action simply duplicated the relief available in the first. The judges unanimously agreed that the equitable matter pleaded in the second action was available to the grantor as a defense in the grantee's action on the covenant. After describing the former practice under the dual system, the Court said:

It is difficult to discover any good reason why the same defense should not be admitted at law, in a suit brought to compel the payment of money due upon the covenant; each suit is brought to compel the performance of the covenant. The question of mistake is one of fact simply, and as conveniently tried in the one court as the other.

Through this decision, which affirmed the right to raise as a "defence at law," an issue that had traditionally been exclusively the province of the equity court, the "equitable defense" was born. According to the majority, the separate equity action was nevertheless allowed to proceed on the ground that in the action at law, "the affirmative relief here sought, could not have been attained, by the admission of such a defence; an appropriate action and complaint for that purpose were necessary."

The posture in which the case reached the Court of Appeals did not require a holding with respect to the mode of trial; The question was simply whether a separate action in equity was proper where there was an action at law pending. The court, however, indicated that it was well aware of the debate engendered by Hill and Crary, although it did not mention

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74 See Act of Apr. 12, 1848, ch. 379, § 122, 1848 N.Y. Laws 497, 521-22 (renumbered to § 144(3) by April 11, 1849, ch. 438, § 144(3), 1849 N.Y. Laws 613, 645-46). This section listed "[t]hat there is another action pending between the same parties, for the same cause," as a ground for demurrer. Id.
75 See Hunt v. Farmers' Loan & Trust Co., 8 How. Pr. 416, 418 (N.Y. Sup. Ct. Monroe County 1850) (noting that since it was "clearly competent for the present plaintiff to recoup his damages in the first action," a separate action would not be permitted); Groshon v. Lyon, 16 Barb. 461, 465-66 (N.Y. Sup. Ct. Gen. T. 1853) (noting that the rule antedated the Field Code); see generally DAVID D. SIEGEL, NEW YORK PRACTICE § 262, at 391-93 (2d ed. 1991).
76 Haire, 5 N.Y. at 362.
77 Id. at 361.
78 Id. at 362.
79 3 Code Rep. 49 (N.Y. Sup. Ct. Madison County 1850); see also supra notes 56-61 and accompanying text.
80 9 Barb. 657 (N.Y. Sup. Ct. Cattaraugus County 1851), rev'd, 12 N.Y. 266
either of these cases specifically. The court observed, with reference to the facts injected into the case by the equitable defense, that “[t]he question of mistake is one of fact simply, and as conveniently tried in the one court as the other.”

The reference to “one court” or “the other” was in one sense a backward glance to the old separate courts of law and equity and inferentially an endorsement of the mode of trial used at law as a suitable and convenient manner of trying issues historically tried in the courts of equity. Thus viewed, it was an outright rejection of the concerns that led Hill and Crary to disallow equitable defenses in actions triable by jury.

Haire’s reference to “one court” or “the other” might also have been meant to apply to the way the Field Code divided judicial business among general terms, circuit courts, and special terms. The general terms consisted of the judges from each judicial district, usually in panels of three, who sat periodically to hear appeals from the circuits and special terms. It performed the intermediate appellate function that the Appellate Division does today. The special terms were held by a single judge for two purposes: to hear pre-trial motions in cases that would later be tried at circuit; and to conduct non-jury trials in cases excluded from the jury trial provisions of the Code, i.e., equity cases. Issues of fact in the “legal” cases enumerated in section 253 of the Code were tried at circuit, where all issues of fact were tried by jury.

(1855); see also supra notes 52–55 and accompanying text.

81 Haire, 5 N.Y. at 362.
84 See N.Y. Code Proc. §§ 20, 254, 255 (1849); see also Hill, 3 Code Rep. at 50 (noting that although the Code abolished the distinction between actions at law and suits in equity in terms of form, jurisdiction, and pleading, a distinction still remains as to whether a jury must hear issues of fact in equity cases); Church v. Freeman, 16 How. Pr. 294, 297 (N.Y. Sup. Ct. Albany County 1857) (holding that under the Code, a party is entitled to a jury trial if a common law action is brought, but in equity cases, a judge of the special term has discretion to proceed without a jury); M'Mahon v. Allen, 10 How. Pr. 384, 384 (N.Y. Sup. Ct. New York County 1854) (exercising discretion and denying the use of a jury to decide issues in an equity suit because of “the great accumulation of business on the circuit calendar, and the great delays consequent thereon”); Wilson v. Forsyth, 16 How. Pr. 448, 448 (N.Y. Sup. Ct. Albany County 1857) (vacating an earlier order allowing a jury trial to determine whether the defendant intended to “hinder, delay or defraud creditors”).
The circuit courts functioned independently of the special terms and were held at different times and sometimes in different places.\textsuperscript{86} If a judge trying an equity case at special term wanted an advisory jury determination of a crucial issue of fact, he was required to interrupt proceedings and frame an issue to be tried at the next convenient circuit.\textsuperscript{87} Conversely, if a legal action triable at circuit also required a non-jury determination of an equitable issue, such as a counterclaim, depending on how the judge scheduled trial of the different issues, the jury trial might have been postponed while awaiting disposition of the equitable issue at the next special term.\textsuperscript{88} In

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N.Y. Laws 613, 666); see also McCarty v. Edwards, 24 How. Pr. 236, 240 (N.Y. Sup. Ct. Gen. T. Albany County 1861) (affirming the circuit court's judgment denying plaintiff's request to have issues of fact in an equitable case heard by a jury).
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\textsuperscript{86} See N.Y. CODE PROC. §§ 20–22 (1849). The original version of the Field Code required special terms and circuit courts to be held at the same time and place. See Act of Apr. 12, 1848, ch. 379, § 19, 1848 N.Y. Laws 497, 501. This provision was dropped in the 1849 version of the Field Code. In a report submitted on Dec. 31, 1849, suggesting an extensive revision that was never adopted, the Code Commissioners stated:

Juries cannot be assembled for particular cases as they arise; they must be drawn periodically, and in large or thinly populated counties, at considerable intervals. So much the more reason is there, that when the court does meet, and the jury are called together from different parts of the county, all the business waiting for them should be dispatched.

N.Y. STATE COMM'RS ON PRACTICE AND PLEADINGS, FINAL REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE, Assembly Doc. No. 16, at vi (Albany 1850) (proposed draft); see also Coe & Morse \textit{supra} note 37, at 242 (noting that the final report of the Code Commissioners was submitted to the Legislature on Dec. 31, 1848 and assigned Assembly document number 16 of 1850).

\textsuperscript{87} See McClave v. Gibb, 52 N.E. 186, 187 (N.Y. 1898) (finding that when a party is not entitled to a jury trial, but a jury is used to decide an issue of fact, "the verdict is treated as an aid to the court to inform its conscience; but it is in no wise bound thereby"); Brinckerhoff v. Bostwick, 12 N.E. 58, 60 (N.Y. 1887) (noting that an equitable case may have issues of fact framed for jury consideration); Carroll v. Diemel, 95 N.Y. 252, 255 (1884) (finding it proper for a trial judge to reject a jury's finding of fact in an equity case); Vermilyea v. Palmer, 52 N.Y. 471, 475 (1873) (holding that under the Code, a jury finding in an equity case has the same effect as in the chancery court in that "[s]uch a finding was used to inform the mind or conscience of the court... [and] was ancillary to the judgment of the court"). The proceeding was analogous to the former chancery practice of securing an advisory opinion by framing a feigned issue for trial in the law court. See id.; Snell v. Loucks, 12 Barb. 385, 387–88 (N.Y. Sup. Ct. Gen. T. 1852) (discussing the use of a "feigned issue" proceeding).

\textsuperscript{88} This was the practice after the Throop Code superceded the Field Code in 1876 and counterclaims received a mode of trial independent of the main action. See infra text accompanying note 157. Where an equitable counterclaim was interposed in a legal action, jury trial of the legal action was usually stayed awaiting
sum, trial judges did not make any findings of fact in cases tried at circuit, and no jury was ever used at special term. Of course, the courts acknowledged that these logistical problems could be circumvented if a party waived its right to a jury trial, or consented to a reference.

Modern critics of the New York experience under the Code point out that the dilemma posed by the Hill and Crary cases was a false one, because a middle course existed between the extremes of trying all issues by jury and disallowing equitable defenses altogether. In modern civil practice where legal and equitable issues are blended, it is commonplace to let the jury pass on the legal issues while the judge decides equitable issues, such as equitable defenses, all in one trial and in one courtroom. Perhaps New York judges, in the early years of Code practice, were not sufficiently imaginative in finding a way out of the dilemma perceived in the earliest cases. The historical fact, however, is that the Code language apparently mandating jury trial of all issues of fact in the enumerated class of cases, coupled with the mind-set fostered by the division of labor between circuits and special terms, constituted a serious impediment in the way of moving forward to the modern practice of blending judicial and jury fact-finding. To the early

disposition of the counterclaim at special term. See, e.g., Gage v. Angell, 8 How Pr. 335 (N.Y. Sup. Ct. Herkimer County 1853); Storandt v. Wakelee, 177 N.Y.S. 535 (App. Div. 4th Dep't 1919); Brody, Adler & Koch Co. v. Hochstätler, 135 N.Y.S. 550 (App. Div. 1st Dep't 1912); Goss v. C. S. Goss & Co., 111 N.Y.S. 115 (App. Div. 1st Dep't 1908); Thomas v. Bronx Realty Co., 70 N.Y.S. 206 (App. Div. 1st Dep't 1901). One case took the sporting view of placing the plaintiff's legal claim on the jury calendar for trial term and the defendant's equitable counterclaim on the special term calendar. See Thomas, 70 N.Y.S. at 207. Because the two claims had crucial issues in common, the court noted that whichever came to judgment first could be res judicata on the other. See id.


90 See, e.g., Young v. Overbaugh, 39 N.E. 712 (N.Y. 1895); Hoppough v. Struble, 60 N.Y. 430 (1875); Freeman v. Freeman, 43 N.Y. 34 (1870); see also supra note 40.


judges, taking equitable defenses to legal actions away from the jury would have entailed splitting the trial of a single case into two separate forums, with the usual delays incident to the different calendars and different times and places of holding court.

In *Haire v. Baker*, it is apparent that the Court of Appeals recognized that this would have had the practical effect of reintroducing the evils of the dual court system, which the Code sought to eliminate. If jury trial of equitable defenses was perceived as an evil, it was the lesser evil in the minds of judges interpreting the provisions of the new Code.

The decision in *Haire v. Baker* was soon followed by the appeals in the contrasting cases of *Dobson v. Pearce* and *Crary v. Goodman*, which went before the Court of Appeals in 1854 and 1855, respectively. In *Dobson*, where the trial judge allowed an equitable defense to be tried before a jury, the court affirmed the judgment and said that the “intent of the legislature is very clear” that a defendant in one of the legal actions enumerated in section 253 of the Code may set up “an equitable defence to defeat a recovery upon it.” The court defined equitable defenses as including “all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar.” In *Crary*, the Court of Appeals reversed the trial court’s refusal to entertain the equitable defense with a sweeping and elegant description of the merger of law and equity.

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93 5 N.Y. 357 (1851).
94 12 N.Y. 156 (1854).
95 12 N.Y. 266 (1855).
96 *Dobson*, 12 N.Y. at 165.
97 Id. Judge Johnson’s concurring opinion observed that “an equitable defence to a civil action is now as available as a legal defence.” Id. at 168.
98 See *Crary*, 12 N.Y. at 267–68. Judge Johnson, delivering the opinion of the court, noted that:

[S]ince the enactment of the Code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff’s claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.

*Id.*
After the decisions of the Court of Appeals in *Haire, Dobson,* and *Crary,* the availability of equitable defenses to legal actions was laid to rest. Given the concerns about jury trials that gave rise to the controversy over allowing equitable defenses, the use of juries to try these defenses appears to have been laid to rest as well. In referring to the jury trial section of the Field Code, Professor Hinton observed: "Under this statute it was assumed as too clear for question, that an equitable defence was to be tried by jury as in [the] case of any other defence."  

Professor Hinton's statement appears to be borne out by the reports of several cases decided under the Field Code in the years following *Haire, Dobson,* and *Crary.* Equitable defenses were litigated before juries without comment in *New York Central Insurance Co. v. National Protection Insurance Co.,* 100 *Chase v. Peck,* 101 and *Pitcher v. Hennessey.* 102 Equitable replications to legal defenses were also tried by juries in several cases under the Field Code—as an "issue of fact" embraced within the legal action. 103

Finally, the rule concerning the mode of trying defenses was a two-way street. While equitable defenses were tried by a jury if the underlying action was legal, legal defenses were tried by

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100 14 N.Y. 85 (1856).
101 21 N.Y. 581 (1860).
102 48 N.Y. 415 (1872).
the court if the underlying action was equitable. For example, if a fiduciary who was a defendant in an equitable action for an accounting pleaded payment as a defense, the issue would be tried by the court, not a jury.105

C. Equitable Defenses Under the Throop Code

The Code of Civil Procedure, called the Throop Code after its principal sponsor, replaced the Field Code in 1876.106 With the exception of a new section on the mode of trying counterclaims, the Throop Code made no changes in the basic provisions established by the Field Code. A new provision, however, was added under section 970, which provided for stating issues for jury trial as of right in cases not otherwise triable by jury.107 As a result of section 970, we are able to catch a glimpse of how the Court of Appeals viewed the trial of equitable defenses. In

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104 See In re Baer, 41 N.E. 702 (N.Y. 1895) (action by purchaser of real property to be relieved of obligation to purchase because of defect in property); Colman v. Dixon, 50 N.Y. 572 (1872) (injunction action against use of trademark; defense that plaintiff had no legal right to trademark); April M's Enter., Inc. v. Scott, 577 N.Y.S.2d 471 (App. Div. 2d Dep't 1991) (mortgage foreclosure; defense of fraud and usury); Wurster v. Armfield, 90 N.Y.S. 699 (App. Div. 2d Dep't 1904) (action for specific performance; defense that defendant was mentally incompetent); King v. Ross, 51 N.Y.S. 138 (App. Div. 1st Dep't 1898) (action to quiet title by plaintiff remains equitable under statute if defendant does not ask for affirmative relief); Stephens v. Humphreys, 10 N.Y.S. 455 (Sup. Ct. Gen. T. 1st Dep't 1890) (mortgage foreclosure; defense of duress and fraud); Kaplan v. 2108-2116 Walton Ave. Realty Corp., 425 N.Y.S.2d 765 (Sup. Ct. Bronx County 1980) (contract defenses in mortgage foreclosure).

105 See Duffy v. Duncan, 35 N.Y. 187 (1866).

106 See Act of June 2, 1876, chs. 448-49, 1876 N.Y. Laws 1 (vol. 2). Extensive amendments were made in 1877 and 1880. See Act of June 5, 1877, ch. 416, 1877 N.Y. Laws 442; Act of May 6, 1880, ch. 178, 1880 N.Y. Laws 1 (vol. 2).

107 See Act of June 2, 1876 ch. 448, § 970. 1876 N.Y. Laws 1, 183. A legal counterclaim may be made in an equity action. Since another new provision, section 974, made counterclaims triable as if they were independent actions, see infra note 157 and accompanying text. Section 970 was used to obtain a jury verdict on the counterclaim. See Roslyn Heights Land & Imp. Co. v. Burrowes, 27 N.Y.S. 622 (Sup. Ct. Gen. T. 2d Dep't 1894) (granting defendant's motion for a trial by jury to consider his common law counterclaim in a mortgage foreclosure); Deeves v. Metropolitan Realty Co., 26 N.Y.S. 23 (N.Y.C. C.P. Gen. T. N.Y. County 1893) (holding that in a foreclosure action on a mechanic's lien, the defendant was entitled to a jury trial on his counterclaim for damages), aff'd, 36 N.E. 739 (N.Y. 1894). Section 970 was also used if adultery was a contested issue in a divorce case. See Lowenthal v. Lowenthal, 51 N.E. 995 (N.Y. 1898) (holding that it is not within the court's discretion to deny the defendant a right to a jury trial on his counterclaims); Cohen v. Cohen, 145 N.Y.S. 652 (App. Div. 1st Dep't 1914) (holding that the defendant had a right to a jury trial in an adultery case, even though the motion was denied as untimely).
Shepard v. Manhattan Ry. Co.,\textsuperscript{108} the defendant in an injunction case sought to invoke section 970 to obtain a mandatory jury verdict on damages incidental to the injunction.\textsuperscript{109} Invoking the equitable clean-up rule,\textsuperscript{110} the court rejected this attempt and ruled that any jury verdict on such an issue would be advisory.\textsuperscript{111} In dictum illustrating the proper use of the section, the court referred to a case "where, to a legal claim, an equitable defense is interposed."\textsuperscript{112}

Before turning to an examination of counterclaims, two more cases decided on the eve of the 1894 constitution deserve mention. These cases illustrate the accepted use of juries to try

\textsuperscript{108} 30 N.E. 187 (N.Y. 1892).
\textsuperscript{109} See id.
\textsuperscript{110} Under the equitable clean-up rule, a court in the exercise of its equity powers, and acting without a jury, may award legal relief incidental to the principal equitable remedy. See, e.g., Jamaica Sav. Bank v. M. S. Invest. Co., 8 N.E.2d 493 (N.Y. 1937) (holding that a jury was not required where a deficiency judgment was sought in a mortgage foreclosure); Lynch v. Metropolitan El. Ry. Co., 29 N.E. 315 (N.Y. 1891) (holding that a court may award past damages in an action to enjoin a continuous trespass). Similarly, a legal action does not cease to be triable by jury because incidental equitable relief is sought. See Remsen v. New York, B. & M. B. R. Co., 97 N.Y.S. 902, 903 (App. Div. 2d Dep't 1906) (granting "incidental equitable relief" in an action to restrain the sheriff from removing an encroaching structure); cf Syracuse v. Hogan, 138 N.E. 406 (N.Y. 1923) (requiring a jury trial when the legal title of property was in dispute, even though there was a claim for injunctive relief). The equitable clean-up rule, however, will not apply if the court perceives two distinct claims, one legal and one equitable, both related to the same transaction. As to the plaintiff, the result is the same as in an equitable clean-up. Under a dubious waiver theory, by joining the legal claim with an equitable claim, a plaintiff loses any right to jury trial of the legal claim. See Di Menna v. Cooper & Evans Co., 115 N.E. 993, 994 (N.Y. 1917) ("The rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost."); Cogswell v. New York, N. H. & H. R. Co., 11 N.E. 518, 519 (N.Y. 1887) (noting that "[w]here a plaintiff brings an action for both legal and equitable relief in respect to the same cause of action, . . . the plaintiff by such election submits to have the issues tried by the court"). The defendant, however, retains the right to jury trial of the legal claim. See Wheelock v. Lee, 74 N.Y. 495 (1878); Vinlis Constr. Co. v. Roreck, 260 N.Y.S.2d 245 (App. Div. 2d Dep't 1965). The distinction between the two situations becomes blurry when the court detaches the claim from its procedural context to determine its essential nature. See Hogan, 138 N.E. at 408 (stating that the court will decide what the main issue is and what factors control the nature of the action); see also WEINSTEIN ET AL., supra note 8, ¶ 4101.37, at 41–75 (discussing the Hogan case).

\textsuperscript{111} See Shepard, 30 N.E. at 188.
\textsuperscript{112} Id. at 189. Although this dictum indicates that the court thought that equitable defenses to legal actions were triable by jury, it is not clear why the framing of an issue under the new section 970 was a procedural mechanism necessary to obtain the jury's verdict on the defense. It does not appear to have been used for that purpose in subsequent cases.
equitable defenses and also the rule’s shortcomings. In Southard v. Curley, the plaintiff sued for damages for breach of a contract by which the defendants agreed to purchase a building—a legal action. In their answer, the defendants alleged that the true agreement was for an option to purchase the building. They further alleged that the written contract was the product of a mistake and should be reformed. The case was tried before a jury, which rendered a verdict for the defendants. The plaintiff appealed on the ground that the evidence of mistake was insufficient as a matter of law and that the trial judge erred in failing to instruct the jury regarding defendants’ burden of proving mistake beyond a reasonable doubt. The court found that there was legally sufficient evidence to support the verdict, thereby treating it as conclusive, subject to the correctness of the instruction to the jury. There was no suggestion that the verdict was merely advisory. Judge Parker’s opinion exhaustively surveyed the various forms of expression that had been used in texts and cases to describe the heightened burden of proof on one seeking reformation of a written contract, and rejected the argument that proof beyond a reasonable doubt was not required. Nowhere does the opinion criticize the practice of allowing a lay jury to hear parol evidence of mistake to change a written contract. Nor does the opinion exhibit any lack of confidence in the jury’s ability to appreciate the fine shadings of meaning in the many formulations of the appropriate burden of proof. In its lack of what Karl Llewellyn called “situation-sense,” the case perfectly illustrates the high formal style ascendant in the late nineteenth century.

113 31 N.E. 330 (N.Y. 1892).
114 See id. at 330.
115 See id.
116 See id.
117 See id.
118 See id.
119 See id. at 332.
120 See id. at 331–32.
121 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60–61 (1960). Llewellyn describes “situation-sense” as indicating “the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.” Id. at 60.
In *Kirchner v. New Home Sewing Machine Co.*, there was a jury trial of a tort case in which the defendant pleaded a general release as an affirmative defense. This, of course, was a run-of-the-mill legal complaint and legal defense. The defendant persuaded the trial judge to allow evidence of prior negotiations to show that the release did not extend to the plaintiff's cause of action. The trial judge also instructed the jury that the release did not cover causes of action unknown to the releasor. The Court of Appeals reversed a judgment for the plaintiff based on the jury's verdict, holding that the trial judge's rulings and instructions were inconsistent with the rule that protected solemn written contracts from alteration through parol evidence. The opinion went on, however, to explain how the plaintiff might obtain relief on a new trial:

[The release] has been set up and proven as an affirmative defense, and the plaintiff, under section 522 of the [Throop] Code, is to be deemed to have controverted the defense by traverse or avoidance, as the case may require, and he may have the benefit of whatever evidence he can produce to sustain such traverse or avoidance. *Meyer v. Lathrop*, 73 N.Y. 315. If the plaintiff can show that by mutual mistake of the parties, or, by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release, contrary to the intent of the parties, or contrary to his intent in case fraud is proven, he is entitled to an instruction to the jury to the effect that the release does not bar his right to recover. Generally speaking, whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms.

*Kirchner* is a fascinating case. On the one hand, it is based on impeccable logic derived from prior cases and statutes. Just as defenses, whether legal or equitable, were triable according to the character of the action, so too were replications to defenses.

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122 31 N.E. 1104 (N.Y. 1892).
123 See id. at 1105.
124 See id.
125 See id.
126 See id. at 1107.
127 Id. at 1106-07.
Joinder of issue under either form of pleading presented an "issue of fact" in the action.\textsuperscript{128} Further, the statute referred to in the quotation from \textit{Kirchner} was the law from the earliest days of code practice, and remains the law today. The law states that a plaintiff does not have to plead to new matter in a defense. Rather, the law supplies the reply and evidence in traversal or avoidance is admissible accordingly.\textsuperscript{129} There are many cases, usually tort cases, in which the defendant pleads the affirmative legal defense of a release and at trial the plaintiff seeks to avoid the release with evidence of fraud or mistake. Even when the evidence in contravention of the release was by way of avoidance on equitable grounds, the cases prior to the CPLR acknowledged the plaintiff's right to trial by jury.\textsuperscript{130}

On the other hand, it is hard to defend on policy grounds the formalistic distinction by which parol evidence is inadmissible at law to attack a written contract such as a release, but is admissible in the same courtroom before the same jury on a theory of rescission or reformation for mistake. According to the late Professor McCormick, in his famous article,\textsuperscript{131} the primary purpose of the parol evidence rule is to control the unruly propensities of lay juries.\textsuperscript{132} If this is true, then the holding of the \textit{Kirchner} case seems to exalt form over substance. As Justice Oliver Wendell Holmes observed many years after \textit{Kirchner} in excluding parol evidence contradictory of terms in an insurance policy:

Of course if the insured can prove that he made a different


\textsuperscript{129} See \textit{N.Y. CODE PROC. \S 168 (1849); N.Y. CODE CIV. PROC. \S 522 (1876); N.Y. CIV. PRAC. ACT \S 243 (1921); N.Y. C.P.L.R. 3011 (1991) (discussing various types of pleadings); see also Wilcox v. American Tel. & Tel. Co., 68 N.E. 153, 154 (N.Y. 1903) (explaining that a plaintiff was not required to appeal to a court of equity for relief against the deed, but a plaintiff could show fraud to defeat the claim); Arthur v. Homestead Fire Ins. Co., 78 N.Y. 462, 467 (1879); Meyer v. Lathrop, 73 N.Y. 315, 322 (1878); Bates v. Rosekrans, 37 N.Y. 409 (1867); Sullivan v. Traders' Ins. Co., 62 N.E. 146 (N.Y. 1901) (approving the plaintiff's reply over the dissent's description of the procedure as an indirect amendment to a legal complaint through the addition of an equitable cause of action).

\textsuperscript{130} See cases cited supra note 128.


\textsuperscript{132} See id. at 366.
contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.\textsuperscript{133}

In Franklin Fire Insurance Co. v. Martin,\textsuperscript{134} which was decided in 1878, New Jersey's highest court anticipated Justice Holmes' view and held that parol evidence of mutual mistake in filling out an application for insurance was not admissible in an action at law upon the policy.\textsuperscript{135} Of course, such a decision was predictable in a state that kept the law and equity courts separate until 1947.\textsuperscript{136} The New Jersey case is interesting because the plaintiff cited several New York cases in support of admitting the evidence of mutual mistake. The court declined to follow the New York cases, however, stating that they "are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box."\textsuperscript{137}

The New York Court of Appeals must have been stung by the criticism in Franklin because it responded to the case by name one year later. In Flynn v. Equitable Life Insurance Co.,\textsuperscript{138} the court affirmed a plaintiff's judgment on a life insurance policy entered on a jury verdict despite materially false answers to questions on the written application concerning the applicant's medical history.\textsuperscript{139} The trial court had admitted parol evidence that the insured gave truthful answers to the insurer's agent, who filled in incorrect data on the application without the knowledge of the applicant.\textsuperscript{140} In holding the insurer estopped from forfeiting the policy, the court's opinion, written by the Chief Judge, cited the Franklin case and commented:

\begin{flushleft}
\textsuperscript{133} Lumber Underwriters v. Rife, 237 U.S. 605, 610 (1915).
\textsuperscript{134} 40 N.J.L. 568 (Ct. Err. & App. 1878).
\textsuperscript{135} See id. at 580-81.
\textsuperscript{137} Franklin Fire Ins. Co., 40 N.J.L. at 579.
\textsuperscript{138} 78 N.Y. 568 (1879).
\textsuperscript{139} See id. 576-78.
\textsuperscript{140} See id. at 575.
\end{flushleft}
Many of the distinctions between courts of law and equity as to the admission of evidence have necessarily become obliterated when these jurisdictions are blended, and are exercised by the same tribunal. In principle, written instruments can have no greater sanctity in courts of law than in courts of equity, and when authority exists for administering justice in either court there is no sound reason why the evidence for that purpose should not be received in either court.\textsuperscript{141}

The court concluded that it was not necessary to first sue to reform the policy and then sue again to enforce it.\textsuperscript{142} Rather, in a single action, the plaintiff could recover the proceeds based on an instruction, that on the evidence, the jury might find the insurer estopped from forfeiting the policy.\textsuperscript{143} Given that the criticism from across the river was based on the way New York used juries to try equitable issues, the Chief Judge’s opinion must be viewed as a reaffirmation of the New York practice. Therefore, the court was sanctioning the use of juries to try equitable issues when they arise as defenses or replications in the legal actions enumerated in section 253 of the Field Code\textsuperscript{144} and section 968 of the Throop Code,\textsuperscript{145} which was newly enacted when Flynn was decided. From this time forward, no New York case ever denied that all defenses were triable in the same manner as the main action. The uneasiness regarding the use of juries to try equitable issues coalesced around the proper scope of counterclaims.

III. DEFENSES, COUNTERCLAIMS, AND JURY TRIAL

Although the Field Code as originally enacted in 1848 provided that a “defendant may set forth in his answer, as many

\textsuperscript{141} Id. at 578. It is interesting that in 1879, judges were still referring to “either court.” Id.; see also supra text accompanying note 81.

\textsuperscript{142} See Flynn, 78 N.Y. at 578.

\textsuperscript{143} See id.

\textsuperscript{144} See N.Y. CODE PROC. § 253 (1852).

\textsuperscript{145} See Act of June 2, 1876, ch. 448, § 968, 1876 N.Y. Laws 1, 183, amended by Act of June 5, 1877, ch. 416, § 217, 1877 N.Y. Laws 442, 462. As originally enacted, section 968 of the Throop Code stated that “[i]n each of the following actions, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is directed: 1. An action to recover a sum of money only. 2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel.” Id. The provision for jury trial of questions concerning adultery in a divorce case originally found under § 253 of the Field Code, N.Y. CODE CIV. PROC. § 253 (1852), was retained but transferred to section 1757 of the Throop Code, Act of June 2, 1876, ch. 448, § 1757, 1876 N.Y. Laws, and was later transferred to CIV. PRAC. ACT § 1149 (1921).
grounds of defence as he shall have,"¹⁴⁶ it contained no mechanism by which a defendant could counterattack and obtain affirmative relief against the plaintiff. Although the judges in *Haire v. Baker*¹⁴⁷ were unanimous in affirming the right of the grantor to raise an equitable defense that defeated the plaintiff's claim for damages for breach of covenant, the majority held that the affirmative relief sought, reformation of the deed, was not available to the grantor as a defendant in the first action.¹⁴⁸ Consequently, the court overruled the demurrer to the grantor's separate action seeking such affirmative equitable relief.¹⁴⁹

As a result of the court's decision in *Haire*, the legislature in the following year, 1852, hastened to confirm the positive aspect of the court's holding by expressly providing for equitable defenses. The legislature also purported to correct the negative aspect of the court's holding, the lack of any procedure for a defendant to obtain affirmative relief against the plaintiff. The original section 129 of the Field Code,¹⁵⁰ which was subsequently renumbered section 150,¹⁵¹ was amended to read: "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."¹⁵²

By this 1852 amendment, the Field Code took the shape that remained essentially unchanged through the Code of Civil Procedure in 1876 (Throop Code) and the Civil Practice Act of 1921,¹⁵³ up until the CPLR in 1963.¹⁵⁴ Counterclaims, however, were introduced into the statutory scheme without reference to

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¹⁴⁷ 5 N.Y. 357 (1851).
¹⁴⁸ See id. at 362.
¹⁴⁹ See id.
¹⁵² Act of Apr. 16, 1852, ch. 392, § 150 1852 N.Y. Laws 651, 654 (new language italicized). The judgment section of the Field Code was also amended to provide that the judgement "may grant to the defendant any affirmative relief to which he may be entitled." N.Y. CODE PROC. § 274 (1852).
¹⁵³ Section 150 of the Field Code was restated in N.Y. CODE CIV. PROC. § 507 (1876) and CIV. PRAC. ACT. § 262 (1921).
¹⁵⁴ N.Y. C.P.L.R. 3018 (McKinney 1991). This statute deals with responsive pleadings, and makes no mention of law and equity. See id. The only reference is found in section 4101 of the C.P.L.R., by which equitable defenses and counterclaims are triable by the court even when set up in jury actions. See N.Y. C.P.L.R. 4101 (McKinney 1992).
the mode of trying them. If any legislator gave thought to the question, of which there is no evidence, it was probably assumed that counterclaims would be treated as independent actions for the purpose of determining the right to jury trial. After all, in order to constitute a counterclaim, the pleading must show a cause of action in favor of the defendant against the plaintiff that could have been brought as a separate action.155 Prior to the 1852 amendment, one court observed that equitable defenses were allowed in legal actions, but equitable counterclaims were not because of the jury trial problems that counterclaims would cause. The court said:

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.156

This division of function between court and jury was made explicit in 1876 when the Code of Civil Procedure (Throop Code) replaced the Field Code. A new rule was created by section 974, which provided:

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon 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.157

155 The 1852 amendment to section 150 of the Field Code required the newly minted counterclaim to be a cause of action in favor of the defendant against the plaintiff, where “a several judgment might be had in the action.” Act of Apr. 16, 1852, ch. 392, § 150, 1852 N.Y. Laws 651, 654.
157 Act of June 2, 1876, ch. 448, § 974, 1876 N.Y. Laws 1, 184 (vol. 2). Section 974, as first enacted in 1876, authorized the court to conduct simultaneous trials of legal and equitable cross-claims. This ran against the grain of the traditional division of labor between the special term and the circuit courts (later called trial terms). Therefore, the legislature removed the innovation in the 1877 amendment, leaving the section the way it reads in the above text. See Act of June 5, 1877, ch. 416, § 222, 1877 N.Y. Laws 44, 462. Montgomery Throop lamented the change in the amended 1877 Code. See Montgomery H. Throop et al., Introduction to N.Y. CODE PROC. (1877). The new section 974 was complemented by section 970. See supra text accompanying notes 108–12. These provisions were designed to provide a procedural mechanism for getting a jury verdict for a legal counterclaim imposed in
When a shorthand reference to section 974 is convenient, it will be called the "the counterclaim statute."\(^{158}\)

The fact that the legislature in 1876 would single out counterclaims for their own mode of trial, separate from the main action, confirms the evidence already reviewed. This leads to the logical conclusion that issues of fact raised by defenses, including equitable defenses, were triable in the same manner as the facts alleged in the complaint. Many years later, Judge Charles E. Clark argued that the existence of the counterclaim statute did not justify a negative inference concerning how defenses were to be tried.\(^{159}\) He disapproved of the way New York courts handled the trial of equitable defenses and was instrumental in drafting the federal rules under which they are tried by the court.\(^{160}\) Nevertheless, in this instance, the wish

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\(^{158}\) NY. CIV. PRAC. ACT § 424 (1921). The counterclaim statute was carried forward in the CPLR in a roundabout fashion. As previously described, the CPLR provides that equitable counterclaims are to be tried by the court. See N.Y. C.P.L.R. 4101 (McKinney 1992). Legal counterclaims are recognized through the back door, so to speak, in section 4102(c) which is entitled "Waiver" and states that a party does not waive a trial by jury of the issues of fact arising upon a counterclaim, cross-claim or third party claim, by asserting it in an action in which there is no right to trial by jury." N.Y. C.P.L.R. 4102(c) (McKinney 1992). Presumably, the right which is not waived under section 4102(c) arises by inference under section 3019(d) which states that "[a] cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint." N.Y. C.P.L.R. 3019(d) (McKinney 1991). Thus, by a combination of sections, it can be concluded that a legal counterclaim (or cross-claim) enjoys the right of trial by jury, even when asserted in an equitable action.

\(^{159}\) See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 105 (2d ed. 1947) (stating that the existence of the counterclaim statute "hardly justifies the reading into it of a negative opposite of more extensive character").

\(^{160}\) See FED. R. CIV. P. 38(a)-(d) (preserving the right to trial by jury under the Seventh Amendment to the Constitution and outlining procedures for demanding trial by jury, specification of issues, and waiver of trial by jury); see also CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 97–98 (2d ed. 1947) (stating that the Federal Rules "[preserve] trial by jury as given by the Seventh Amendment
appears to be father to the thought. It is hard to believe that so exhaustive, indeed prolix, a codification of civil practice as the Throop Code would deliberately enact a new provision dealing with jury trial of counterclaims while at the same time saying nothing about how defenses were to be tried. The only explanation for this omission is that it was perfectly obvious to the codifiers that the existing provisions governing jury trial of enumerated actions also applied to all defenses that might be raised in those actions. The only reasonable conclusion is that the sections on jury trial of any "issue of fact" in the enumerated legal actions under the Throop Code, together with the newly enacted counterclaim statute, gave seamless coverage of all jury trial rights.

The introduction of express statutory authority for a distinct mode of trial for counterclaims stimulated some maneuvering by defendants who wanted to avoid the mode of trial dictated by the plaintiff's action. This article is concerned primarily with the relation between equitable defenses and counterclaims in legal actions, but it should be noted that the converse situation was also presented. Thus, a defendant in an equity case who wanted his legal issue tried by a jury might try to plead it as a counterclaim, rather than as a defense. If the court was convinced that the defendant's answer raised a genuine counterclaim, a jury would try the legal issue. If, however, the...
court regarded the new matter raised in the answer as a defense, the defendant would be locked into the non-jury mode of trial dictated by the plaintiff's action.\textsuperscript{164}

Ejectment cases presented particularly vexing problems with respect to defenses and counterclaims. Even allowing for the recordability of judgments in the land title records, absent a formal decree of reformation, a judgment in favor of a defendant in an ejectment action might be viewed by title examiners as less than conclusive evidence of title—unlike a judgment in the plaintiff's favor for ejectment. This must have been in the minds of the judges in the early case of \textit{Haire v. Baker},\textsuperscript{165} in which the majority allowed a second action for reformation of a deed notwithstanding the pendency of an ejectment action in which an equitable defense could have been set up.\textsuperscript{166} In any event, in
several reported cases involving an ejectment, the defendant's request for reformation was tried on a reference. In other cases, when an affirmative decree of reformation was unavailable because a necessary party, such as a common grantor, was absent, the defendant was allowed to set up an equitable defense before a jury. One particularly clear
division of labor between the circuit courts (subsequently, trial terms) and special terms continued well into the twentieth century. See Wasserman v. Taubin, 114 N.Y.S. 447, 448–49 (App. Div. 2d Dep't 1908) (Gaynor, J., concurring) (stating that section 974 of the Throop Code refers to "the 'mode' of trial, and not the place, or particular part or subdivision of the court, or court room, in which the trial is to be tried"). In 1915, the Court of Appeals addressed the question for the first time, chastising the Appellate Division for failing to recognize the possibility of trying a legal complaint and an equitable counterclaim at the same time and in the same courtroom. See City of New York v. Matthews, 108 N.E. 80 (N.Y. 1915). In Di Menna, an erroneous decision by the lower courts that both the claim and counterclaim were triable by jury as of right gave Judge Cardozo of the New York Court of Appeals, a fortuitous opportunity to describe how parts of a jury verdict may be treated as conclusive and other parts as only advisory. See 115 N.E. at 994–95. Furthermore, the Court of Appeals provided additional insight regarding its preference for the jury verdict on common issues. See id. at 994–95.

167 See, e.g., Young v. Overbaugh, 39 N.E. 712 (N.Y. 1895); Hoppough v. Struble, 60 N.Y. 430 (1875); Freeman v. Freeman, 43 N.Y. 34 (1870); Siemon v. Schurck, 29 N.Y. 598 (1864). The reference in all of these cases was necessarily by consent of the parties. Nothing in an answer could make a case referable by compulsion if the complaint stated a legal claim. See Snell v. Niagara Paper Mills, 86 N.E. 460, 461 (N.Y. 1908) (holding that both parties must consent to a reference and refusing to grant a reference based on the defendant's answer which established a counterclaim requiring a "long examination of documents"); Untermeyer v. Bernhauer, 11 N.E. 847, 848 (N.Y. 1887) (denying plaintiff's motion for a reference in an action to recover damages for breach of contract). The Untermeyer court also noted that the request for a reference must be made in the original complaint. See id. at 848. The court concluded "'[i]f the action is a referable one, the answer cannot make it non-referable,' and on the same principle, if the action is non-referable, a counter-claim set up in the answer cannot make it referable." Id. (citation omitted).

168 See Cray v. Goodman, 12 N.Y. 266 (1855); Webster v. Bond, 9 Hun 437 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1876). Other cases refused to allow the ejectment defendant to set up an equitable defense where interested third parties, such as a common grantor, were not before the court. See, e.g., Hicks v. Sheppard, 4 Lans. 335 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1871); Cramer v. Benton, 60 Barb. 216 (N.Y. Sup. Ct. Gen. T. 1871). This was a harsh rule for defendants because they would often find it difficult to bring in such parties. The rule was that "a person bringing a legal action cannot be compelled to sue any person except such as he may elect to sue." Chapman v. Forbes, 26 N.E. 3, 5 (N.Y. 1890). This limitation influenced some courts to allow the equitable defense between the parties even though non-parties would be necessary for a decree reforming a deed. See, e.g., Glacken v. Brown, 39 Hun. 294 (N.Y. Sup. Ct. Gen. T. 3d Dep't 1886); Webster v. Bond, 9 Hun. 437 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1876); see also Deiches v. Western Dev. Co., 142 N.Y.S. 932 (App. Div. 1st Dep't 1913) (holding that in an action at law, a defendant cannot
statement is found in the pre-1894 case of _Glacken v. Brown:_169 "It is not necessary to reform the deeds in order to do justice between the parties. Such reformation would require an action in which the railroad company [a non-party] should also be a party."170 In reversing the trial court’s exclusion of evidence of mistake in the deeds, the court commented on the correct mode of trying the issue, stating that:

While the action is legal and the defense equitable, the method of trial is as if the action were wholly legal. We conclude, therefore, that the defendant was entitled to have submitted to the jury the questions of fact, arising upon the testimony in his behalf, substantially as he requested.171

A. Drawing the Line Between Equitable Defenses and Counterclaims

From the very beginning of Code Practice in 1848, there were essentially two divergent views of how to characterize equitable issues raised by a defendant in a legal action—they could be treated as either a defense or a counterclaim. These two approaches were summarized by Professor (later Judge) Charles E. Clark in 1926.172 Assume a case in which a plaintiff sues for services provided under a written contract that calls for payment at the rate of $10.00 per unit. The defendant answers with an allegation that the true agreement was for $1.00 per unit and that the written contract contains a typographical mistake and should be reformed.173 One view, called “analytical” by Judge Clark, would say that the new matter pleaded by the defendant is sufficient to defeat the plaintiff’s claim without compel a plaintiff to bring third parties into the action by raising an equitable counterclaim, but noting that a defendant can compel a plaintiff to bring third parties into the action by raising an equitable defense).169

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170 Id. at 298.
171 Id. (citation omitted); accord De Forest v. Walters, 47 N.E. 294, 295 (N.Y. 1897) (expressing a similar sentiment in dictum).
173 Judge Clark later said of hypotheticals such as the one given in the text—when a plaintiff sues for services under a written contract and defendant alleges there is a mistake and seeks reformation, that “[h]istorically, therefore, it would seem to be a counterclaim; analytically it would seem to be a defense. It has proved impossible to compel a view that either one or the other must necessarily be the only correct view.” CHARLES E. CLARK, _HANDBOOK OF THE LAW OF CODE PLEADING_ 640–41 (2d ed. 1947).
further affirmative relief against the plaintiff. It should be simply regarded as a defense, and if equitable in historical origin, an equitable defense under the merged system. The contrary view would emphasize the historical development of the law. Prior to the merger, the defendant was driven to the necessity of bringing a bill in equity to fight the legal action. Under the merged system, the defendant could obtain relief in the same action. In order to be consistent with past practice, however, the historical school would require the defendant to bring a cross-bill in the form of a counterclaim for equitable relief against the plaintiff's action.\textsuperscript{174}

If the "historical" view had been accepted, there would have been no equitable defense \textit{eo nomine}. All equitable defensive matter would have been in the form of a counterclaim.\textsuperscript{175} This would have certainly solved the jury trial problem in New York. As equitable counterclaims, their mode of trial would have been independent of the main action, and thus without a jury. If this interpretation had been given to the Field Code, then no constitutional question could have arisen because there was no antecedent practice of using juries for equitable counterclaims to legal actions. Indeed, prior to the Field Code, there was no such thing as an equitable counterclaim to legal actions.\textsuperscript{176} As Judge Cardozo wrote many years later, "a different construction might have been given to the statute in its beginnings. The question was one not of constitutional privilege, but of the meaning of legislation."\textsuperscript{177}

The reader who recalls the unease with which some judges in the earliest cases under the Field Code contemplated the use

\textsuperscript{174} See Hinton, \textit{supra} note 99, at 732–34; James A. Pike & Henry G. Fischer, \textit{Pleadings and Jury Rights in the New Federal Procedure}, 88 U. PA. L. REV. 645, 659–60 (1940); see also Ward v. Union Trust Co., 152 N.Y.S. 237, 239 (App. Div. 1st Dep't 1915) (distinguishing \textit{Bennett v. Edison Elec. Illuminating Co.}, 58 N.E. 7 (N.Y. 1900), as limited to fraud and holding that mistake must be pleaded as a counterclaim for reformation); Dewey v. Hoag, 15 Barb. 365, 368 (N.Y. Sup. Ct. 1853) (stating that "where a recovery is attempted to be resisted by interposing an equitable counterclaim in the nature of a cross-bill, the ordinary mode of stating the agreement in a bill of complaint in chancery, is sufficient").

\textsuperscript{175} This appears to have been the position taken in \textit{Dewey}, 15 Barb. at 368. An early criticism of this view is found in \textit{JOHN NORTON POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION} § 29, at 48–49 (5th ed. 1929), which was first published in 1875.

\textsuperscript{176} See \textit{MacKellar v. Rogers}, 17 N.E. 350 (N.Y. 1888).

\textsuperscript{177} \textit{Susquehanna S.S. Co. v. A. O. Andersen & Co.}, 146 N.E. 381, 385 (N.Y. 1925).
of juries to try equitable issues,\textsuperscript{178} may wonder why the New York courts did not grasp this opportunity to allow resolution of the entire dispute in one proceeding, while keeping the equitable issues away from the jury. It is submitted that the reason why this did not happen lies in the chronology of statutory and judicial developments following the enactment of the Field Code in 1848. As originally enacted, the Code made no provision for counterclaims, and no such procedure existed at common law.\textsuperscript{179} Therefore, when the issue of allowing equitable defenses in legal actions first came before the Court of Appeals in \textit{Haire},\textsuperscript{180} it was in the form of a stark choice. Either admit the equitable issue as a defense, with a jury trial, or refuse to allow such a defense to be set up in a legal action, and remit the defendant to a plenary action. Without the mechanism of a counterclaim, the Code afforded no middle ground by which the equitable matter could come into the case without the jury's participation. Given that one of the primary objects of merging law and equity was to abolish the cumbersome practice of two separate lawsuits to settle one controversy, it would have been unthinkable for the court to have chosen the second alternative. True, the legislature acted swiftly to remedy the defect in the Code and provided for counterclaims by an amendment added in 1852, but by then the die had already been cast in favor of allowing the equitable defense. The only remaining problem in the Code was to draw some line distinguishing equitable defenses from counterclaims.

It is easy enough to follow the lead of \textit{Haire} and say that a defense is solely negative in effect, while a counterclaim serves to afford affirmative relief against the plaintiff. While one is triable according to the main action, the other draws its own mode of trial. The rub lies in deciding whether affirmative relief is needed or whether a simple defense is sufficient. A court committed to the analytical view of equitable defenses by \textit{Haire} and \textit{Crary}\textsuperscript{181} was bound to police attempts by defendants to force defensive equities into the mold of affirmative relief. In 1873, a leading practice manual noted that the Code did not authorize

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 52–61 and accompanying text.
\item See \textsc{Fleming James, Jr.} \& \textsc{Geoffrey C. Hazard, Jr.}, \textsc{Civil Procedure} § 9.9 (3d ed. 1985).
\item See supra note 67 and accompanying text.
\item See supra notes 67, 98 and accompanying text.
\end{enumerate}
\end{footnotesize}
every defense to be pleaded as a counterclaim and summarized: "The subject of a counter-claim must be a demand in favor of the defendant that could be made the foundation of an independent action against the plaintiff."\(^1\) It is necessary to add the qualification that the affirmative action referred to did not include the pseudo-affirmative relief formerly available from the pre-merger chancellor to enjoin some action at law. The evolution of the equitable defense had supplanted this form of relief, which had always been defensive in substance.

This appears most forcibly in *Walker v. American Central Insurance Co.*,\(^3\) in which an insured plaintiff sought to recover up to the full value of the insurance policy for a fire that had totally destroyed his stock of merchandise.\(^4\) The policy stated that it was to take effect on February 1st, and the fire occurred on February 6th.\(^5\) The insurer's answer set up a counterclaim seeking reformation of the policy\(^6\) on the ground that it was intended as a renewal of an old policy and not as additional insurance.\(^7\) The answer alleged that it was intended to take effect only at the expiration of the old policy on February 17, and that the effective date written in the policy was a mistake.\(^8\) No reply was served and the trial court ruled that the purported counterclaim was in reality a defense, which required no reply.\(^9\) The whole case was submitted to the jury, which returned a verdict in plaintiff's favor.\(^10\)

On appeal, the defendant argued that the allegations of the counterclaim became conclusive because the plaintiff had failed

\(^{182}\) 2 WILLIAM WAIT, THE PRACTICE AT LAW, IN EQUITY, AND IN SPECIAL PROCEEDINGS, IN ALL THE COURTS OF RECORD IN THE STATE OF NEW YORK 428 (1873).

\(^{183}\) 38 N.E. 106 (N.Y. 1894).


\(^{185}\) See *id.*

\(^{186}\) See *id.* at 751–52. The defendant's pleading strategy was a characteristic attempt by an insurance company to escape the clutches of a jury, but may also have been encouraged by unfortunate dictum in *Born v. Schrenkeisen*, 17 N.E. 339 (N.Y. 1888). Counsel for the insurer cited this case in his brief in *Walker* but without dissent, the court ignored it. See *Walker v. American Cent. Ins. Co.*, 143 N.Y. 167, 169 (1894).

\(^{187}\) See *Walker*, 21 N.Y.S. at 751–52.

\(^{188}\) See *id.*

\(^{189}\) See *id.*

\(^{190}\) See *id.* at 752.
The Court of Appeals emphatically rejected this argument, holding that the facts alleged in the answer amounted to a defense, not a counterclaim, and that no reply was necessary. The court stated a two-part test for reducing something pleaded as a counterclaim to a defense. First, when the facts pleaded are proved, "their inevitable first effect would be to disprove and defeat the plaintiff's claim." Second, "that [the] result would furnish a remedy complete and perfect, and leave the defendant in a position of entire safety," and not in need of any more relief.

In applying this test, the court reaffirmed its commitment to what Judge Clark later called the analytical view of how defensive equities function in modern practice. In Walker, the court held that the pre-merger practice of obtaining a decree of reformation was now self-executing under the merged system of practice. The court noted that the pleaded facts had the effect of rebutting the plaintiff's claim by operation of law and that an actual decree of reformation would be superfluous. It also found that the second part of the quoted test was satisfied, stating that "[t]he defense at law was perfect and fully adequate." and that by the time the fire occurred "[t]he policy] had matured, and ceased to be a continuing liability under which new rights could accrue." Referring to the statutory requirement that a counterclaim must be an independent cause of action, the court applied that criterion to the facts of the case and concluded that an attempt by the insurer to sue for reformation after the fire loss would have been dismissed on the ground that its "remedy at law would be adequate, and no necessity or ground for equitable interference would be

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191 See Walker, 38 N.E. at 107.
192 See id.
193 Id.
194 Id.
195 See supra notes 172–73 and accompanying text.
196 See Walker, 38 N.E. 107–08.
197 See id. While not citing the Walker case, the court's streamlined view of equitable defenses is approved in Walter Wheeler Cook, Equitable Defenses, 32 YALE L.J. 645, 653–54 (1923). Cook did not approve of trying equitable defenses by jury. See id. at 651–52. Rather, he discussed the subject at large, without reference to the development of New York law. See id.
disclosed." The remedy at law was the insurer's ability to plead and prove its equitable defense when sued by the insured. The court concluded that the case was properly sent to the jury for decision. It is surely significant that in 1894, the court included the equitable defense within the "remedy at law," the availability of which precluded an independent action in equity for reformation and, consequently, an attempt to state a counterclaim for reformation.

Although some confusion had been sown by dictum in the 1888 case of Born v. Schrenkeisen, the main battle over whether the courts would continue to protect jury trial of equitable defenses against attempts by defendants to plead them as non-jury counterclaims was fought in 1900, eight years after the Southard and Kirchner cases, discussed above. Chief Judge Parker, who had written the opinion in Southard, apparently had second thoughts about allowing juries to decide equitable issues such as reformation—but he protested in dissent.

In Bennett v. Edison Electric Illuminating Co., the plaintiff contracted to build two wells for the defendant at a price stated in the contract as $10.00 per one-thousand gallons of water produced per day. The wells produced 1,150,000 gallons per day and plaintiff demanded $11,520.00. The defendant's answer pleaded a counterclaim alleging that the true agreement was for $1.00 per one-thousand gallons, and that the price stated in the written contract was a mistake. The

199 Walker, 38 N.E. at 108.
200 See id.
201 17 N.E. 339 (N.Y. 1888). In Born, the action was for one year's guaranteed minimum royalty owed by the assignees of a patent. See id. at 340. The defense was a mistake in the written contract which should have contained a condition, not a covenant. See id. at 340–41. Given the lengthy term of the contract, the defendants probably could have pleaded a genuine counterclaim. The court clearly erred in suggesting that they were required to do so. See id. at 341. A defendant, may opt to simply establish a defense and withhold a counterclaim for later. See, e.g., Brown v. Gallaudet, 80 N.Y. 413 (1880).
202 See supra notes 113, 122 and accompanying text.
203 58 N.E. 7 (N.Y. 1900). This case was decided sufficiently close to the ratification of the 1894 constitution to be relevant in establishing how equitable defenses were tried at that time.
205 See id. at 833–34.
206 See id. at 834.
defendant asked that the contract be reformed. The issue of jury trial was squarely presented by the defendant's motion to have the reformation counterclaim tried first at special term, where the court would decide it without a jury. This motion was denied and the trial before a jury resulted in a verdict for the plaintiff. On appeal, the defendant relied on the counterclaim statute, section 974 of the Throop Code, in urging that the trial court erred in denying its motion and submitting the issue to the jury. The court affirmed the jury verdict, holding that a so-called counterclaim, that was also a complete defense, was not covered by section 974. The court said the section did not apply when "the matter alleged also constitutes a defense, and relieves the defendant as fully as the allowance of the counterclaim." The court reasoned that the jury, whose verdict was conclusive, properly tried the case, because the defendant alleged a simple equitable defense.

In Bennett, Chief Judge Parker wrote a dissent in which another judge joined. His principal concern was voiced in his opening sentence: "In the view of our jurisprudence, a court cannot, as well and as safely as a jury, decide common-law issues, while, on the other hand, a jury cannot as well and as safely as a court, try equitable issues." The Chief Judge found statutory sanction for his policy position in the counterclaim statute. He rejected the majority's distinction between different kinds of counterclaims and its corollary that new matter even though pleaded as a counterclaim, did not attract a separate mode of trial if it also amounted to a defense to the action.

The Chief Judge's strongest point was his policy view that lay juries were not well suited to try equitable issues that often required sophisticated legal judgment. He may well have had in

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207 See id.  
208 See id.  
209 See id.  
210 See Bennett, 58 N.E. at 7.  
211 See id.  
212 See id.  
213 See id. The defense had pleaded its new matter "for a defense and by way of counterclaim." Id.  
214 See id. at 7–8 (Parker, J., dissenting).  
215 See id. at 8.  
216 See id. at 8–9.
mind the *Southard* case, in which his own elaborate description of the appropriate language with which to explain the burden of proof required for contract reformation to a jury had a labored air of unreality and futility. In *Bennett*, Chief Judge Parker also made a trenchant point when he argued that had the defendant taken the initiative as a plaintiff and commenced an action to reform the written contract, it clearly would have been triable without a jury. What rational purpose is served by insisting on a jury trial when, fortuitously, the procedural posture of the case is reversed and the reformation claim is raised defensively? No one has ever made a convincing case that a jury trial is the best way to balance and decide fact-oriented and multifaceted, often discretionary, equitable issues. The Code Commissioners and the early cases may have viewed the rule allowing juries to try equitable defenses as the lesser of two evils, where the other option was to exclude equitable defenses altogether. They also appeared to have blithely accepted, as an article of faith, that equitable issues were as easily tried "in the one court as the other."

The Chief Judge faltered badly, however, when he attempted to locate his policy position in the statutory structure of the Throop Code. There were many cases on the books recognizing equitable defenses and the use of juries in trying them. Unless all of those cases were meaningless, some objective test must exist for distinguishing defenses from counterclaims. It could not have been the intent of the legislature simply to turn the mode of trial over to the drafters of defensive pleadings. Yet Chief Judge Parker's opinion appears to have been willing to allow any defense to be framed as a counterclaim whenever a defendant chose that form of pleading.

The Chief Judge also failed to consider the implications of his position with respect to the established rule in New York that counterclaims are not compulsory. A defendant may withhold a counterclaim arising out of the same transaction as the one alleged in the complaint against him and assert it in a

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217 See supra notes 113–21 and accompanying text for discussion of Chief Judge Parker's opinion.
218 See *Bennett*, 58 N.E. at 8 (Parker, J., dissenting).
219 See supra note 76 and accompanying text.
220 See *Bennett*, 58 N.E. at 8 (Parker, J., dissenting).
subsequent action—subject to principles of collateral estoppel affecting common issues necessarily decided in the first action. A simple defense, on the other hand, must of course be raised in the first action or else the resulting judgment becomes res judicata. Therefore, if the Chief Judge was correct in characterizing the new matter pleaded by defendant as a counterclaim, the inference is that the defendant could have withheld it for subsequent litigation. But does that inference withstand scrutiny when tested against the facts of the case? If the defendant had not raised the issue of mistake, the plaintiff presumably would have recovered judgment based on the written price of $10.00 per one thousand gallons. Would Chief Judge Parker have allowed the owner thereafter to sue the well company for reformation of the contract and restitution of the difference between $10.00 and $1.00 per one thousand gallons? One presumes not. It would seem that the preclusive effect of failing to raise the mistake issue in the first action is more consistent with regarding it as a defense than as a counterclaim.

It is unnecessary to say that new matter of an equitable character raised in an answer must be either a defense or a counterclaim. The same facts may support both a defense and a counterclaim. As stated by Pomeroy:

The facts from which the defensive right arises, may perhaps, in a proper occasion and when employed for that purpose, be made the basis of affirmative relief; but, when so employed,

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222 See Batavia Kill Watershed Dist. v. Charles O. Desch, Inc., 441 N.E.2d 1115 (N.Y. 1982); Di Mena v. Cooper & Evans Co., 115 N.E. 993 (N.Y. 1917); see also Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 8.9 (2d ed. 1977) (discussing a civil action where the complaint presents equitable issues and the counterclaim presents legal issues).


they would not be a defence. . . . If to this negative effect [the defense] is added the privilege of obtaining an affirmative judgment against the plaintiff, based upon the same equitable right, the latter so far ceases to be a "defence," and becomes in turn a cause of action.225

Therefore, in a case where the defendant alleges new matter of an equitable character, even if labeled a counterclaim, in so far as it would defeat the relief requested by the plaintiff, it is also a defense to which the rule of claim preclusion applies. To the extent it might be raised against a different cause of action by the plaintiff, or constitute the basis of an affirmative claim by the defendant for relief against the plaintiff, it is a counterclaim. In this aspect, claim preclusion does not apply, and issue preclusion would be applicable, but only as to those issues actually presented and decided.

This view of claim preclusion as applied to a cross or overlapping defense/counterclaim is supported by Judge Cardozo's notable opinion in Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.226 In Schuylkill, a seller of coal sued five defendants for the price of coal delivered under a written contract.227 At issue was whether each defendant was liable for coal delivered to the others, i.e., whether the contract called for joint and several liability.228 An earlier court decision interpreted the contract as creating joint liability and gave judgment against all of the defendants.229 Later, the seller sued the same defendants for the price of subsequent deliveries of coal.230 In this action, the defendants counterclaimed for reformation, alleging that by mistake the contract failed to express the intent of the parties that only those who received coal should be required to pay for it.231 The Court of Appeals reversed a summary judgment for the plaintiff, holding that the former judgment did not preclude the defendants from litigating the merits of the counterclaim for reformation.232

226 165 N.E. 456 (N.Y. 1929).
227 See id. at 457.
228 See id.
229 See id.
230 See id.
231 See id.
232 See id. at 458.
Obviously, the rule by which a claim is merged in the resulting judgment would not bar the seller from suing for subsequent deliveries of coal. They presented a different claim for different sums of money. The same freedom from claim preclusion applies to the defendants; the former judgment did not act as a bar to litigating the subsequent deliveries. The court recognized what we now call collateral estoppel or issue preclusion—which issue actually litigated and decided is final. That meant that the defendants could not relitigate the meaning and effect of the written contract; on that issue they had their day in court. Presumably, however, the equitable issue of mistake in drafting the contract had not been raised in the first case, so that issue was open and litigable in the second case.

In sum, as to subsequent deliveries of coal, the equitable issue in the first case was a counterclaim, which the defendants were privileged to withhold and save for later.\footnote{233} As to the price owed for the delivery sued on in the first case, the equitable issue was a defense and not open to relitigation. This follows from Judge Cardozo’s definition of the scope of claim preclusion as applicable to any relitigation that “would destroy or impair rights or interests established by the first [judgment].”\footnote{234} As applied to the facts of the second case, whether or not the buyers were liable for the price of subsequent deliveries of coal would have no effect on the seller’s right to keep the money recovered in the first case. If that money had been at stake in the second action, Judge Cardozo cautioned that “[a] different question would have been presented.”\footnote{235}

\textit{Schuylkill Fuel} illustrates that where a contract calls for a number of performances over a period of time, the existence of some equitable ground for the buyer to resist a claim for payment may present simultaneously a genuine equitable defense and a genuine equitable counterclaim. When this is the

\footnote{233} The legitimacy of the defendant pleading a counterclaim is consistent with \textit{Walker v. American Cent. Ins. Co.}, 38 N.E. 106 (N.Y. 1894). \textit{See supra} text accompanying notes 183–200. The insurance loss in \textit{Walker} was a single event, which when litigated in the form of an equitable defense, would end the controversy. In \textit{Schuylkill Fuel}, the contract called for a series of performances, each one of which could give rise to new issues.

\footnote{234} \textit{Schuylkill Fuel}, 165 N.E. at 457.

\footnote{235} \textit{Id.} at 458; \textit{accord} Henry Modell & Co. v. Minister, Elders and Deacons of the Reformed Protestant Dutch Church, 502 N.E.2d 978, 979 (N.Y. 1986) (litigating the right to the possession of the same property that was involved in successive actions on different theories).
case, there is authority for allowing the defendant to commence a separate action for equitable relief, and presumably in the alternative, to plead a counterclaim and invoke the counterclaim statute's provision for a separate mode of trial. On the other hand, the reasoning of Bennett might permit the mode of trying the defense to trump the mode of trying the counterclaim where the same equitable issue is dispositive of both. In such a case, it would seem that the legal remedy, for the issues triable by jury as of right in the main action, are adequate to protect the defendant's rights; and this is the basic test laid down in *Walker v. American Central Insurance Co.* There is no denying that if CPLR 4101 is held unconstitutional as it denies jury trial of equitable defenses to legal actions, the elusive dividing line and overlap between defenses and counterclaims will once again move to center stage.

B. Defenses, Counterclaims, and Jury Trial Under the Civil Practice Act: The Susquehanna Steamship Case

Even though the manner of trying equitable defenses had been settled for many years, the debate broke out one last time in *Susquehanna Steamship Co. v. A. O. Andersen & Co.* This case was decided under the Civil Practice Act, which replaced the Throop Code in 1921. Up until 1963, when the CPLR abolished the distinction between equitable defenses and counterclaims as far as jury trial is concerned, this case came to

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236 See National Fire Ins. Co. v. Hughes, 81 N.E. 562, 563–65 (N.Y. 1907) (holding that a defense in a pending action did not bar the defendant from seeking reformation of a fire insurance policy for mutual mistake in a separate action); Burke v. Betts, 214 N.Y.S. 208, 210 (Sup. Ct. N.Y. County 1926) (stating that “a judgment for the defendant in the equity action would not bar such defendant’s action on [a promissory note], since no counterclaim has been set up in that litigation”).

237 See Samuel Strauss & Co. v. American Credit Indem. Co., 196 N.Y.S. 708, 710 (App. Div. 1st Dep’t 1922) (holding that the defendant was entitled to have his counterclaim tried at special term because it was a case in equity).

238 See supra notes 203–12 and accompanying text (providing an example of a case in which the jury was presented with the equitable issue of contract formation).

239 See Di Menna v. Cooper & Evans Co., 115 N.E. 993, 993 (N.Y. 1917), which provides an analogy for this suggestion.

240 See supra notes 183–200 and accompanying text.

241 146 N.E. 381 (N.Y. 1925).

be regarded as the definitive statement of the old rule. In fact, the Advisory Commission that recommended the change incorporated in CPLR 4101 apparently regarded the case as the *fons et origio* of the rule—the nineteenth century antecedents were conveniently forgotten.243

In *Susquehanna Steamship*, a party who had chartered a ship assigned its right to a sub-charterer.244 The sub-charterer entered into a written contract with the owner in which it promised to make advances on the prime charter hire directly to the owner, subject to refund if there was an excess of what was actually owed by the prime charterer.245 When sued by the owner's assignee for the balance, the defendant argued that the contract was, in effect, only a guarantee of collection.246 On the issue of contract interpretation, Judge Cardozo's opinion contrasted the language of the contract with the interpretation suggested by the defendant:

The owner's promise is to refund if the advances are in excess of what the charterer shall owe. The defendant would have us transform this into a promise to refund if the advances are in excess of what the charterer can pay. That would be to remake

243 See supra notes 7, 8. Although neither the Advisory Commission nor the leading text cite any authority for this extraordinary notion, the principal source is probably CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 105 (2d ed. 1947), which in turn relies on the author's own critique of the *Susquehanna* case published one year after that decision in Charles E. Clark, *Trial of Actions Under the Code*, 11 CORNELL L.Q. 482, 495 n.56 (1926). Judge Clark does not indicate any awareness of the issue raised by the 1894 constitution, and as a matter of statutory interpretation, he ignores many of the early cases reviewed in this article and attempts to downplay the significance of others. For example, he remarks that *Bennett v. Edison Elec. Illuminating Co.*, 58 N.E. 7 (N.Y. 1900), was the product of a divided court and only cited one unimportant case in support of its conclusion (the Appellate Division's opinion in *Bennett* supplied relevant authorities). Of course, the learned author is entitled to make these observations for what they are worth, but they do not go to the heart of the matter. Cases cited by Judge Clark in favor of non-jury trial of equitable defenses are all cases in which the courts essentially conceded the point, by forcing the issue into the mold of an equitable counterclaim. One court recognized an equitable defense for what it was, but, contrary to Judge Clark's citation, held it triable by jury. See *Sturm v. Atlantic Mut. Ins. Co.*, 38 N.Y.C. Super. 281 (Super. Ct. N.Y. County 1874), *aff'd*, 63 N.Y. 77 (1875). The court stated that "[a]lthough to a purely legal claim an equitable defense may be interposed, yet there is no reason why the matters out of which such equitable defense arises may not be tried by a jury." *Id.* at 298.

244 See *Susquehanna Steamship*, 146 N.E. at 382.
245 See *id*.
246 See *id*.
the contract rather than construe it.\textsuperscript{247}

During the jury trial, the trial judge excluded evidence of conversations leading up to the contract.\textsuperscript{248} He ruled them inadmissible under the parol evidence rule, a ruling the court did not criticize.\textsuperscript{249} The defendant's answer, however, had pleaded as an affirmative defense that the written contract mistakenly failed to express the true intentions of the parties.\textsuperscript{250} The trial judge's refusal to admit the evidence was apparently based on the fact that the pleadings disclosed no counterclaim in equity. The Appellate Division affirmed a money judgment for the plaintiff.\textsuperscript{251} It held that the parol evidence was not admissible before the jury under the equitable defense.\textsuperscript{252} Furthermore, a counterclaim for reformation was required to raise the issue and render the evidence admissible—before the court, not the jury.\textsuperscript{253}

In some earlier cases canvassed in this article, hard questions were raised by defendants who insisted on framing their equitable issue as a counterclaim, necessitating an inquiry into whether the counterclaim was genuine, i.e., whether it secured some advantage or protection not afforded by a defense. No such difficulty, however, was present in the \textit{Susquehanna Steamship} case. The question was whether a defendant, who was content to rely on a simple equitable defense, ought to be required to plead a counterclaim and forego his right to jury trial.

The Court of Appeals reversed and granted a new trial in an elaborate opinion by Judge Cardozo containing two parts.\textsuperscript{254} First, he reaffirmed a series of cases holding that a defense, not a counterclaim, was the appropriate pleading by which to raise new matter, legal or equitable, that had the effect of defeating the claim sued upon, without obtaining affirmative relief against the plaintiff—only the latter being the proper office of a

\begin{footnotes}
\item[247] Id.
\item[248] See id. at 383.
\item[249] See id.
\item[250] See id.
\item[252] See id. at 578.
\item[253] See id.
\item[254] See \textit{Susquehanna Steamship}, 146 N.E. at 385.
\item[255] See id. at 383–84.
\end{footnotes}
counterclaim. Implicit in this holding was the proposition that reformation may be a self-executing defense, and that an actual decree was not to be regarded as "affirmative relief" when its only function was to defeat the plaintiff's claim. Indeed, the court noted an earlier case that held an actual decree unnecessary.

In the second part of his opinion Judge Cardozo discussed jury trial of equitable defenses in greater detail than had any previous case. He quoted statutory language from the Civil Practice Act and the Throop Code mandating that in an action for money only, a jury trial was required for "an issue of fact." He further noted that "[a]n issue of fact arises upon a denial in the answer, or upon 'a material allegation of new matter' constituting a defense." For this rule, Cardozo cited the relevant sections of the Civil Practice Act, the Throop Code and the Field Code. Finally, he observed that:

There is no distinction in this respect between kinds of defenses, dependent upon their origin in equity or at law. The distinction is between all defenses on the one side and counterclaims on the other. Civ. Prac. Act § 424; Code Civ. Pro. § 974. The rule is settled under these provisions that equitable defenses are triable in the same way as defenses that are legal.

Judge Cardozo's opinion is remarkable for the candor with which he faced up to the defects of the rule he enforced. Echoing the concerns of several judges in the past, he acknowledged the difficulty of applying the rule in practice, because, "[v]ery likely
there is danger of confusion and injustice at times in this blending of the issue." Judge Cardozo further noted that "[j]uries may find it difficult to apply the presumption that preliminary treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake." The only compensating factors that Judge Cardozo could identify were the high burden of proof in reformation cases, the power to bifurcate trials, and the power of appellate courts to police jury verdicts.

Judge Cardozo clearly had some reservations about the wisdom of the New York rule requiring a jury trial of equitable defenses when interposed in cases in which jury trial was a matter of right. Even during his lifetime, Cardozo was renowned as a progressive, even liberal, judge. Less widely appreciated is a point made by his recent biographer, Professor Kaufman, that he had a great respect for and deference to the co-ordinate branches of government. If Cardozo were convinced that the legislature had decreed a clear rule, he would be the last person to deviate from that command. In Susquehanna Steamship, Cardozo acknowledged that other states and the federal courts had construed their rules of practice to allow for non-jury trial of equitable defenses, but concluded that "[w]e are committed to another holding, not only by the reported precedents, but by the consistent practice of trial judges extending over many years."

264 Id. at 385.
265 Id.
266 See id.
267 Professor Andrew L. Kaufman is the Charles Stebbins Fairchild Professor of Law, Harvard Law School.
270 Susquehanna Steamship, 146 N.E. at 385. Cardozo's familiarity with code practice was of long standing. His biographer tells us that when he commenced practice in 1891:

[on]e of [his] first assignments as a fledgling lawyer was to make a study, for his firm's use, of a recent multivolume annotated version of the Field Code of Civil Procedure, which regulated the course of litigation in New York courts. Although he had not been asked to learn the statute section
Jury trial in civil cases is not universally admired. It is no accident that the federal guarantee contained in the Seventh Amendment to the United States Constitution has never been deemed essential to the concept of ordered liberty nor made binding on the states through incorporation by the Fourteenth Amendment. Although sympathetic to the civil jury in general, this author has no hesitation in saying that the nature of most equitable defenses is that they are far better suited to determination by a trained jurist than by a lay jury. Nevertheless, the Constitution must be obeyed, and the specific question presented leaves little or no room for judicial activism based on policy preferences. As the Supreme Court of California observed with respect to the jury trial guarantee contained in its constitution: “what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution.”

In providing for non-jury trial of equitable defenses, CPLR 4101 sets forth a better rule than the one it replaced. When the cases are dispassionately viewed as historical facts, however, it is submitted that they show that juries were used to try equitable defenses from the earliest days of the Field Code. That being so, the practice was raised to constitutionally guaranteed status if, as has been assumed, the “heretofore used” provision of the 1894 constitution constitutionalized the statutory rights created by the Field Code in 1848 and continued by the Throop Code in 1876.

IV. THE 1894 CONSTITUTION REVISITED

In his Susquehanna Steamship opinion, Judge Cardozo refrained from relying on a point that would have clinched his argument for jury trial of equitable defenses. He did not say by section, he did just that. He had a retentive memory, and his newly acquired encyclopedic knowledge of New York procedure earned him a reputation as a master of that subject quite early in his career.

KAUFMAN, supra note 268, at 55. In 1891, Cardozo's assignment would have been to study the Throop Code of Civil Procedure, a prolix work containing over 3,400 sections.

See WEINSTEIN ET AL., supra note 8, ¶ 4101.09, at 41-27 to 41-31 (providing a useful collection of sources).

People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 835 (Cal. 1951).

146 N.E. 381 (N.Y. 1925).
that the wisdom of the past practice of using juries had been placed beyond debate by the New York Constitution of 1894. He did observe that the Field Code might have been interpreted differently in the beginning. "The question," he said, "was one not of constitutional privilege, but of the meaning of legislation."274 Is there any significance in Cardozo's use of the past tense "was," in referring to the court's and the legislature's freedom of action in dealing with jury trial of equitable defenses when the Field Code was adopted in 1848? On the one hand, it may have been a straightforward use of the past tense in making an historical statement. On the other hand, however, a jurist sensitive to the nuances of language may have implied a contrast between the courts' freedom in 1848 and the constraint imposed by the constitution at the time he wrote that particular word in 1925.

The constitutional question was a delicate one at that time. As previously stated, it is presently the accepted view that the 1894 constitution upgraded all existing statutory jury trial rights to constitutionally guaranteed ones.275 No one in recent years has suggested otherwise. When Susquehanna Steamship was decided, however, the situation was quite different. At that time, few voices had ever so much as hinted that the period referred to by the "heretofore used" guarantee had been moved up to 1894.276 Actually, there were post–1894 cases on the books that expressly said that the period referred to by the guarantee stopped with the constitution of 1846. In 1915, in Moot v. Moot,277 the court held that a constitutional right of jury trial on the issue of adultery in a divorce action could only be waived as "prescribed by law," and that a rule of court was not the equivalent of a statutory law.278 The court said that "[t]he measure of the right of trial by jury preserved by the state Constitution (article I, § 2) in actions for divorce is the right to a jury trial in such cases as it existed at the time of the adoption

274 Id. at 385.
275 See supra text accompanying notes 22–25.
276 The possibility was suggested by Judge Willard Bartlett's concurring opinion in Sporza v. German Sav. Bank, 84 N.E. 406, 411 (N.Y. 1908) (reviewing relevant text of all New York constitutions) and In re Brenner, 71 N.Y.S. 44, 50 (Sup. Ct. Kings County 1901), aff'd., 74 N.Y.S. 1121 (App. Div. 3d Dep't 1901).
278 Moot, 108 N.E. at 426.
of the Constitution of 1846.”

It is therefore understandable that, even if he had a position on the effect of the 1894 constitution, Judge Cardozo circumvented a constitutional holding and simply reaffirmed prior interpretations of “the meaning of legislation.”

The statement in *Moot* was not necessary to the decision insofar as it excluded the period between 1846 and 1894 from the coverage of the guarantee. If the right to a jury trial of adultery in divorce cases antedated the 1846 constitution, it also necessarily antedated the 1894 constitution. The result, therefore, is the same under either view. Subsequent cases, involving jury trial of counterclaims, however, transformed the dictum into holdings.

Legal counterclaims in equity actions were unknown to the dual court system prior to the merger in 1846. As a result, the case of *MacKellar v. Rogers*, concluded that a jury trial was not constitutionally guaranteed by the constitution of 1846, but only by the counterclaim statute—section 974 of the Throop Code. The *MacKellar* case by itself does not say anything about the effect of the 1894 constitution because the case was decided six years before that constitution was adopted. Several cases decided after 1894, however, required the courts to decide whether the right to jury trial of legal counterclaims remained merely statutory under section 974 of the Throop Code or whether it had acquired constitutional protection under the 1894 constitution. A definitive decision on the status of the right was required as a result of the holding of *Moot*, stating that a constitutional jury trial right could only be waived as “prescribed by law” and that a court rule was not the equivalent of a provision of law.

In *Manhattan Life Insurance Co. v. Hammerstein Opera Co.*, a defendant in an equity action for mortgage foreclosure

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280 Although Judge Cardozo was on the Court of Appeals when *Moot* was decided, he did not participate in the decision, and cannot be counted among the judges who presumably approved the dictum that the “heretofore used” period ended in 1846.
281 17 N.E. 350 (N.Y. 1888).
282 N.Y. CODE CIV. PROC. § 974 (1882). Section 974 became law when the Throop Code was first adopted in 1876. See supra note 157.
counterclaimed for damages. The trial court denied the defendant's motion for a jury trial on his counterclaim because it was not made within the time allowed by the rule of court. The Appellate Division, acknowledging Moot, affirmed the result and held that noncompliance with a court rule could not effect a waiver of a constitutional right to jury trial. The court relied on MacKellar in holding that the right to jury trial of a legal counterclaim was merely a statutory right and not a constitutional right. This holding was followed in several cases. The 1958 Report of the Advisory Committee on Practice and Procedure did not betray any awareness of a problem when it simultaneously adopted the inconsistent positions that the 1894 constitution upgraded all prior statutory jury rights; and that there is no constitutional right to jury trial of a legal counterclaim.

An amendment to the Lien Law passed in 1929 provided further occasion for courts to reaffirm the non-constitutional status of the right created by the original counterclaim statute, and its successor, section 424 of the Civil Practice Act. It provided that in an action to foreclose a lien, "in case a counterclaim is set forth by any defendant in his answer, such defendant shall be deemed to have waived a trial by jury of the issues raised thereby." This was in derogation of the counterclaim statute and would not be valid if the right created in 1876 became constitutionally vested in 1894. Yet, when the Lien Law amendment came before the courts, it was held as a valid modification of a statutory rule.

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1st Dep't 1899). These two cases reached the same conclusion.  
284 See Hammerstein, 171 N.Y.S. at 678.  
285 See id.  
286 See id. at 678–79.  
287 See id.  
290 See id. at 217, 575–76.  
291 Act of Apr. 10, 1929, ch. 515, § 3, 1929 N.Y. Laws 1037, 1040–41 (current version at N.Y. LIEN LAW § 45 (McKinney 1993)).  
As recently as 1962, the Court of Appeals unconditionally invoked the *MacKellar* holding that a legal counterclaim to an equitable action was not a constitutionally protected right. In *Phoenix Mutual Life Insurance Co. v. Conway*, a life insurance company brought an action in equity after the death of the insured, seeking rescission of a decree rescinding the policy for fraud. The beneficiary denied the allegations of the complaint and counterclaimed for the proceeds. The court ruled that the Appellate Division had discretion to sequence a non-jury trial of the plaintiff's equity claim first, even though a decision adverse to the beneficiary would effectively conclude the case and forestall a jury determination of the beneficiary's legal claim under the insurance contract. Since the beneficiary's right to a jury trial of its counterclaim was statutory only, the court held that the Appellate Division's ruling "does not raise any constitutional issue and we proceed to consider whether that court abused its discretion." The court went on to hold that the beneficiary's failure to promptly commence a plenary action at law on the policy, after the company gave notice that it was rejecting the insurance claim, justified an exercise of discretion that resulted in denying her a jury trial.

None of these holdings have been overruled, but the tide

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294 See id. at 755.
295 See id.
296 See id.
297 See id. at 756 (basing its holding on the fact that the Appellate Division is a branch of the supreme court and therefore has discretion).
298 Id. at 755.
299 See id. at 756.
300 But see *Forrest v. Fuchs*, 481 N.Y.S.2d 250 (Sup. Ct. Nassau County 1984). This case is rare in that it clearly saw that the necessary effect of the 1894 constitution was to constitutionalize the right to jury trial of legal counterclaims. See id. at 253–54. This conclusion was unnecessary to the decision because of a
of opinion on the coverage of the "heretofore used" clause began to turn with the opinions of Surrogate Delehanty in In re Leary,301 and Surrogate Sobel in In re Luria.302 They observed that the 1846 constitution had been held to move forward the timeline for applying the guarantee.303 The 1894 constitution used exactly the same language; should it not have the same effect?

Although this view has now become canonical,304 it rests on nothing more than the assumption that language used in 1894 must have the same "updating" effect as the same language used in 1846. Moreover, the assumption is a purely retroactive exercise in logic. There is no evidence that the delegates who "drafted" the clause in 1894 had any actual intention whatsoever to update the jury trial guarantee from 1846 to 1894; they appear to have simply carried forward the provision contained in the 1846 constitution unchanged.305 Although the current interpretation of the language of article I, § 2 of the 1894 constitution appears to have the inevitability of a syllogism, it is

finding of waiver. See id. at 254. Cf. WEINSTEIN ET AL., supra note 8, ¶ 4101.34, at 41-65 to 41-68 (seeing the logical implications but not following them). A few pages further on, the same text repeats the statement that "[t]he right to a jury trial on equitable defenses is not constitutional, as it was not available prior to 1777 and was not afforded by statute enacted prior to 1894." Id. ¶ 4101.38, at 41-78.


302 313 N.Y.S.2d 12 (Sur. Ct. Kings County 1970); see also Mayers, supra note 23, at 185. It may be presumed that Mayers' article played a role in persuading the delegates to the 1938 constitutional convention to change the wording of Art I § 2 to its present form.

303 See Conderman v. Conderman, 44 Hun. 181 (N.Y. Sup. Ct. Gen. T. 5th Dep't 1887) (holding that the "heretofore used" clause moved the period covered by the guarantee up to 1846); Wynehamer v. People, 13 N.Y. 378 (1856); see also Cancemi v. People, 18 N.Y. 128, 135 (1858); United States Trust Co. v. United States Fire Ins. Co., 18 N.Y. 199, 210-11 (1858) (assuming that the period covered by the guarantee was pre-1846); but see People v. Cosmos, 98 N.E. 408, 409 (1912) (stating that "[t]he period referred to in the expression 'heretofore used,' is the time which antedates the adoption of the original Constitution, when the common law was in force"); accord Smith v. Western Pac. Ry. Co., 128 N.Y.S. 966, 967 (App. Div. 1st Dep't. 1911) (reaching the same conclusion), aff'd, 96 N.E. 1106 (N.Y. 1911).


305 See In re Luria, 313 N.Y.S.2d at 14. In concluding that the 1894 constitution updated the "heretofore used" period to 1894, Surrogate Sobel's influential opinion acknowledged that this result was "probably unintentional as far as the proceedings disclose." Id.
just as logical to say that the delegates to the 1894 convention, who simply copied the identical text\textsuperscript{306} of the 1846 constitution, intended it to have the identical meaning it had then, i.e., that the period covered by the guarantee was the period prior to 1846. This possibility seems at least as likely as the one entailed by today’s consensus that it was their intent to constitutionalize, wholesale, all jury trial grants enacted after the merger of law and equity in 1846, as contained in both the Field and Throop Codes.

It is true that the 1846 constitution used the same formula that was used in prior constitutions, but there was something special about the situation in 1846. The framers of that constitution were embarking on an experiment never before attempted: the fusion of two court systems, one of which had used juries, while the other had not. Their intent in using familiar terminology was informed by live issues. They must also have been aware of the significance of “heretofore used” as related to the different modes of trial in the former courts of law and equity and how it would apply in the new Supreme Court, which was to have “general jurisdiction in law and equity.”\textsuperscript{307} The First Report of the (Field) Commissioners makes it clear that this was the case.\textsuperscript{308}

This is the way the courts looked at the matter until recent years.\textsuperscript{309} The transition from the older view to the current view was based in part on the gratuitous assumption that the older cases such as \textit{Moot} simply overlooked the effect of the 1894 constitution.\textsuperscript{310} Such an assumption requires the belief that many former judges and counsel had a memory block or were ignorant of recent history. Before \textit{Moot} was decided, the issue had been thoroughly examined in conflicting Appellate Division

\textsuperscript{305} The word “copied” is used notwithstanding that the 1894 version deleted two commas around the phrase “in all cases in which it has been heretofore used.” \textit{See infra} note 311.

\textsuperscript{307} N.Y. CONST. art. VI, § 3 (1846).

\textsuperscript{308} \textit{See First Report of the Commissioners, supra} note 36, at 177.

\textsuperscript{309} \textit{See} Blum v. Fresh Grown Preserve Corp., 54 N.E.2d 809, 810 (N.Y. 1944) (expressly reaffirming the position taken by the \textit{Moot} court).

\textsuperscript{310} \textit{See} Mayers, \textit{supra} note 23, at 185 n.25 (the first to make such a suggestion); \textit{see also} \textit{Weinstein Et Al., supra} note 8, ¶ 4101.07, at 41–24 to 41–26; N.Y. STATE ADVISORY COMM. ON PRACTICE AND PROCEDURE, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, Legis. Doc. No. 13, at 564–65 (1958).
cases that referred to both the 1846 and 1894 constitutions.\textsuperscript{311} Furthermore, seven years before the \textit{Moot} case was decided, the author of that opinion, Chief Judge Willard Bartlett, had gone to the trouble of writing a special concurrence\textsuperscript{312} in which he reviewed the text of the earlier constitutions and suggested that the guaranteed period had been moved up to 1894.\textsuperscript{313} This novel suggestion did not gain the approval of a majority when Judge Bartlett wrote his concurring opinion in 1908, and by the time he wrote the opinion in \textit{Moot} in 1915, he had abandoned that view.\textsuperscript{314} The \textit{Moot} opinion, in which all the participating judges concurred, was clearly anything but inadvertent.

The older view expressed in \textit{Moot} was held by judges who were closer to the climate of opinion surrounding the 1894 constitution than contemporary judges and other legal scholars. In addition, the older view is the basis of actual holdings, and to give more than lip service to the current view would require the express overruling of several cases.\textsuperscript{315} On the other hand, despite how often the current view has been repeated, this author not believe the result of any case would be different if that view were abandoned and the older position reaffirmed.\textsuperscript{316}

\textsuperscript{311} See Halgren v. Halgren, 145 N.Y.S. 987, 988 (App. Div. 2d Dep't 1914) (quoting the 1894 constitution and stating that the issue of adultery was triable by jury "before the adoption of the Constitution"); Cohen v. Cohen, 145 N.Y.S. 652, 656 (App. Div. 1st Dep't 1914) (Clarke, J., dissenting) (asserting that the constitution of 1846 extended the period of the guarantee). There is an initial difficulty in determining whether a citation, or even a quotation, from the constitutional guarantee of jury trial refers to the 1894 or the 1846 constitutions, because both have the same citation (Art. I, § 2) and the same language. Fortunately, for the researcher, a potentially ambiguous quotation can be traced to its correct source by a pair of commas. In the 1846 version, commas surround the phrase within the sentence, "[the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate." N.Y. CONST. art. I, § 2 (1846). In the 1894 version, there are no commas around the phrase "in all cases in which it has been heretofore used." N.Y. CONST. art. I, § 2 (1894).


\textsuperscript{313} See id. at 411–12.

\textsuperscript{314} See supra text accompanying note 276 (noting that few had recognized that the "heretofore used" guarantee was moved up to 1894).

\textsuperscript{315} See WEINSTEIN ET AL., supra note 8, ¶ 4101.07, at 41–24 to 41–26. This widely respected treatise suggests that subsequent references to \textit{Moot} are dicta. However, it must be mentioned that the same treatise admits that several cases hold that trial by jury of legal counterclaims is governed only by statute, not the constitution, despite the fact that the statute that had conferred the right was passed in 1876, seventeen years before the constitution of 1894. See id. ¶ 4101.34, at 41–65 to 41–67.

\textsuperscript{316} This proposition would be tested by a case striking down a statute passed
Stare decisis places greater weight on what the courts have actually decided, rather than on what they have merely stated, however frequently they have stated it.

General history as well as legal history suggests that it would be prudent to acknowledge the possibility of wisdom in those judges who preceded the present generation. This author does not suggest that they specifically foresaw that a future legislature in 1963 would reconsider how best to try equitable defenses. Still, it does seem rash simply to assume that there was no cautionary purpose behind their studied refusal to equate the effect of the jury trial article of the 1894 constitution to that of the 1846 constitution. If the effect of the 1894 constitution is so clear, why then did Judge Cardozo in 1925 pass up the opportunity of shedding the blessings of constitutional grace on his interpretation of the early statutes in Susquehanna Steamship?\(^3\)

The language chosen by the drafters of the 1938 constitution also suggests an open mind. If they were convinced that the 1894 constitution had the effect now so widely supposed, it would have been easy enough to make it clear. The problem of promoting statutory rights to constitutional rights was called to their attention.\(^3\) Instead of clearly resolving the issue, they left the question open. Without referring to any date or period, they said essentially, that we add nothing and we subtract nothing; whatever is presently guaranteed by the constitution shall continue to be guaranteed. As far as objectively verifiable evidence takes us, the effect of the 1894 constitution is at the very least an open question.

Finally, apart from every other consideration, it is a legitimate judicial method to call a halt to a line of authority when convinced that it leads in the wrong direction as a matter of policy. This author believes this to be the situation with the line of cases of comparatively recent vintage that have declared, in dictum, that the 1894 constitution raised post-1846 statutory jury rights to constitutional status.

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after 1894, that derogated from a right to jury trial, that had been granted by a statute between 1846 and 1894. This author is not aware of any such case.

\(^3\) "Cardozo generally liked to use all available arguments to bolster an opinion." ANDREW L. KAUFMAN, CARDozo 282 (1998).

The Advisory Commission that drafted the CPLR and the leading text on New York civil practice both conclude that there is no constitutional problem with the rule contained in CPLR 4101—that equitable defenses are triable by the court. These authorities maintain that while the 1894 constitution elevated all prior statutory jury trial rights to constitutionally guaranteed rights, there was no statutory right to jury trial of equitable defenses to legal actions prior to 1894. But the sections of the Civil Practice Act that Cardozo interpreted in Susquehanna Steamship each carried forward, without material change, sections of the Throop Code and, in turn, the Field Code. Of course, we are all children of legal realism, and no longer believe in the pious fiction that, unlike legislation, a court decision states what the law has always been. Cardozo's interpretation of what the relevant statutes meant to the court in 1925 creates at most a rebuttable presumption of what they always meant. Perhaps contemporary critics have just such a notion in mind when they say that jury trial of equitable defenses was not the rule prior to the 1894 constitution. It is as if the rule sprang full-grown from the brow of Cardozo when he uttered it in his Susquehanna Steamship opinion. Cardozo would be surprised to hear of that speculation. He did not rest his holding on a legal fiction, however benign. Although he did not refer to the 1894 constitution, he made it clear that the way he interpreted the statutes was the way they had been interpreted in the past.

Now that the genesis of jury trial of equitable defenses is under reexamination in the context of the "heretofore used" clause of the 1894 constitution, we are required to verify whether Cardozo's interpretation was in fact acted upon in the pre-1894 cases. Did those cases routinely use juries as a matter of right in adjudicating equitable defenses to legal actions?319

319 It is interesting to speculate on what the court could have done in Susquehanna Steamship, if it had been convinced that the traditional interpretation was mistaken and that a better interpretation called for non-jury trial of equitable defenses. This indeed would have required a decisive holding on the effect of the 1894 constitution. If the period covered by the guarantee was moved up to 1894, there is no escape from the conclusion that because juries were "used" from the beginning as a matter of right, the "heretofore used" clause of that constitution would have frozen that usage into a constitutional right, however misguided it may have been as an original matter of statutory interpretation. See
This author finds himself in the curious position of concurring with the result reached by the leading authorities—recognizing the validity of CPLR 4101—while rejecting both of the grounds relied upon by them. Research of the early cases and statutes shows that the use of juries to try equitable defenses in legal actions dates back to the earliest days of the Field Code, with the consequence that the practice became constitutionally guaranteed in 1894, unless the effect of that constitution is different from what it is presently believed to be.

As to the latter question, a more tentative conclusion is set forth. There is undoubtedly room for difference of opinion on the effect of the 1894 constitution, and it is conceded that this author's view runs up against a settled climate of opinion. Nevertheless, a fresh look at the question is justified. If viewed as an open question, the weight of reason, authority and sound policy favors a return to the older view. In other words, the period covered by the guarantee copied verbatim in the 1894 constitution from the 1846 constitution, is the period preceding the merger of law and equity in 1846. If this is so, jury trial of equitable defenses, when raised as "an issue of fact" in the enumerated legal actions set forth in the Field and Throop Codes, remained purely statutory when the 1938 constitution was adopted, and was validly changed by the CPLR in 1963.

supra text accompanying note 272 (discussing the remarks of the California court).