

## CLAIM PRECLUSION AND REFORMATION OF CONTRACTS: NEW YORK CPLR 3002(d)

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In 1939, the New York Legislature accepted a recommendation of the Law Revision Commission<sup>1</sup> and enacted what is now CPLR 3002(d): "A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed."<sup>2</sup> The purpose of this article is to critique this statute and urge its repeal. Before addressing the statute, however, it seems fair to tell the other side of the story through an illustration of an unfortunate case decided before the statute was enacted, and for which it would have afforded relief.

In *Kwiatkowski v. Brotherhood of American Yeomen*,<sup>3</sup> a woman insured her life for \$5,000 with a fraternal benefit society. The written application, attached to the membership certificate when it was delivered, warranted the truth of all statements and provided that any untrue statement would render the certificate void.<sup>4</sup> She died almost two years later, and the society denied liability because the word "three" was written in answer to a printed question on the application form asking the number of her children; whereas the undisputed evidence showed that she had seven.<sup>5</sup>

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<sup>1</sup> NEW YORK LAW REVISION COMMISSION REPORT 205-99 (1939).

<sup>2</sup> 1939 N.Y. Laws ch. 128; N.Y. CIV. PRAC. ACT § 112-d (1939). When the CPLR replaced the Civil Practice Act in 1963, former section 112-d was transferred unchanged to CPLR 3002(d). The background and origin of this statute and companion statutes is presented in 3 JACK WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶ 3002.09 (1996).

<sup>3</sup> 153 N.E. 847 (N.Y. 1926).

<sup>4</sup> *Id.* at 847.

<sup>5</sup> *Kwiatkowski v. Brotherhood of Am. Yeomen*, 216 N.Y.S. 102, 103 (4th Dep't 1926), *rev'd*, 153 N.E. 847 (N.Y. 1926); *see also* *Emanuele v. Metropolitan Life Ins.*

At the trial before a jury, witnesses for the plaintiff beneficiaries testified that as a Polish immigrant the deceased could neither read nor speak English; that the questions were put to her verbally by the insurer's medical examiner in Polish; that he never asked how many children she had; that all the answers in the application were written by the examiner; that the deceased could not read the completed application and signed it with her mark; and that after the certificate and attached application were delivered, she put them away without further inquiry.<sup>6</sup> The report does not indicate whether the defendant introduced any contradictory evidence.

The plaintiffs argued that the defendant was estopped from claiming that the false answer was the deceased's act. Both sides moved for a directed verdict, and the trial judge thereupon directed a verdict for the plaintiffs.<sup>7</sup>

On appeal, the Appellate Division affirmed the judgment by a 3-2 vote.<sup>8</sup> The majority analyzed prior New York Court of Appeals cases holding that an insured was bound to read the questions and answers set forth in the application if it was physically annexed to the policy and returned to the insured.<sup>9</sup> These cases held that a failure to read the papers deprived the insured of any equitable claim of estoppel against the insurance company.<sup>10</sup> The majority nevertheless concluded that the precedents left room to

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Co., 242 N.Y.S. 715, 717 (N.Y.C. City Ct. Kings County 1930) (noting insured failed to indicate in policy application previous surgery and consultations with physician).

<sup>6</sup> *Kwiatkowski*, 153 N.E. at 847; see also *Emanuele*, 242 N.Y.S. at 717 (submitting that assured was illiterate and had application read to him).

<sup>7</sup> *Kwiatkowski*, 216 N.Y.S. at 103.

<sup>8</sup> *Id.* at 108 (Sears, J., dissenting) (stating section 58 of Insurance Law has no application to contracts of fraternal benefit organizations).

<sup>9</sup> *Id.* at 104-07; see *Stanulevich v. St. Lawrence Life Ass'n*, 127 N.E. 315, 315 (N.Y. 1920) ("[T]he application being a part of the policy, the insured and assured are bound by its terms ..."); *Bollard v. New York Life Ins. Co.*, 162 N.Y.S. 706, 710 (Sup. Ct. App. T. 1st Dep't 1917) ("The policy and the papers so delivered are the whole contract."), *aff'd*, 168 N.Y.S. 1102 (1st Dep't 1918), *aff'd*, 126 N.E. 900 (N.Y. 1920); cf. *Sternaman v. Metropolitan Life Ins. Co.*, 62 N.E. 763, 766-67 (N.Y. 1902) (stopping insurer from using defense of fraud or breach of warranty where answers to questions incorporated in policy were not written down or delivered with policy).

<sup>10</sup> *Kwiatkowski*, 216 N.Y.S. at 104-06; see also *Carmichael v. John Hancock Mut. Life Ins. Co.*, 101 N.Y.S. 602, 604 (1st Dep't 1906) (noting that plaintiff would have noticed false answers had he read policy); *Hook v. Michigan Mut. Life Ins. Co.*, 90 N.Y.S. 56, 60 (Sup. Ct. Albany County 1904) (recognizing duty of party to contract to acquaint herself with its contents). *But see Emanuele*, 242 N.Y.S. at 719 ("A grave injustice results where the application is delivered written in the English language to an insured who neither reads nor writes English ...").

take account of the circumstances of particular cases and held that the facts before the court justified an estoppel against forfeiture of the coverage for breach of warranty.<sup>11</sup>

On appeal to the New York Court of Appeals, the judgment was unanimously reversed and the complaint dismissed.<sup>12</sup> The court explained that the defendant had done nothing to deter the deceased from having the written contract read over and explained to her and that her choice not to do so afforded no ground for distinguishing the earlier cases denying estoppel.<sup>13</sup> Of particular relevance to the subject of this study the court observed:

If the plaintiffs were seeking a reformation of the contract made by the applicant, through whom they claim, evidence that the answers contained in the written statement were never given and that the defendant, through its agents, have taken unfair advantage of her disability to read English, might be relevant. We do not pass upon such question now. In the present case the plaintiffs are suing upon a contract and under its terms are not entitled to a recovery.<sup>14</sup>

The suggestion that the evidence might justify a recovery on a different theory was cold comfort given the court's disposition of the appeal: complaint dismissed. At the time this case was decided, the final judgment against the plaintiffs was *res judicata*; therefore, no second action for reformation would lie.<sup>15</sup> If the statute under examination had been in force at the time of the *Kwiatkowski* case, the plaintiffs would have been entitled to have their reformation claim heard on the merits and might have obtained the substance of justice and not just its shadow.

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<sup>11</sup> *Kwiatkowski*, 216 N.Y.S. at 108; see also *Davern v. American Mut. Liab. Ins. Co.*, 150 N.E. 129, 130-32 (N.Y. 1925) (analyzing whether policy rider was part of same insurance contract and therefore subject to same application).

<sup>12</sup> *Kwiatkowski*, 153 N.E. at 847.

<sup>13</sup> *Id.*; see also *Emanuele*, 242 N.Y.S. at 718 (noting that no act of insurer hindered applicant from learning contents of policy).

<sup>14</sup> *Kwiatkowski*, 153 N.E. at 847; see also *Emanuele*, 242 N.Y.S. at 719 (concluding that although not constituting fraud, false answers on application barred recovery by insured).

<sup>15</sup> *Steinbach v. Relief Fire Ins. Co.*, 77 N.Y. 498, 502 (1879) (holding doctrine of *res judicata* must apply, "unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded."); see also *Washburn v. Great W. Ins. Co.*, 114 Mass. 175, 176 (1873) (holding action at law bar to action in equity).

## I. LAW, EQUITY AND RES JUDICATA

The subject of this article is whether an action in equity for reformation should be permitted after an unsuccessful attempt to enforce a written contract has gone to final judgment. This is only one part of the larger question of when litigation over the same matter must come to an end. The question is most acute when the reason for asking for a second chance arises because of some circumstance not reasonably ascertainable in the first case. The value the law places on finality is manifest when it denies a paralyzed accident victim access to any additional legal remedy after a final judgment awarding a modest sum based on apparently minor injuries.<sup>16</sup>

Sometimes the plea for a second chance arises because the lawyers and judges bungled the handling of the first case. It is similar to undergoing a second operation because the surgeon mistakenly left a sponge in the patient's body during the first operation.<sup>17</sup> It might be even more frustrating if the problem is caused by the surgeon's deliberate choice. Imagine how a patient feels if she is told that she needs a second operation for repair of an aneurysm. The surgeon says: "I saw the aneurysm, but that wasn't why I operated the first time. I operated because I thought you had a tumor. The surgery disclosed an aneurysm, not a tumor. However, we do not do operate on aneurysms during tumor operations." If that were the surgeon's position, it is doubtful if society would even be content with the solution that the patient can always undergo a second operation. The cry would be to fix the system and change the surgeon's attitude.

Before the merger of law and equity in the mid-nineteenth century, a litigant like Ms. Kwiatkowski was in very much the same position as the patient suffering from either an aneurysm

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<sup>16</sup> *Fetter v. Beale*, 11, 91 Eng. Rep. 1122, 1122 (K.B. 1697) (holding plaintiff's recovery in first action bars action for subsequent loss resulting from same injury); *Whitney v. Clarendon*, 18 Vt. 251, 251 (1846) (noting that recovery for loss of son's services bars recovery for continued loss in subsequent suit); 2 A.C. FREEMAN, LAW OF JUDGMENTS § 599 (5th ed. 1925) (stating "[u]nforseen and improbable injuries resulting from any act are, equally with existing and probable injuries, parts of an inseverable demand."); RESTATEMENT (SECOND) OF JUDGMENTS § 18, illus. 1 (1980).

<sup>17</sup> Here, too, the law, unlike medicine, denies a second chance. The Restatement's position is that the finality of judgment is not impeached because of error. The sole remedy of the party adversely affected is to take steps to set aside or reverse the erroneous judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. b. & illus. 2; *id.* § 19 cmt. a. (1980); 2 FREEMAN, *supra* note 16, §§ 553 (fraud), 628 (mistake), and 727 (legal error).

or a tumor, and the common law court was like the surgeon with the one-track mind. Of course, there was one difference: the plaintiff, unlike the patient, made the initial diagnosis. However, the line dividing the subject matter jurisdiction of the common-law court from that of chancery was sometimes a fine one, and misdiagnoses were common.<sup>18</sup> Depending on how the evidence developed, a bill in equity might be dismissed because the Chancellor found the legal remedy adequate. On the other hand, an action at law might fail because critical evidence was inadmissible before a jury because of the statute of frauds or the parol evidence rule. Either way, if such were found to be the case, the unsuccessful plaintiff was permitted a second chance to seek the proper form of relief in the proper forum<sup>19</sup> for much the same reason that the unhappy patient underwent a second operation to repair the aneurysm: it was a poor solution, but given the system it was better than the alternative.

<sup>18</sup> It was "difficult, and perhaps impossible" said Justice Field, to find "any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law ... ." *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891); accord RESTATEMENT (SECOND) OF JUDGMENTS § 25, cmt. i. (1980) (noting when plaintiffs had to choose between an action at law or equity, "the choice could be difficult, as the dividing line was not exact."); see also *Forstmann v. Joray Holding Co.*, 154 N.E. 652, 654 (N.Y. 1926) ("The fact that the remedy is exclusively in equity does not compel the court to do inequity. Equity does not aid doubtful rights."). Uncertainty did not end with merger. See Russell P. Duncan, Note, *Law and Equity in New York - Still Unmerged*, 55 YALE L.J. 826, 826 (1946) (noting that although law and equity were merged in New York with Field Code, lawyers and judges continued to distinguish between both which created confusion and needless multiplicity of suits).

<sup>19</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 25, cmt. i. (1980). An adverse judgment at law did not merge a plaintiff's claim to an equitable remedy arising from the same transaction. 2 FREEMAN, *supra* note 16, § 647. Nor did a prior failure to obtain equitable relief bar a subsequent action at law. *Id.* § 646. If, however, an issue common to both cases had been litigated and determined in the earlier proceeding, it was the subject of collateral estoppel in a second proceeding. *Id.* § 643. See *Willamsburgh Sav. Bank v. Town of Solon*, 32 N.E. 1058, 1062 (N.Y. 1893) (holding town's action brought in equity which resulted in finding that town's bank board was valid estopped town from later claiming that bonds were invalid in later action at law); *Tuska v. O'Brien*, 68 N.Y. 446, 449-50 (1877) (holding action brought by property owner was res judicata as to property title for purposes of subsequent bankruptcy sale). Much the same rule applied within the common law court system where the wrong form of action was unsuccessfully sought. 2 FREEMAN, *supra* note 16, § 735; see generally RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, 3 (1980) (discussing effects of judicial judgment).

## II. FINALITY OF JUDGMENT UNDER CODE PRACTICE

The New York constitution of 1846 abolished the separate courts of common law and equity,<sup>20</sup> and the 1848 Code of Procedure (the Field Code) did away with the ancient common-law forms of action. Thenceforth there was to be but a single forum and a single vehicle for redress of private wrongs, known as a "civil action."<sup>21</sup> Within the unified civil action, all claims arising from the same transaction could be joined, whether those claims were formerly denominated legal or equitable.<sup>22</sup> Further, against such claims the defendant was permitted to interpose all defenses, likewise whether formerly denominated legal or equitable.<sup>23</sup>

With respect to the basic type of *res judicata*, now called claim preclusion, the defendant was given no choice. According to the post-code cases, he was required to interpose any defense he had; otherwise it was forever barred by a judgment against him.<sup>24</sup> As to the plaintiff, the new system was not so clear. Al-

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<sup>20</sup> N.Y. CONST. of 1846, art. 6, § 3 (1846). Article vi, § 3 specifically provides, "There shall be a Supreme Court having general jurisdiction in law and equity." By its provisions, the Constitution of 1846 abolished the court of chancery and its jurisdiction, and its powers were delegated to the Supreme Court. WILLIAM F. WALSH, *A TREATISE ON EQUITY* § 7, at 37 n.5 (1930).

<sup>21</sup> N.Y. CODE OF PROC. § 69 (1852) The Code provided as follows:

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 of private wrongs, which shall be denominated a civil action.

*Id.* § 69. Between 1849 and 1852, the Field Code was amended and new sections were added. In consequence, the sections of the code as originally enacted in 1848 were renumbered. For example, section 69 above was originally section 62. Since the cases almost invariably use the renumbered 1852 version of the code, this article will cite to that version.

<sup>22</sup> *Id.* § 167 (1852); see generally Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925) (discussing history and effects of uniting law and equity under Code of Procedure).

<sup>23</sup> CODE OF PROC. §150. The 1952 amendments removed all questions as to the type of defense defendants could raise by providing that "[t]he 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." *Id.*

<sup>24</sup> *Id.*; see *Mandeville v. Reynolds*, 68 N.Y. 528, 545 (1877) ("The intent of the Code [of Procedure] is clear, that all controversies respecting the matter involved in litigation, shall be determined in one action."); *Winfield v. Bacon*, 24 Barb. 154, 160-61 (N.Y. Sup. Ct. Kings County 1857) ("[T]he court has received, in the [C]ode [of Procedure], such a grant of power as to be able to dispose of the whole controversy, and do complete justice between the parties."); *Hinman v. Judson*, 13 Barb. 629, 630 (N.Y. Sup. Ct. Gen. T. Cortland County 1852) ("[B]y the Code [of Procedure], the de-

though the Field Code abolished the old forms of action and made equitable rights litigable with legal ones, the old patterns necessarily continued their hold on the minds of lawyers who still needed some coherent and structured framework with which to evaluate the legal significance of groupings of facts.<sup>25</sup> The new code was designed to change the machinery of justice, not its substantive content.<sup>26</sup>

The Field Code thus laid down no rule on the topic of claim preclusion. That such a doctrine was necessary was obvious if the legal system were to work as intended. Otherwise, not only would litigants be harassed, but new disputes entering the system could never be reached if old ones were endlessly re-litigated. The courts were left to define the scope of the "claim" adjudicated in one judgment in relation to the "claim" presented in a second action, whether brought by the same plaintiff against the same defendant or vice versa. Absent identity of claims or causes of action, the second case could proceed subject to a more limited type of *res judicata* traditionally called collateral estoppel by judgment, now called issue preclusion. Under this rule, even where the causes of action were different, preclusion applied to a particular issue within the cause if such issue were common to both actions and had been litigated and determined in an earlier action.<sup>27</sup>

With respect to the distinction between legal and equitable

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defendant can avail himself of any equitable defense which was formerly available in chancery ..."); *Auburn City Bank v. Leonard*, 20 How. Pr. 193, 197 (N.Y. Sup. Ct. Spec. T. Monroe County 1860) ("Parties must assert their rights, whether legal or equitable, at the first opportunity."); The RESTATEMENT (SECOND) OF JUDGMENTS specifically provides that, "[i]n an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (1980); see also *id.* § 18(2), *illus.* 4.

<sup>25</sup> "The forms of action we have buried, but they still rule us from their graves." F.W. MAITLAND, *EQUITY AND THE FORMS OF ACTION* 296 (1909). "Thus, despite introduction of the concept of the single form of action in the Field Code, the courts persisted in defining 'cause of action' for *res judicata* purposes in terms of the common law forms of action." RESTATEMENT (SECOND) OF JUDGMENTS, *Introduction* ch. 1, 6 (1980).

<sup>26</sup> First Report of the Commissioners on Practice and Pleadings 87 (Albany 1848). "The [C]ode [of Procedure] makes no change in the substantive rules of the common law or equity, nor does it change the character and quality of the relief given." WALSH, *supra* note 20, § 7, at 37.

<sup>27</sup> FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* §§ 11.3, 11.7-8 (claim preclusion), 11.16-20 (issue preclusion) (1992); see also RESTATEMENT (SECOND) OF JUDGMENTS §§ 20, 24-28 (1980).

remedies, the New York courts recognized that the benefits of the merged system would be largely dissipated if a narrow or formal definition of a cause of action were predicated on the law-equity distinction. For example, according to *Hahl v. Sugo*,<sup>28</sup> if a structure maintained by a defendant encroached on a plaintiff's land, the plaintiff could unite a request for equitable relief in the form of a mandatory injunction addressed to the defendant together with a request for legal relief, formerly known as ejectment, requiring the sheriff to remove the offending structure and restore the plaintiff's possession.<sup>29</sup> If a judgment awarding exclusively legal relief became final, all of the plaintiff's rights and remedies with respect to that encroachment were merged into the final judgment.<sup>30</sup> Even if that judgment proved ineffectual because of the sheriff's inaction, the plaintiff was precluded from bringing a second action seeking equitable relief.<sup>31</sup>

The court's determination to give the merger of law and equity its fullest effect in the claim preclusion context came at the cost of some hardship to the plaintiff victimized by the encroachment. By holding that he could not split legal and equitable relief into two successive actions, the court compelled him to anticipate in his original action the potential necessity of equitable relief caused by a circumstance arising after judgment — the sheriff's inability or unwillingness to tear down and remove the encroaching structure.<sup>32</sup>

A substantially lesser hardship would occur where the need to supplement or supersede a claim for legal relief with equitable relief was either manifest from the beginning of the action or be-

<sup>28</sup> 62 N.E. 135 (N.Y. 1901); see also WALSH, *supra* note 20, § 22, at 113 (discussing holding of case).

<sup>29</sup> *Hahl*, 62 N.E. at 136-37; see also *Carroll v. Bullock*, 101 N.E. 438, 439 (N.Y. 1913) (noting that *Hahl v. Sugo* decided that, "it is no longer necessary in such a case ... to establish the legal right before seeking equitable relief ...").

<sup>30</sup> *Hahl*, 62 N.E. at 137; see also *Dawley v. Brown*, 79 N.Y. 390, 399 (1880) (holding that plaintiff's former action to establish title created estoppel in later action for ejectment).

<sup>31</sup> *Hahl*, 62 N.E. at 137; see also *Wright v. Nostrand*, 94 N.Y. 32, 47 (1883) (noting that plaintiff's only remedy was by appeal).

<sup>32</sup> *Hahl*, 62 N.E. at 137. Criticisms of this case are noted in CHARLES E. CLARK, CLARK ON CODE PLEADING § 72, at 321 (1928). Clark himself did not condemn the case and it is endorsed in WALSH, *supra* note 20, § 22, at 113-14; see also Jay Leo Rothschild, *The Simplification of Civil Practice in New York: A Review of Judicial Experience Under the Civil Practice Act*, 23 COLUM. L. REV. 618, 619 (1923) (acknowledging that under Code of Civil Procedure in New York, distinction between actions at law and suits in equity was abolished).



came so during trial. An example based on *Steinbach v. Relief Fire Ins. Co.*<sup>33</sup> will illustrate the point. Suppose a plaintiff seeks to recover on a fire insurance policy. The defendant insurance company defends on the ground of breach of condition (storing of hazardous materials), rendering the policy void. The plaintiff has oral testimony that the insurer's agent knew of and consented to the storage of the materials in question as part of the plaintiff's ordinary business. The testimony might be relevant in three ways: first, to interpret the meaning of ambiguous language in the written policy; second, to estop the company from forfeiting the policy; and third, to reform the written policy to conform to the intent of the parties by striking the condition. The first two possibilities do not entail an exclusively equitable remedy,<sup>34</sup> but the court may exclude the testimony in a jury trial

<sup>33</sup> 77 N.Y. 498 (1879).

<sup>34</sup> The expression "exclusively equitable" refers to the mode of trying disputed issues of fact. When the New York Chancery Court was abolished by the constitution of 1846 and its functions transferred to the reorganized New York Supreme Court, the right to a jury trial was preserved "in all cases in which it has been heretofore used ... ." N.Y. CONST. of 1846, art. 1, § 2 (1846). By that time, many principles that had originated in chancery had already been adopted by the common law courts, such as the right of an assignee to sue on a contract, WALSH, *supra* note 20, § 19, at 93, and the right to plead fraud in the inducement as a defense to a contract claim, Whitney v. Allaire, 4 Denio 554, 557 (N.Y. Sup. Ct. 1847), *aff'd*, 1 N.Y. 305 (1848). Since trial by jury was used at common law before the merger, these equitable rules that had become recognized at law prior to the merger came within the constitutional guarantee of a jury trial. In short, they had lost their exclusively equitable character and, for procedural purposes, had become "legal." JAMES, JR. ET AL., *supra* note 27, § 8.2 (noting that by 1791 there was no clear line between the jurisdiction of courts at law and equity); WALSH, *supra* note 20, § 19, at 93 n.28 (distinguishing procedural from substantive characterization).

Estoppel is a principle of equitable origin. See 3 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 802 (5th ed. 1941). Estoppel had been denied application in early common law cases. See, e.g., Jennings v. Chenango County Mut. Ins. Co., 2 Denio 75, 79-80 (N.Y. Sup. Ct. 1846); Cheriot v. Barker, 2 Johns. 346, 351 (N.Y. Sup. Ct. 1807); Vandervoort v. Columbian Ins. Co., 2 Cai. R. 154, 160-61 (N.Y. Sup. Ct. 1804). On the eve of the merger, it was first applied at law. Frost v. Saratoga Mut. Ins. Co., 5 Denio 154, 155, 157-58 (N.Y. Sup. Ct. 1848). It was frequently applied in jury trials thereafter. See, e.g., Rowley v. Empire Ins. Co., 36 N.Y. 550, 551, 555a (1867); Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N.Y. 392, 394-95 (1858).

Clearly actions (formerly bills in equity) for reformation of written documents had never been recognized at common law. NORMAN FETTER, EQUITY JURISPRUDENCE § 194 (1895); WALSH, *supra* note 20, § 110, at 514-16. And being exclusively equitable, these actions were triable by the court under the code system.

For many years after the merger it was not necessary in New York to determine whether estoppel had become a legal rule or had remained an exclusively equitable one. Prior to the enactment of the CPLR in 1963, the statutory right to jury

because of the parol evidence rule.<sup>35</sup> The same testimony, however, is traditionally admissible in equity, without a jury, to reform the written policy.<sup>36</sup> If an amendment to the complaint is

trial depended solely on the historical character of the action brought by the plaintiff. DAVID D. SIEGEL, *NEW YORK PRACTICE* § 209 (2d ed. 1991). If the action was historically "legal," such as an action to recover money under a contract, defensive issues, even equitable ones, introduced in the action by the answer or reply were triable by jury as a matter of right. *Susquehanna S.S. Co. v. A.O. Anderson & Co.*, 146 N.E. 381, 383 (N.Y. 1928); *Bennett v. Edison Elec. Illuminating Co.*, 58 N.E. 7, 7 (N.Y. 1900); *DeForest v. Walters*, 47 N.E. 294 (N.Y. 1897) (dictum); *Southard v. Curley*, 31 N.E. 330, 330 (N.Y. 1892); *McGurty v. Delaware Lackawana & Western R.R. Co.*, 158 N.Y.S. 285, 287 (4th Dep't 1916); *Wooden v. Waffle*, 6 How. Pr. 145, 153 (N.Y. Spec. T. 1851) (dictum). Whether the "heretofore used" clause of the 1894 Constitution, N.Y. CONST. art. I, § 2 (1894), constitutionalized the previous statutory jury right is a question that deserves serious discussion.

In 1963, CPLR 4101 made "equitable defenses" in legal actions triable by the court alone. *Rill v. Darling*, 253 N.Y.S.2d 184, 186 (Sup. Ct. Madison County 1964) (citing CPLR 4101 (1963)), *aff'd*, 251 N.Y.S.2d 396 (3d Dep't 1964). The new rule also applied to equitable replications to legal defenses. *Id.* at 186. Nevertheless, estoppel issues today routinely go before juries. *See Tannenbaum v. Provident Mut. Life Ins. Co.*, 364 N.E.2d 1122, 1123 (N.Y. 1977) (concluding that jury finding of estoppel was supportable and proper); *Wageman v. Metropolitan Life Ins. Co.*, 263 N.Y.S.2d 915, 918-19 (1st Dep't 1965) (vacating jury verdict and finding that plaintiff was estopped by his actions from recovering), *aff'd*, 221 N.E.2d 566 (N.Y. 1966). Apparently estoppel, when raised by reply to defendant's affirmative defense, has acquired "legal" status.

<sup>35</sup> *Pindar v. Resolute Fire Ins. Co.*, 47 N.Y. 114, 117-18 (1871); *see also Rohrbach v. Germania Fire Ins. Co.*, 62 N.Y. 47, 63-64 (1875) (declaring terms of agreement controlling although they did not match intent of parties). These cases were distinguished in *Van Schoick v. Niagara Fire Ins. Co.*, 68 N.Y. 434, 441 (1877) and their application was limited in *Whited v. Germania Fire Ins. Co.*, 76 N.Y. 415, 419 (1879). *See EDWIN W. CADY, OUTLINES OF INSURANCE* § 66 (2d ed. 1925) (explaining *Van Schoick* on waiver grounds).

<sup>36</sup> *Benett v. Agricultural Ins. Co.*, 12 N.E. 609 (N.Y. 1887). When the evidence was equally relevant to recovery at law through the use of estoppel, *see supra* note 34, and in equity through reformation, the early code cases used juries, and accepted their verdicts as conclusive, not advisory. *Maher v. Hibernia Ins. Co.*, 67 N.Y. 283, 288 (1876); *see also Flynn v. Equitable Life Ins. Co.*, 78 N.Y. 568, 578 (1879) (rejecting New Jersey authority requiring reformation in equity prior to enforcement at variance with written warranty). *Cf. Pitcher v. Hennessy*, 48 N.Y. 415, 422 (1872) (acknowledging reformation as an equitable defense litigable in jury trial). *See also Robbins v. Springfield Fire & Marine Ins. Co.*, 44 N.E. 159, 161 (N.Y. 1896) (holding that on facts alleged and proved, written warranty was unenforceable and stating that reliance on a particular theory of mistake, waiver or estoppel "is of but little consequence, as any one of those theories is sufficient to avoid the defense relied upon in this case."); *McCall v. Sun Mut. Ins. Co.*, 66 N.Y. 505, 517 (1876) (affirming judgment on reformation theory where case was argued on estoppel theory); *Houlden v. Farmers' Alliance Coop. Fire Ins. Co.*, 177 N.Y.S. 286, 290 (4th Dep't 1919) (relying upon estoppel cases in order to support theory of mistake and judgment to reform), *aff'd*, 132 N.E. 919 (N.Y. 1921); *Mead v. Saratoga & Washington Fire Ins. Co.*, 80 N.Y.S. 885, 887 (3d Dep't 1903) (finding insurance company was estopped from claiming fraud where agent misdescribed meat market as dwelling),

necessary, it is routinely granted.<sup>37</sup>

Suppose the critical testimony is excluded in the jury trial of the plaintiff's action at law on the contract, and he fails to request equitable relief under which the testimony would be admissible. Without the testimony, the result is judgment for the defendant insurer. May the plaintiff bring a subsequent action seeking reformation and enforcement of the contract as reformed? The *Steinbach* case held the plaintiff barred by res judicata (claim preclusion).<sup>38</sup> Consistent with the result reached in the later *Hahl v. Sugo* case, where the removal of the encroachment was seen as the identical claim in both actions,<sup>39</sup> the *Steinbach* court saw the recovery of the insurance proceeds as the common claim in both actions, notwithstanding the difference in legal and equitable theories sought to be invoked in succession.

Admittedly, the scope of the relevant "claim" for the purpose of claim preclusion is a difficult question to settle, and the New York courts have not always been consistent in their approach. However, the distinction between law and equity has not been implicated in the more questionable cases.<sup>40</sup> With specific refer-

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*aff'd*, 71 N.E. 1134 (N.Y. 1904).

<sup>37</sup> N.Y. CPLR 3025(b) (McKinney 1992); see SIEGEL, *supra* note 34, § 237 (2d ed. 1991) (stating that leave to amend pleadings, at any time during proceedings, shall be freely granted "[i]f there is no prejudice to the other side ..."). Cf. former N.Y. Civ. Prac. Act § 111 (1920) and FED. R. CIV. P. 15(a). See also CLARK, *supra* note 32, § 114, at 501-08 (noting that courts traditionally were hesitant to allow amendment of pleadings where such would alter theory of recovery, though "modern" trend has been more liberal toward amendment).

<sup>38</sup> *Steinbach v. Relief Fire Ins. Co.*, 77 N.Y. 498, 502 (1879).

<sup>39</sup> *Hahl v. Sugo*, 62 N.E. 135, 138 (N.Y. 1901).

<sup>40</sup> Compare *Reilly v. Sicilian Asphalt Paving Co.*, 62 N.E. 772 (N.Y. 1902) (passing on issue of bar and merger) with *JAMES, JR. ET AL.*, *supra* note 27, § 11.9 (outlining difficulty in defining single cause of action in tort cases); RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. c., illus. 1 (1980) (stating that damage or injury arising from single incident will give rise to only one cause of action under merger doctrine). Unlike FED. R. CIV. P. 13(a), in New York counterclaims are not compulsory even when they arise from the same transaction that is the basis of the plaintiff's complaint. See *Batavia Kill Watershed Dist. v. Charles O. Desch, Inc.*, 444 N.Y.S.2d 958 (3d Dep't 1981) (holding New York law does not require compulsory pleading of counterclaims), *aff'd*, 441 N.E.2d 1115 (N.Y. 1982). Accord *National Fire Ins. Co. v. Hughes*, 81 N.E. 562, 563 (N.Y. 1907); *Brown v. Gallaudet*, 80 N.Y. 413, 417 (1880); *Gates v. Preston*, 41 N.Y. 113, 116 (1869); *Tyler v. Standard Wine Co.*, 102 N.Y.S. 65, 68 (Sup. Ct. Monroe County 1906), *aff'd*, 106 N.Y.S. 1148 (4th Dep't 1907). This rule has produced some anomalies in New York's approach to res judicata. RESTATEMENT (SECOND) OF JUDGMENTS § 22 states:

A, a physician, brings an action against B for the price of medical services rendered to B. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A

ence to law and equity, even the narrowest view of the relevant "claim" concedes that where possession of the same piece of property or the same sum of money is involved in successive actions, claim preclusion in the form of merger and bar is applicable, notwithstanding the fact that the first judgment was based on common-law rules and the second action invokes equitable rules.

This understanding of identity of claims in law and equity was reaffirmed in Chief Judge Cardozo's notable opinion in *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*<sup>41</sup> A seller of coal had brought an action against five defendants for the price of coal delivered in installments under a requirements contract. At issue was the liability of each defendant for coal delivered to others. The issue presented was whether the written contract called for joint or several obligation. The court in that action held the obligation joint and rendered judgment for the plaintiff against all the defendants.<sup>42</sup> Later, the seller brought another action against the same defendants for the price of subsequent deliveries of coal. In this action the defendants counterclaimed to have the contract reformed to express the intent that only those who had received a delivery were obligated to pay for it. The New York Court of Appeals reversed a summary judgment for the plaintiff on the counterclaim, holding that the former judgment did not preclude the defendants from litigating

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for malpractice relating to the services sued upon the prior action. (B is precluded, however, from seeking restitution of any amount paid pursuant to the judgment ...).

RESTATEMENT (SECOND) OF JUDGMENTS § 22, illus. 2 (1980).

The rule stated accords with Judge Cardozo's analysis in *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 165 N.E. 456 (N.Y. 1929) (noting that decision in one action will be conclusive as to meaning of contract terms but not as to whether terms should be reformed). However, in the facts stated in the illustration, New York has applied preclusion, ignoring the distinction between issues actually litigated and those merely logically entailed in an unlitigated (default) judgment. See *Blair v. Bartlett*, 75 N.Y. 150, 153 (1878) (indicating that *res judicata* is applied to facts asserted in default judgment); *Dunham v. Bower*, 77 N.Y. 76, 80 (1879) (noting that any allegation expressly or impliedly involved in judgment is merged into that judgment and cannot be relitigated); *Collins v. Bennett*, 46 N.Y. 490, 495 (1871) (holding that judgment rendered in Justice Court was bar to suit in New York Supreme Court); *Gates v. Preston*, 41 N.Y. 113 (1869) (same); *Weisinger v. Rosenberg*, 108 N.Y.S. 1065, 1066 (Sup. Ct. App. T. 1908) (same). See generally Maurice Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969) (examining application of *res judicata* and collateral estoppel in New York courts).

<sup>41</sup> 165 N.E. 456 (N.Y. 1929).

<sup>42</sup> *Id.* at 458.

the merits of equitable reformation.<sup>43</sup>

For obvious reasons, that aspect of claim preclusion called merger would not preclude a seller from suing to collect the price of goods subsequently delivered under an installment contract after having successfully sued for the price of an earlier delivery.<sup>44</sup> In keeping the "bar" aspect of claim preclusion coextensive with the "merger" aspect, the New York Court of Appeals held that the cause of action for the subsequent deliveries was different from that covered by the former judgment for earlier deliveries.<sup>45</sup> Consequently, the defendants' obligation to pay the price demanded in the second action was not concluded by the earlier judgment against them. The court acknowledged that the issue actually litigated in the former action (that the written contract called for joint obligation) could not be re-litigated.<sup>46</sup> This holding applied what later came to be called collateral estoppel by judgment,<sup>47</sup> and more recently, issue preclusion.<sup>48</sup> Since the equitable issue of reformation, and presumably proof of facts necessary to sustain it, had not been introduced in the former action, the defendants were not precluded from raising it as a defense or counterclaim within the format of the new cause of action brought by the seller.

Cardozo's opinion acknowledged the authority of *Steinbach* in shaping his definition of claim preclusion.<sup>49</sup> An earlier judgment bars the losing party from raising any issue that could have been raised originally, whether it was raised or not, when its introduction in a second action could "destroy or impair rights or interests established by the first [judgment]."<sup>50</sup> The opinion noted that the second *Steinbach* action in equity sought to

<sup>43</sup> *Id.*

<sup>44</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 26, cmt. g., illus. 7 (1980).

<sup>45</sup> *Schuykill*, 165 N.E. at 458.

<sup>46</sup> *Id.* at 459.

<sup>47</sup> Austin W. Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 (1942) (coining phrase "collateral estoppel" to mean that matters actually litigated and resolved cannot be re-litigated in subsequent action).

<sup>48</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). The Restatement defines issue preclusion as "[w]hen an issue of fact or law is litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.*

<sup>49</sup> *Schuykill*, 165 N.E. at 458.

<sup>50</sup> *Id.* at 457.

"recover the same loss."<sup>51</sup> The first judgment determined that the company did not owe fire insurance proceeds and would have been nullified if a second judgment, based on a new theory, found that it did owe the proceeds. In the *Schuylkill* case, different sums for different deliveries were at stake in the two actions. A judgment that the buyer did not owe for the later deliveries would not impair the seller's right to keep the money recovered under the first judgment. In distinguishing *Steinbach*, Cardozo noted that a "different question would have been presented if the loss [at issue in the second case] had been a later one."<sup>52</sup>

The discussion thus far has emphasized that the combined effect of the *Hahl*, *Steinbach* and *Schuylkill* cases was to establish an irreducible minimum criterion for identity of claims or causes of action for the purpose of claim preclusion (ownership of the same property or duty to pay the same sum of money). Beyond this narrow boundary, the scope of claim preclusion remained problematic. For example, where one renders services at the request of another, the amount owed under an alleged express contract might differ only slightly from what would be owed as the reasonable value on a quasi-contract theory. Both theories may be joined in a single code action. Yet it was once held that a final judgment denying recovery on an express contract because of the one year statute of frauds, or failure to prove an express promise, did not preclude a second action for the value of the same services on a quasi-contract theory.<sup>53</sup> The difference in the measures of recovery coupled with the difference in legal theory was thought sufficient to distinguish two distinct causes of action. Similarly, an unsuccessful action in equity seeking specific performance of a contract was once held different from a second action at law for damages for breach of the same contract.<sup>54</sup>

More recent cases have enlarged upon the bare minimum criteria established in the *Hahl*, *Steinbach* and *Schuylkill* cases.

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<sup>51</sup> *Id.* at 458.

<sup>52</sup> *Id.*

<sup>53</sup> *Smith v. Kirkpatrick*, 111 N.E.2d 209, 212 (N.Y. 1953), *overruled by* *O'Brien v. City of Syracuse*, 429 N.E.2d 1158 (N.Y. 1981); 2 FREEMAN, *supra* note 16, § 736 (viewing the issue as one of election of remedy).

<sup>54</sup> *Carmen v. Fox Film Corp.*, 198 N.Y.S. 766, 770 (1st Dep't 1923); *see* T.W. Courens, Annotation, 26 A.L.R.2d 446 (1952). *Cf.* *Stambovsky v. Cohen*, 1 A.2d 456, 459 (N.J. Ct. Err. & App. 1938) (holding that denial of rescission on ground of time-liness does not bar action at law seeking damages upon fraudulent contract).

Following the lead of the Restatement Second of Judgments,<sup>55</sup> the New York Court of Appeals now holds that all claims arising from the same factual transaction are concluded by the first judgment resulting therefrom, both with respect to merger as to the winner,<sup>56</sup> and bar as to the loser.<sup>57</sup> The earlier case allowing a second action in quasi-contract following defeat in an action on an express contract was expressly overruled,<sup>58</sup> and it also seems settled that no action for damages at law will be allowed following an adverse judgment in an action for specific performance.<sup>59</sup> Older cases<sup>60</sup> that had made inroads on the policy of claim preclusion in the name of ameliorating the problem of election of remedies have also been shaken and are probably destined for the scrap heap of legal history.

In sum, the holdings in *Hahl*, *Steinbach* and *Schuykill* form the basic core of a claim preclusion doctrine that has grown well beyond the minimum criteria established by those cases. The following illustration from the Restatement Second of Judgments reaches a result contrary to CPLR 3002(d):

(A) sues (B) for breach of a written contract claiming money

<sup>55</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980).

<sup>56</sup> *Smith v. Russell Sage College*, 429 N.E.2d 746, 749-50 (N.Y. 1981) (dictum); see RESTATEMENT (SECOND) OF JUDGMENTS §§ 18 & 24 (1980). Cf. *Hahl v. Sugo*, 62 N.E. 135 (N.Y. 1901), *supra* notes 28-32 and accompanying text. Technically, the merger aspect of claim preclusion only applies to the claimant, RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1980). But in jurisdictions having a compulsory counterclaim rule, it in effect applies to the party against whom the claim is brought. Even if the party defeats the claim brought against him, if he withholds a counterclaim arising from the same transaction, he is precluded from asserting it in a subsequent action. Charles A. Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 39 IOWA L. REV. 255, 260 (1954).

The steps taken by the Court of Appeals towards a transactional definition of claim preclusion must remain incomplete so long as New York adheres to its rule of permissive counterclaims. See SIEGEL, *supra* note 34, § 224. New York's attenuated view of claim preclusion in the context of counterclaims may be the cause of its overbroad approach to issue preclusion in that context.

<sup>57</sup> *Smith*, 429 N.E.2d at 750; *O'Brien v. City of Syracuse*, 429 N.E.2d 1158 (N.Y. 1981); RESTATEMENT (SECOND) OF JUDGMENTS §§ 19 and 24 (1980).

<sup>58</sup> *O'Brien*, 429 N.E.2d at 1160.

<sup>59</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 25, cmt. i. (2), & illus. 17-18 (1980). Cf. *Ajajian v. Schlanger*, 103 A.2d 9 (N.J. 1954) (determining that consolidation of law and equity courts broadened scope of claim preclusion).

<sup>60</sup> See, e.g., *Mertz v. Press*, 91 N.Y.S. 264 (1st Dep't 1904) (allowing action on bond after earlier judgment foreclosing mechanic's lien), *aff'd*, 76 N.E. 1100 (N.Y. 1906); *Sager v. Blain*, 44 N.Y. 445 (1871) (allowing action for sum of money after judgment denying replevin of specific money); *Powers v. Mulford*, 158 N.Y.S.2d 707 (2d Dep't 1956).

damages. There is no breach unless the contract is interpreted in a certain way. At trial (A) fails because the court does not accept (A)'s interpretation and rejects parol evidence offered by (A) as to the meaning of the contract. Formerly the action – an action at law – would have been dismissed but (A) would be free to commence a suit in equity to reform the contract to accord with what (A) claims to have been the true intention of the parties. In a modern system (A) could seek any needed remedy in a single action. Hence if in the first action judgment went for (B) for failure to prove a breach of the contract as written, and (A) did not seek reformation in that action, (A) would be barred from a second action for reformation.<sup>61</sup>

Given the current enlarged scope of claim preclusion, the rule created in CPLR 3002(d) is anachronistic today. Indeed, it is doubtful whether the statute ever had a sound basis.

### III. THE ORIGINS OF CPLR 3002(d)

In the previous discussion of an action on a written contract followed by a second action to reform the contract and to recover on it as reformed, the facts used in the example were said to have been based on the case of *Steinbach v. Relief Fire Ins. Co.*<sup>62</sup> The model accurately portrayed the facts themselves, but left out the actual procedural history of the case. The hypothetical assumed that both actions were brought in New York and demonstrated that the plaintiff had ample opportunity to obtain full relief in the first action. In the actual *Steinbach* case, the plaintiff brought his first action in a Maryland state court. The defendant insurance company had the case removed to the federal circuit court for the district of Maryland on grounds of diversity of citizenship.<sup>63</sup> Unlike Maryland, which had taken some steps toward merging law and equity,<sup>64</sup> the federal courts in the nineteenth century did not entertain any mixing of the two systems. Although the original Judiciary Act of 1789 vested both legal and equitable jurisdiction in federal courts,<sup>65</sup> a division of function

<sup>61</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 25, illus. 20 (1980).

<sup>62</sup> 77 N.Y. 498 (1879); see *supra* text accompanying note 33.

<sup>63</sup> *Steinbach*, 77 N.Y. at 500.

<sup>64</sup> CLARK, *supra* note 32, at 28-29; WALTER W. COOK, CASES AND MATERIALS ON EQUITY 14-15 (4th ed. 1948).

<sup>65</sup> 2 JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶¶ 3.02-.09 (2d ed. 1992). Prior to the coalescing of law and equity in the federal courts, which began with the Equity Rules of 1912 and was materially accelerated by the Law and Equity Act of 1915, there were two procedures in the federal courts: one at law, a



was rigidly maintained. An action had to be brought on either the "law side" or the "equity side" of the court. No joinder of equitable claims with legal claims was permitted,<sup>66</sup> nor were equitable defenses allowed on the law side.<sup>67</sup> Thus, owing to the defendant's removal of the case from state court to the law side of the federal court, the plaintiff found himself in a forum not of his choosing, and one which was deaf to any equitable relief, such as reformation. Accordingly, the defendant won the first action brought by Steinbach.<sup>68</sup> Presumably, the plaintiff could have discontinued his action and brought a new bill on the equity side,<sup>69</sup> but within the framework of the existing action, his possible equitable claim for reformation was not one which "could have been litigated" within the rationale of claim preclusion. The New York Court of Appeals in *Steinbach* overlooked this procedural background, and unjustly held that the federal judgment precluded the subsequent reformation action in New York.

The problem created by the limited subject matter jurisdiction of the federal courts in the nineteenth century was compounded by the rule of *Swift v. Tyson*.<sup>70</sup> As nearly every law student knows, prior to *Erie Railroad v. Tompkins*<sup>71</sup> in 1938, the federal courts in diversity cases did not consider themselves

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second in equity. See *infra* note 69. The Judiciary Act provided "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Act of Sept. 24, 1789, ch. 20 §16, 1 Stat. 82, 28 U.S.C. § 384.

<sup>66</sup> *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684 (1927); *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 641 (1890); *Hurt v. Hollingsworth*, 100 U.S. 100 (1879).

<sup>67</sup> *Northern Pac. R.R. v. Paine*, 119 U.S. 561 (1887); *Burnes v. Scott*, 117 U.S. 582 (1886).

<sup>68</sup> *Steinbach*, 77 N.Y. at 500.

<sup>69</sup> It was not until the federal law and equity act was passed in 1915 that a case mistakenly brought on the law side could be transferred to the equity side. Act of March 3, 1915, c.90, 38 Stat. 956 (Judicial Code § 274(a)). Prior to that time, no transfer could be ordered; rather, a new action was required, subject to such problems as the statute of limitations. *Waldo v. Wilson*, 231 F. 654 (4th Cir.), *cert. denied*, 241 U.S. 673 (1916). As to bills mistakenly brought on the equity side, *Cf. Curriden v. Middleton*, 232 U.S. 633 (1914) (dismissing bill prior to Equity Rule 22 in 1912) *with Friederichsen v. Renard*, 247 U.S. 207 (1918) (transferring case to law side without lapse of statute of limitations under Rule 22).

<sup>70</sup> 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In *Swift*, the Supreme Court held that federal courts were not obliged to follow state court decisions under the Judiciary Act of 1789 when deciding an issue of commercial law. *Id.* at 18.

<sup>71</sup> 304 U.S. 64 (1938). In *Erie*, the Supreme Court overruled *Swift*, holding that there was no federal common law and federal courts were thus to apply the substantive law of the states in diversity cases. *Id.* at 79-80.

bound to follow state common-law precedents in matters of general commercial law. One such common-law issue was the effect of oral testimony to raise an estoppel against a party relying on a written contract.

In *Northern Assurance Co. v. Grand View Building Association*,<sup>72</sup> the plaintiff owned property upon which he had a fire insurance policy. Desiring additional insurance, he requested another policy from an agent of the defendant company. When the plaintiff disclosed his existing policy, the agent agreed to issue a concurrent policy. Presumably through inadvertence, the written policy delivered by the agent to the plaintiff contained an "other insurance" clause: a condition voiding the policy in the event of other insurance unless endorsed in writing in the policy. The plaintiff retained the policy without reading it, and when a fire loss occurred, the company denied liability. As in *Steinbach*, the plaintiff sued in a (Nebraska) state court, and on defendant's petition the case was removed to the law side of the Nebraska federal court on diversity grounds.<sup>73</sup>

Once again, as in *Steinbach*, the plaintiff found himself in a common-law court not of his choosing. In this case, however, the plaintiff seemingly had nothing to fear because on the facts of his case, federal courts had previously borrowed the estoppel doctrine, originally crafted by equity, and applied it in actions on the law side.<sup>74</sup> Indeed, on similar facts, cases from both the state of Nebraska and the United States Court of Appeals for the Eighth Circuit had denied equitable actions for reformation on the ground that the legal remedy was adequate.<sup>75</sup>

The federal trial court gave judgment for the plaintiff, based on a special verdict of the jury finding the facts as stated above. The judgment was affirmed by the Eighth Circuit Court of Appeals but was reversed by the United States Supreme Court.<sup>76</sup> In a long and rambling opinion the Court veered away from its own prior precedent and held that the parol evidence rule barred oral testimony of the facts supporting the estoppel (or waiver, as the

<sup>72</sup> 183 U.S. 308 (1902).

<sup>73</sup> See *id.* at 309.

<sup>74</sup> *Union Mut. Ins. Co. v. Wilkinson*, 80 U.S. (13 Wall.) 222, 232-33 (1871); see also *American Life Ins. Co. v. Mahone*, 88 U.S. (21 Wall.) 152 (1874).

<sup>75</sup> *Firemen's Fund Ins. Co. v. Norwood*, 69 F. 71 (8th Cir. 1895); *Home Fire Ins. Co. v. Wood*, 69 N.W. 941, 942-43 (Neb. 1897).

<sup>76</sup> *Northern Assurance Co. v. Grand View Bldg. Ass'n.*, 101 F. 77 (8th Cir. 1900), *rev'd*, 183 U.S. 308 (1902).

Court preferred to call it).<sup>77</sup>

The plaintiff then brought a second action in the Nebraska state court seeking to reform the policy by striking out the other insurance clause, and to recover the proceeds. The Nebraska Supreme Court affirmed a judgment for the plaintiff in a scathing opinion which, among other criticisms, anticipated the *Erie* case by questioning the authority of the federal court to decide a contract case on grounds alien to Nebraska law.<sup>78</sup> As to the problem of *res judicata*, the court noted the prior cases refusing equitable relief because the estoppel issue could be raised in an action at law, and stated:

The plaintiff began its action and prosecuted it to final judgment in reliance upon, and in strict conformity with, these decisions, the former of which was justified, as the court pronouncing it thought, by the opinion of the Supreme Court of the United States in *Insurance Company v. Wilkinson*, 13 Wall 233, 20 L.Ed 617. To say now that the plaintiff is estopped because it failed in the first instance to take its cause into a forum whose doors were, to all appearances, firmly and finally bolted and barred against it, would not fall short of a mockery of justice.<sup>79</sup>

Once again, the insurance company carried the case to the United States Supreme Court on a writ of error, arguing that Nebraska had failed to give full faith and credit to the prior federal court judgment. In unanimously affirming the state judgment granting reformation, the Court's opinion by Justice Holmes took it as given that the reformation action was a different cause of action, not barred by *res judicata*.<sup>80</sup> This assumption was undoubtedly based on the limited subject matter jurisdiction of the law side of the federal trial court in the prior action. The only point to which Holmes gave real consideration was election of remedies. Because an equitable remedy was apparently unavailable according to the cases on the books at the time the

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<sup>77</sup> *Northern Assurance*, 183 U.S. at 328-329. The background and impact of this case is fully described in WILLIAM R. VANCE, *INSURANCE* § 87 (3d ed. 1951).

<sup>78</sup> *Grand View Bldg. Assn. v. Northern Assurance Co.*, 102 N.W. 246 (Neb. 1905).

<sup>79</sup> *Id.* at 248.

<sup>80</sup> *Northern Assurance Co. v. Grand View Bldg. Assn.*, 203 U.S. 106, 107 (1906); see *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920) (holding prior judgment not conclusive on issue that first tribunal lacked authority to address due to nature of prior action).

plaintiff started his original action at law, the Court held that he had made no deliberate election of remedy.<sup>81</sup>

The *Steinbach* and *Northern Assurance* cases have been stated at some length because they were the two cases chiefly relied on by the New York Law Revision Commission when it transmitted to the legislature its recommendation which resulted in the adoption of what is now CPLR 3002(d). The purpose of the statute, according to the Commission, was to overrule *Steinbach* and follow *Northern Assurance*.<sup>82</sup>

It is apparent that the Commission saw the question exactly as Justice Holmes did in *Northern Assurance*: as one of election of remedies solely. Indeed, the Commission's recommendation is entitled "Relating to Election of Remedies" and subdivision (d) was one of a series of four changes, the other three of which did deal with that doctrine.<sup>83</sup> Subdivision (d) is the only one that allows a party who loses a final judgment in an attempt to recover a sum of money to re-litigate a second action to recover the same money on a different theory.<sup>84</sup>

Although election and claim preclusion can overlap when applied to a given set of facts, the two doctrines are distinct. When election applies, it is because a party has initiated a legal proceeding on a stated theory or to obtain a stated remedy.<sup>85</sup>

<sup>81</sup> *Northern Assurance*, 203 U.S. at 108. In doing so, Holmes distinguished *Washburn v. Great Western Ins. Co.*, 114 Mass. 175 (1873), in which election of remedies was applied to a claimant who brought a bill in equity to reform a policy of marine insurance by striking a promissory warranty concerning the magnum tonnage of coal. The plaintiff had previously lost an action at law in which he alleged compliance with the warranty. The *Washburn* Court reasoned:

[the plaintiff's] bill does not assert an equitable right which, although it could not have been secured to him in the action at law, might coexist with the right asserted by him in that action [which would apply to the litigation sequence in the *Northern Assurance* case]; but proceeds on grounds wholly inconsistent with those maintained by him in the action at law, and seeks to show that his contract with the defendants was essentially different from that which he alleged, and submitted to the final judgment of the court, in that action.

*Id.* at 176. *Cf.* *Knight v. Electric Household Util. Corp.*, 30 A.2d 585 (N.J. 1943) (holding that where plaintiff has attempted to enforce contract as written, he has elected his remedy and abandoned any attempt to seek reformation).

<sup>82</sup> Recommendation Relating to Election of Remedies [1939] New York Rev. Comm'n Rep., 214-15.

<sup>83</sup> *Id.* at 215; see also 2 FREEMAN, *supra* note 16, § 696, at 1473-75 (viewing question as one of election of remedies).

<sup>84</sup> N.Y. CPLR 3002(d) (McKinney 1992).

<sup>85</sup> *Fitzgerald v. Title Guar. & Trust Co.*, 49 N.E.2d 489 (N.Y. 1943); *Conrow v. Little*, 22 N.E. 346 (N.Y. 1889); *Mollen v. Tuska*, 87 N.Y. 166 (1881); see also SIEGEL,

Claim preclusion applies when a legal proceeding has gone to final judgment.<sup>86</sup> Contemporary thinking, while hostile to the older predisposition to find a conclusive election by the mere commencement of an action,<sup>87</sup> unmistakably supports reinforcing the preclusive effect of final judgments.<sup>88</sup>

In *Northern Assurance*, Holmes reached the issue of election of remedies only because he accepted as too obvious for discussion the proposition that a law judgment could neither merge nor bar equitable issues that could not have been litigated in an exclusively common-law forum. *Steinbach* erred only in neglecting to take account of the proposition that Holmes recognized and acted upon.

Unfortunately, in its zeal to redress some fossilized election of remedies cases, the Law Revision Commission overlooked the peculiar procedural background of the *Steinbach* and *Northern Assurance* cases, and drew legislation broadly to apply to any case in which an adverse judgment in an action on a written contract was followed by a reformation action, without regard to whether or not the plaintiff had a fair opportunity to tender his equitable issue in the earlier action.<sup>89</sup> In doing so, it trespassed on territory belonging to claim preclusion. Ironically, the circumstance that produced the difficulty in the earlier cases—the limited subject matter jurisdiction on the law side of the federal courts—had been eliminated by the new federal rules in 1938,<sup>90</sup>

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*supra* note 34, § 218.

<sup>86</sup> SIEGEL, *supra* note 34, § 444. The purpose of requiring a final judgment on the merits is to ensure finality. *Id.* In New York, the fact that an appeal has been initiated and is pending does not divest the judgment of its finality. *Id.*; see also RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-18 (1980).

<sup>87</sup> JACK WEINSTEIN, ET. AL, NEW YORK CIVIL PRACTICE §§ 3002.01-.02 (1992); CLARK, *supra* note 32, § 76; Jay Leo Rothschild, *A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies*, 14 CORNELL L. Q. 141 (1929).

<sup>88</sup> RESTATEMENT (SECOND) OF JUDGMENTS, *Introduction*, ch. 9-10 (1980). "The rules of res judicata in modern procedure therefore may fairly be characterized as illiberal toward the opportunity for relitigation." *Id.* at 10.

<sup>89</sup> *Weissman v. Friend*, 285 N.Y.S.2d 906 (3d Dep't 1967) (holding that pursuant to CPLR 3002(d), action for reformation of shareholders' agreements was not barred by res judicata); *Scheer v. Nething*, 122 N.Y.S.2d 270, 271 (2d Dep't 1953) (holding that adverse judgment in action on contract did not bar new action to reform contract). *But see* *Falkowski v. Metropolitan Life Ins. Co.*, 25 N.Y.S.2d 474 (Sup. Ct. Erie County 1941) (holding that if same facts sought to be established in second action for reformation were litigated in earlier action on contract (presumably on estoppel theory), earlier adverse judgment precluded second action).

<sup>90</sup> FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"); see also FED R. CIV. P. 38(a) (preserving right of trial by jury); JAMES W.

the year before the Commission made its recommendation.

Not only is the statute over-broad in relation to the hardship that once existed, it is under-inclusive with respect to other situations equally deserving of the kind of relief it purports to provide. As written, the statute only relieves plaintiffs who neglect to seek reformation in an action on a contract. What about defendants? The facts of *Bennett v. Edison Electric Co.*,<sup>91</sup> suggest an illustration. Suppose an excavating contractor sues an owner for work done under a written contract calling for payment at a rate of \$10.00 per cubic foot excavated. If the owner tries to testify that he only promised to pay \$1.00 per cubic foot, the evidence will undoubtedly be excluded under the parol evidence rule and the contractor will recover judgment. After that judgment becomes final, may the owner bring an action against the contractor to have the written contract reformed for fraud or mistake, and thereby avoid paying the earlier judgment or obtain restitution of money paid pursuant to it? The answer is clearly no. The owner had the opportunity of pleading an equitable defense in the first action. The same payment obligation is at issue in both cases and the court would hold the claims identical. The owner is precluded not only as to issues actually litigated in the contract action, but also as to issues that could have been litigated (claim preclusion).<sup>92</sup>

Any legislator who today proposed a statute overturning the result in this situation would be laughed to scorn. The only justification for allowing the owner to raise his equitable claim in a second action would be if the court in which the original action

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MOORE & JO D. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 2.06 (2d ed. 1992); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 1.7 (3d ed. 1985).

<sup>91</sup> 58 N.E. 7 (N.Y. 1900).

<sup>92</sup> *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 165 N.E. 456 (N.Y. 1929); *Massari v. Einsiedler*, 78 A.2d 572 (N.J. 1951). The Restatement (Second) of Judgments has no section covering the example of a law defendant who withholds an equitable defense and later seeks to nullify the adverse judgment by an equitable action. A close parallel is found in section 22(2)(b), dealing with withheld counterclaims, cmt. f., illus. 9-10. The necessity of this result also derives from the general rule that equity will not enjoin a party from suing at law where his remedies in that forum are adequate, which they obviously are in a merged system that allows equitable defenses in legal actions. Compare *Haire v. Baker*, 5 N.Y. 357, 361-62 (1851) (holding that defense at law could be used in suit in equity) with *Phoenix Mut. Life Ins. Co. v. Bailey*, 80 U.S. 616, 623 (1871) (stating that, absent special circumstances, when party has good defense at law to "purely legal demand" he should use such defense rather than resort to seeking equitable relief). It would be nonsensical for equity to abstain while a legal action is pending, yet overhaul the judgment afterwards.

on the contract was brought was an exclusively common-law court that did not entertain equitable defenses. This is precisely the system that existed before the merger of law and equity in New York in 1848; and prior to that time the later bill in equity would have been allowed.<sup>93</sup>

The anachronism illustrated in the hypothetical case of the defendant is exactly parallel to the actual *Steinbach* and *Northern Assurance* cases that the Law Revision Commission took as negative and positive models in drafting its statute. The plaintiffs in those cases deserved a second chance at seeking equitable reformation only because that relief was unavailable to them on the law side of the federal court in the nineteenth century. To use the unhappy position of pre-merger defendants as a reason for allowing defendants today a second chance to litigate equitable defenses would be absurd. Yet that is exactly what CPLR 3002(d) allows plaintiffs, with respect to their equitable claims.

#### IV. KWIATKOWSKI REVISITED

At this point, it is appropriate to reassess the *Kwiatkowski* case set forth at the beginning of the article.<sup>94</sup> Is CPLR 3002(d) needed to prevent a repetition of the injustice resulting from that case? The decision is a composite of a harsh substantive rule and an extreme application of a retrogressive procedural rule. On the substantive side, many early cases had allowed estoppel at law to avoid forfeiture of insurance coverage based on written warranties and conditions, upon proof that the facts were known to the company's agent, or the warranted facts were inserted in the written application by the agent without the applicant's knowledge.<sup>95</sup> Beginning with (then) Justice Lehman's opinion in

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<sup>93</sup> *King v. Baldwin*, 17 Johns. 384, 388 (N.Y. 1819); see also *Gregory v. Burrall*, 2 Edw. Ch. 417, 421 (N.Y. 1835) (noting that courts of equity can entertain suits and grant relief notwithstanding judgments at law); *Webster v. Wise*, 1 Paige Ch. 319 (N.Y. 1829); *Briggs v. Law*, 4 Johns. Ch. 22 (N.Y. 1819) (enforcing judgment at law via injunction); *Livingston v. Hubbs*, 2 Johns. Ch. 512 (N.Y. 1817) (same); see also *Dobson v. Pearce*, 12 N.Y. 156, 158 (1854) (holding Connecticut chancery decree enjoining enforcement of New York common-law judgment is res judicata in equitable defense pursued under reformed procedure in New York).

<sup>94</sup> See *supra* text accompanying notes 3-14.

<sup>95</sup> *Sternaman v. Metropolitan Life Ins. Co.*, 62 N.E. 763 (N.Y. 1902) (holding that medical examiner is agent of insurance company, and insurer is therefore estopped from taking advantage of examiner's errors in reporting answers on policy); *Miller v. Phoenix Mut. Life Ins. Co.*, 14 N.E. 271 (N.Y. 1887) (holding that insurer was estopped from claiming answers to questions in life insurance application were

*Bollard v. New York Life Ins. Co.*,<sup>96</sup> in 1917, the courts receded from their former pro-consumer holdings and rendered a series of decisions that protected the insurance industry from having its written contracts impeached by parol evidence before sympathetic juries.<sup>97</sup> Perhaps some of the early cases had not paid

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incorrect where answers were filled in by insurer's agent and not read back to insured); *Flynn v. Equitable Life Ins. Co.*, 78 N.Y. 568 (1879) (holding insured estopped from taking advantage of untrue answers written in policy by its agent); *Whited v. Germania Fire Ins. Co.*, 76 N.Y. 415 (1879) (binding insurance company to statements made by agent); *Mowry v. Rosendale*, 74 N.Y. 360 (1878) (estopping insurance company from denying responsibility for risk subscribed by its agents on inappropriate form); *Rowley v. Empire Ins. Co.*, 36 N.Y. 550 (1867) (holding mistakes made by insurance company's agent are imputed to company).

<sup>96</sup> 162 N.Y.S. 706 (Sup. Ct. App. T. 1st. Dep't 1917), *aff'd*, 168 N.Y.S. 1102 (1st Dep't 1918), *aff'd*, 126 N.E. 900 (N.Y. 1920) (per curiam).

<sup>97</sup> The shift in the court's position was occasioned by a statute enacted in 1906. N.Y. INS. LAW § 58 (amended in 1939 as N.Y. INS. LAW § 142 and currently codified as N.Y. INS. LAW § 3204(c)). This law effectively eliminated strict warranties in life insurance policies and transformed them into "representations" that avoided a policy only if material to the risk undertaken. It also provided that no written application could be considered part of the insurance contract, unless physically attached to the policy. Thence forward, in cases covered by section 58, an insurer could not defend a claim based on misrepresentations in an application if it was not attached to the policy when delivered to the insured. *Archer v. Equitable Life Assur. Soc.*, 112 N.E. 433 (N.Y. 1916); *Bible v. John Hancock Mut. Life Ins. Co.*, 176 N.E. 838 (N.Y. 1931). *Bollard* held that the insured's failure to read the application after it was returned to him was such laches as to counteract his traditional right to estop the insurer from relying on statements inserted in the application by company agents without the applicant's knowledge. *Accord Minsker v. John Hancock Mut. Life Ins. Co.*, 173 N.E. 4 (N.Y. 1930). Ms. Kwiatkowski received none of the benefits of the statute and all of its burdens. Since section 58 did not apply to fraternal benefit insurance, *see Hoff v. Hoff*, 161 N.Y.S. 520 (3rd Dep't 1916), the disparity between the actual number of children (seven) and the number (three) written by the company's agent was allowed to operate as a strict warranty instead of a representation as provided in section 58. Had the statute applied, the issue of materiality would have been for the jury. On a warranty, materiality was irrelevant. Having denied Kwiatkowski the statutory benefits, the court extended to her case the burden of losing her estoppel claim because her application had been (without statutory compulsion) returned with the certificate. Both before and after *Kwiatkowski*, the court extended the anti-estoppel rationale of *Bollard* to insurance policies not covered by section 58, provided that the relevant document was in fact, though without compulsion of law, physically returned to the insured. *Satz v. Massachusetts Bonding & Ins. Co.*, 153 N.E. 844 (N.Y. 1926); *Stanulevich v. St. Lawrence Life Ass'n*, 127 N.E. 315 (N.Y. 1920).

Perhaps the most extreme reaction against an insured's use of estoppel occurred in *Axelroad v. Metropolitan Life Ins. Co.*, 196 N.E. 388 (N.Y. 1935). In *Axelroad*, an insured signed a blank reinstatement application, which was later completed with substantial misrepresentations by the company's agent without the insured's knowledge or consent. *Id.* at 441. The fact that the agent did not attach the application to the policy given to the insured was held to be of no moment, as reinstatement applications were not subject to section 58. *Id.* at 450-51. The court



enough attention to the problem of possible collusion between agents greedy for commissions and applicants who knew or should have known that they were ineligible for insurance.<sup>98</sup> However, the later cases went too far in the other direction by denying estoppel to the deserving and undeserving alike.<sup>99</sup> Whatever the case may be, in changing its estoppel rule, the New York Court of Appeals never denied that the same or similar evidence that was excluded in the action to enforce the written contract was admissible under an equitable claim to reform the contract. It is clear that fear of jury lawlessness lay at the heart of the change in the law. As Justice Holmes wrote in a contemporary case before the United States Supreme Court:

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

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therefore denied the use of estoppel and the policyholder was held bound to the misrepresentations written in the reinstatement application by the agent. *Id.* at 451.

These holdings remain law at the present time. *Friedman v. Prudential Life Ins. Co.*, 589 F. Supp. 1017 (S.D.N.Y. 1984) (holding that misrepresentations made by insured are not attributable to insurer's agent even if agent is actually responsible for physically writing false information); *Bloom v. Mutual of Omaha Ins. Co.*, 557 N.Y.S.2d 614, 616 (3d Dep't 1990) (holding that insurance company is not estopped from denying coverage because of misrepresentations made by insurance agent on life insurance application); *Equitable Life Ins. Co. v. O'Neil*, 413 N.Y.S.2d 714 (1st Dep't 1979) (stating that policy was void because misrepresentations about insured's medical condition made by agent were so flagrant that insured should have been aware); see also 68 N.Y. JUR. 2D, *Insurance*, § 366 (1988).

<sup>98</sup> If a court perceived collusion between the applicant and the company's agent in providing false information in the insurance application, neither the early nor the recent cases allowed a theory of imputed knowledge to work an estoppel against the insurer in aid of a wrongdoer. *New York Life Ins. Co. v. Fletcher*, 117 U.S. 519 (1886); *McCormack v. Security Mut. Life Ins. Co.*, 116 N.E. 74 (N.Y. 1917); *Simon v. Government Employees Life Ins. Co.*, 434 N.Y.S.2d 447 (2d Dep't 1980).

<sup>99</sup> The reasoning of *Bollard* and its progeny that the insured should read his policy and attached application after it is mailed to him runs contrary to experience. EDWIN W. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 514 (2d ed. 1957) ("It seems not unlikely that an insurer receiving such a letter [correcting a misstatement in the application] would suspect the insured of being a crank or insane."). Moreover, it has been noted that "it would seem reasonable to hold that the insurer delivering an instrument which he knows will not be read is not justified in assuming that all of its terms are assented to." VANCE, *supra* note 77, at 263 n.20; see also RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979) (describing standardized agreements). An attempt to reestablish a middle ground based on the applicant's good faith appears in (then) Justice Breitel's opinion in *Wageman v. Metropolitan Life Ins. Co.*, 263 N.Y.S.2d 915 (1st Dep't 1965), *aff'd*, 221 N.E.2d 566 (N.Y. 1966).

formation by letting the jury strike out a clause.<sup>100</sup>

Although the New York Court of Appeals gave reasons for its express holdings that parol evidence was inadmissible at law to estop enforcement of written contract terms, it never openly confronted a related procedural question. Under code practice the right to jury trial attached to the type of action brought by the plaintiff, not to issues injected into the case by new matter raised in the answer or reply.<sup>101</sup> If an action, as pleaded, was traditionally one that would have been brought in the common-law court before the merger, it attracted the right to jury trial of all issues of fact raised therein.<sup>102</sup> Conversely, if the action, as pleaded, would have been within the subject matter jurisdiction of the old chancery court, there was no right to trial by jury of any issue of fact under the code system.<sup>103</sup>

Under this test, an action brought to reform a contract and recover on it as reformed was not triable by jury.<sup>104</sup> An action

<sup>100</sup> *Lumber Underwriters v. Rife*, 237 U.S. 605, 610 (1915). Holmes had previously taken a similar position as a state court judge. *Batchelder v. Queen Ins. Co.*, 135 Mass. 449 (1883).

In commenting on the older New York cases, *see supra* note 93, the New Jersey common-law court complained that they were "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." *Franklin Fire Ins. Co. v. Martin*, 40 N.J.L. 568, 579 (1878). The *Martin* case was expressly overruled and estoppel at law was permitted in *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969).

After *Bollard*, New York continued to apply estoppel in cases where the facts did not present the opportunity for collusion between an applicant and an agent, and were established by parol evidence. *Davern v. American Mut. Liability Ins. Co.*, 150 N.E. 129 (N.Y. 1925).

<sup>101</sup> *See* N.Y. CODE OF PROC. §§ 253 (1851) (specifying which issues of fact should be tried by jury), 250 (defining issues of fact), 254 (describing issues to be tried by court); *see also* *Hale v. Omaha Nat'l Bank*, 49 N.Y. 626, 631 (1872) (stating that court may grant whatever judgment is consistent with case made by complainant and embraced within the issues whether it would sustain action at law or in equity).

<sup>102</sup> *See* *Susquehanna S.S. Co. v. A.O. Anderson & Co.*, 146 N.E. 381, 384 (N.Y. 1925).

<sup>103</sup> *Bell v. Merrifield*, 16 N.E. 55, 56 (N.Y. 1888); *In re Beare's Estate*, 203 N.Y.S. 483 (N.Y. Sur. Ct. 1924), *aff'd*, 209 N.Y.S. 793 (1st Dep't 1925); *Moffat v. Mount*, 17 Abb. Pr. 4 (N.Y. Super. Ct. Gen. T. N.Y. County 1863).

<sup>104</sup> Since such cases were tried in chancery, without a jury, before the merger, *Many v. Beekman Iron Co.*, 9 Paige Ch.188 (N.Y. 1841); *Gillespie v. Moon*, 2 Johns. Ch. 585, 595 (N.Y. 1817), and could not be entertained at common law, *see* *Lewitt & Co. v. Jewelers Safety Fund Soc.*, 164 N.E. 29 (N.Y. 1928) (same); *Hay v. Star Fire Ins. Co.*, 77 N.Y. 235 (1879) (same); *Kilmer v. Smith*, 77 N.Y. 226 (1879) (same); *Cheriot v. Baker*, 2 Johns. 346, 351 (N.Y. Sup. Ct. 1807) (same), they were triable in the merged system without a jury. *Wells v. Yates*, 44 N.Y. 525 (1871) (reformation action tried at special term); *Johnson v. Taber*, 10 N.Y. 319 (1852) (transferring to

brought to recover on a written contract was triable by jury.<sup>105</sup> Under the early code cases, however, a good deal depended on how the complaint was pleaded. If the plaintiff wished to anticipate an affirmative defense based on the written contract, he could bring an action to reform.<sup>106</sup> He might, however, choose not to anticipate the defense and plead the terms of the alleged contract as he construed them ultimately to be. The defendant was then required to plead as new matter in its answer the written terms and extrinsic facts, such as breach of warranty, upon which it sought to rely.<sup>107</sup> Under the code, no express reply was required from the plaintiff. New matter in the answer was deemed traversed or avoided, as the case required.<sup>108</sup> When it is also borne in mind that an express request for relief was not a necessary part of a cause of action,<sup>109</sup> it seems clear that evidence

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special term (non-jury) of newly created New York State Supreme Court because bill for reformation filed in chancery court prior to merger).

<sup>105</sup> *Glenn v. Lancaster*, 109 N.Y. 641, 642 (1888) (holding action based on contract to recover monetary damages only is triable by jury); *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. Pr. 179 (N.Y. Super. Ct. N.Y. County 1857) (holding that court considers entire circumstances to decide whether trial by jury is necessary). *Cf.* N.Y. CPLR 4101 (McKinney 1992) (defining issues triable by jury).

<sup>106</sup> *Bennett v. Agricultural Ins. Co. of Watertown*, 12 N.E. 609 (N.Y. 1887); *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N.Y. 657 (1873). On anticipating defenses generally, see CLARK, *supra* note 32, at 250-52 and Judge Clark's opinion in *Alcoa S.S. Co. v. Ryan*, 211 F.2d 576, 578 (2d Cir. 1954).

<sup>107</sup> *Goldschmidt v. Mutual Life Ins. Co.*, 7 N.E. 408 (N.Y. 1886) (holding that burden fell on defendant to prove facts pertinent to terms of contract and resulting in denial of insurance coverage); *Jacobs v. Northwestern Life Assur. Co.*, 51 N.Y.S. 967, 968 (2d Dep't 1898) (stating that breach of warranty is affirmative defense which defendant must plead and prove), *aff'd*, 58 N.E. 1088 (N.Y. 1900).

<sup>108</sup> N.Y. Code of Proc. § 168 (1851); N.Y. CODE OF CIV. PROC. § 522 (1877); N.Y. CIV. PRAC. ACT §§ 243, 274 (1938); N.Y. CPLR 3011 (1963) (describing types of pleadings); see *Meyer v. Lathrop*, 73 N.Y. 315, 322 (1878) (noting that plaintiff was not required to reply to defense in answer and could wait until trial); *Bates v. Rosekrans*, 37 N.Y. 409 (1867); *Linker v. Jamison*, 159 N.Y.S. 469 (2d Dep't 1916); *Jacobs v. Northwestern Life Assur. Co.*, 51 N.Y.S. 967 (2d Dep't 1898), *aff'd*, 58 N.E. 1088 (N.Y. 1900). In *Sullivan v. Traders Ins. Co.*, 62 N.E. 146 (N.Y. 1901), plaintiffs' express equitable reply was approved over a dissent objecting to the procedure as indirectly amending a legal complaint to add an equitable cause of action.

For a similar rule in federal practice, see *Neeff v. Emery Transp. Co.*, 284 F.2d 432 (2d Cir. 1960).

<sup>109</sup> From the first Field Code, see Code of Proc. § 275, it was provided that though relief must be consistent with the facts pleaded, it need not be the relief need not be specifically demanded. *Emery v. Pease*, 20 N.Y. 62, 64 (1859). See generally CIV. PRAC. ACT §§ 472-84 (judgments); N.Y. CPLR 3017(a) (McKinney 1992). Nor was it necessary for the judgment to expressly provide for formal reformation where the legal relief awarded was consistent therewith. *Maher v. Hibernia Ins. Co.*, 67 N.Y. 283 (1876); *Hoppough v. Struble*, 60 N.Y. 430, 434 (1860) (stating that

in aid of the automatic reply in equitable avoidance of the insurer's affirmative legal defense was admissible within the context of an action triable by jury as a matter of right.<sup>110</sup> In short, equitable issues arising by way of replication to legal defenses were triable by jury in legal actions, just as equitable defenses to legal actions were so triable.<sup>111</sup> It was not until the CPLR replaced the former Civil Practice Act in 1963 that the right to jury trial of equitable defenses and replications in legal actions was withdrawn and such issues were made triable by the court alone.<sup>112</sup>

Obviously, the whole purpose of protecting written contracts (particularly insurance contracts) against jury verdicts based on estoppel would have gone for naught if similar parol evidence, admittedly relevant to equitable reformation, could go before the

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defendant can avail himself of equitable defense in legal action seeking ejection); *see also* *Broidy v. State Mut. Life Assur. Co.*, 186 F.2d 490 (2d Cir. 1951) (holding judgment as sufficient without formal findings on which to base claim of reformation).

<sup>110</sup> *See* *Wilcox v. American Tel. & Tel. Co.*, 68 N.E. 153, 154 (N.Y. 1903) (recognizing that plaintiff could produce evidence of fraud on appeal to court of equity); *Kirchner v. New Home Sewing Mach. Co.*, 31 N.E. 1104, 1106 (N.Y. 1892) (implying that plaintiff's right to recover will not be barred if he can prove that the cause of action was released due to adversary's fraud); *Grattan v. Metropolitan Life Ins. Co.*, 80 N.Y. 281, 294 (1880) (noting that it was not improper for plaintiff to submit evidence of fraud if it was grounds for reformation); *Meyer v. Lathrop*, 73 N.Y. 315, 322 (1878) (stating that when agreement is presented at trial, plaintiff has right to produce evidence of mistake although not set forth in complaint); *Mandeville v. Reynolds*, 68 N.Y. 528, 543 (1877) (finding that "[j]udgment obtained by fraud upon a court, binds not such court or any other, and its nullity upon that ground ... may be alleged in a collateral proceeding"); *McGurty v. Delaware L. & W. R. Co.*, 158 N.Y.S. 285, 287 (4th Dep't 1916) (stating that various provisions of Code of Civil Procedure "are to be construed as declaratory of [ ] right [to trial by jury], rather than as modifying or infringing it."). When a defendant interposed a legal defense, such as breach of warranty, in its answer, the statutes cited in note 108 supra operated to create an issue in replication to the answer. "For that purpose [the automatic statutory reply], evidence admissible under the principles of either law or equity, takes the place of pleading." *Arthur v. Homestead Fire Ins. Co.*, 78 N.Y. 462, 467 (1879).

<sup>111</sup> *Susquehanna S.S. Co. v. A. O. Andersen & Co.*, 146 N.E. 381, 384 (N.Y. 1925) (stating that "equitable defenses are triable in the same way as defenses that are legal").

<sup>112</sup> N.Y. CPLR 4101 (McKinney 1992) ("[E]quitable defenses and equitable counterclaims shall be tried by the court."); *see* *Rill v. Darling*, 253 N.Y.S.2d 184, 185-86 (Sup. Ct. Madison County 1964) (illustrating problems resulting from trial treatment afforded to equitable counterclaims and equitable defenses under Civil Practice Act prior to enactment of CPLR 4101), *aff'd*, 21 A.D.2d 955, 251 N.Y.S.2d 396 (3d Dep't 1964). *But see* CPLR 4212 (permitting court to submit any issue of fact required to be decided by court to advisory jury).

same juries. By the time the *Kwiatkowski* case was decided, the New York Court of Appeals had responded to the dilemma indirectly by moving perilously close to reinventing the old imaginary boundary lines dividing the forms of action, and particularly the line dividing law from equity. Again departing from earlier code cases that had welcomed a generous approach to the fusion of law and equity within a single litigation,<sup>113</sup> the New York Court of Appeals in *Jackson v. Strong*<sup>114</sup> applied a rule called "theory of the pleadings"<sup>115</sup> that sharply limited the powers of trial courts to respond flexibly to facts as they developed at trial.<sup>116</sup> Even if the facts originally alleged, or sought to be added by amendment to conform to the evidence, showed some actionable claim, it could not be addressed if the grouping of facts in the original complaint was patterned on another legal theory.<sup>117</sup>

<sup>113</sup> See *Flynn v. Equitable Life Ins. Co.*, 78 N.Y. 568, 578 (1879) (supporting consolidation of law and equity into one lawsuit); *Lattin v. McCarty*, 41 N.Y. 107 (1869) (following earlier cases which upheld one action for legal and equitable claims and allowing plaintiff's equitable action to clear title to be tried with legal action to recover possession of premises); *New York Ice Co. v. North W. Ins. Co.*, 23 N.Y. 357, 360 (1861) (noting that legal and equitable grounds for relief should be united in same action); *Emery v. Pease*, 20 N.Y. 62, 64 (1859) (recognizing that distinction between legal and equitable remedies no longer exist); *Laub v. Buckmiller*, 17 N.Y. 620, 626 (1858) (stating that "legal and equitable relief may be asked for in one action."); *Phillips v. Gorham*, 17 N.Y. 270, 274 (1858) (finding that "a complaint needs only to contain facts constituting a cause of action, recognising no distinction of causes of action into legal or equitable."); see generally *Clark*, *supra* note 32, at 321 (discussing various cases supporting one cause of action for legal and equitable relief).

<sup>114</sup> 118 N.E. 512 (N.Y. 1917). Plaintiff pleaded a contract of partnership and sought an equitable accounting. The proof showed a contract of employment payable in quantum meruit. A referee's award of a sum owed under the contract was reversed because a recovery of damages on a legal ground could not be had where the complaint was based on an historically equitable ground. *Id.* at 512-13.

<sup>115</sup> See SIEGEL, *supra* note 34, § 209 (explaining "theory of pleadings").

<sup>116</sup> See *Southwick v. First Nat'l Bank*, 61 How. Pr. 164, 170 (1881) (stating that "[i]f a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary."); *Barnes v. Quigley*, 59 N.Y. 265, 268 (1874) (holding that it was error for court below to change plaintiff's cause of action). The *Barnes* court noted that "the Code [of Procedure] ... does not permit a cause of action to be changed ... because [plaintiff] has mistaken his remedy." *Id.*

<sup>117</sup> See *Feldblum Realty Corp. v. City of New York*, 269 N.Y.S. 793, 794 (N.Y. City Ct. Bronx County 1934) (allowing substitution of different legal theory of recovery through amendment of complaint but noting that "an amendment seeking an entirely different cause of action would be allowed only on severest terms."); see also E. F. Albertsworth, *The Theory of the Pleadings in Code States*, 10 CAL. L. REV. 202, 202-03 (1922) (illustrating that although amendments to pleadings were eventually permitted, they could not introduce new cause of action); see generally *Bernard V.*

Thus sixty years after the first Field Code was adopted, the New York Court of Appeals marched resolutely backward, like the surgeon who, when he opened up a patient in search of a tumor, would look only for tumors.<sup>118</sup>

Today, all this is ancient history. Juries are excluded from equitable issues,<sup>119</sup> and the CPLR makes ample provision for adapting the shape of the case to new facts and theories.<sup>120</sup> The

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Lentz, Note, *The Extent to Which a Plaintiff Must Proceed Upon a Definite Theory*, 83 U. PA. L. REV. 654 (1935) (discussing limitations on amendments to complaint); William F. Walsh, *Merger of Law and Equity Under Codes and Other Statutes*, 6 N.Y.U. L. REV. 157 (1929) (suggesting that cases filed in improper court should not be dismissed, but transferred).

<sup>118</sup> See *supra* text accompanying notes 17-19. Forty years earlier, on similar facts, the New York Court of Appeals held that it was error to dismiss a complaint because it erroneously requested equitable relief and established a right to legal relief on the facts alleged and proved. *Williams v. Slote*, 70 N.Y. 601, 602 (1877); *accord* *New York Ice Co. v. Northwestern Ins. Co.*, 23 N.Y. 357, 359 (1861); *Emery v. Pease*, 20 N.Y. 62, 64-65; see also *Clark*, *supra* note 22, at 8-9 n.31 (examining New York cases before and after legal and equitable claims could be tried in one cause of action).

<sup>119</sup> N.Y. CPLR 4101 (McKinney 1992); see also *Federman v. Berger*, 216 N.Y.S.2d 61, 62 (1st Dep't 1961) (stating that defendants waived right to jury trial by imposition of equitable counterclaims); *Menado Corp. v. Indemnity Ins. Co.*, 279 N.Y.S.2d 84, 86 (N.Y. Civ. Ct. N.Y. County 1967) (denying jury trial based on CPLR 4101). Although the language of the statute does not explicitly mention equitable replications to legal defenses, it has properly been held that it applies. *Rill v. Darling*, 253 N.Y.S.2d 184, 186 (Sup. Ct. Madison County 1964), *aff'd*, 251 N.Y.S.2d 396 (3d Dep't 1964); *accord* *Michael Rose Prods. Inc. v. Loew's Inc.*, 19 F.R.D. 508 (S.D.N.Y. 1956) (discussing reformation issue in federal practice arising by way of reply to affirmative defense of release).

Under federal practice, although *Hoed v. New York Cent. R.R.*, 3 F. Supp. 1020, 1020 (W.D.N.Y. 1933) expressed some doubt, it seems clear that mistake in the inducement of a written release, arising by way of reply, presents an equitable issue for the court, not a legal issue for the jury. See *Alcoa S.S. Co. v. Ryan*, 211 F.2d 576, 578 (2d Cir. 1954) (stating that "[t]he issue of mistake, in the making of an agreement ... seems one for court and not jury trial under the federal practice."); see also *Lion Oil Ref. Co. v. Albritton*, 21 F.2d 280, 282 (8th Cir. 1927) (noting that in case of mutual mistake, "equity can grant relief"); *Lumley v. Wabash R.R. Co.*, 76 F. 66, 70 (6th Cir. 1896) (stating that "[e]quity relieves from mistakes"), *aff'd*, 96 F. 773 (1899).

<sup>120</sup> See CPLR 3017(a) (stating that "the court may grant any type of relief within its jurisdiction appropriate to proof whether or not demanded, imposing such terms as may be just."); *id.* § 3025(c) (stating that "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence."); *id.* § 3026 (stating that "[p]leadings shall be liberally construed [and] [d]efects shall be ignored if a substantial right of a party is not prejudiced."); see also *McGinnis v. Bankers Life Co.*, 334 N.Y.S.2d 270, 276 (2d Dep't 1972) (indicating that "[m]odern civil practice codes such as the CPLR have abolished technical rules of pleading ..."); SIEGEL, *supra* note 34, § 209 (stating that "[i]t is today permissible ... to prove a theory different from that pleaded, as long as the pleading gives notice of the transaction out of which the proved claim arises and covers its material elements.").

only residue of *Jackson v. Strong* is the legitimate concern that a defendant originally sued on a purely equitable theory be given an opportunity to insist on a jury trial if the plaintiff's case belatedly reduces itself to a legal one.<sup>121</sup>

Reform, however, lay in the future at the time Ms. Kwiatkowski sought her remedy in our legal system. Under the influence of *Jackson v. Strong*, her evidence that was relevant to reformation was not considered in an action pleaded on a legal contract theory. The court conveniently forgot the older cases allowing reformation evidence to go before the jury under the automatic statutory replication.<sup>122</sup> Such a severe application of the "theory of the pleadings" doctrine was particularly inappropriate in the context of the *Kwiatkowski* case. There was no possible prejudice or surprise involved. There was only one disputed question of fact in the case, and the evidence was equally relevant on an estoppel theory or a reformation theory. If reformation had been expressly pleaded in the complaint, the judge,

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Even before the reforms effected by the CPLR, New York courts had receded from the rigidity of *Jackson v. Strong*. See *Wainwright & Page, Inc. v. Burr & McAuley, Inc.*, 5 N.E.2d 64, 65 (N.Y. 1936) (finding contract complaint at law requesting inappropriate relief contained sufficient facts to support accounting in equity); *Milliken v. Western Union Tel. Co.*, 18 N.E. 251, 252 (N.Y. 1888) (noting that "[t]he present system of pleading does not require that the conclusions of law should be set forth in the pleading, provided the court can see ... the facts stated impose a legal obligation upon the defendant."); *Emery*, 20 N.Y. at 64 (stating that "relief is to be given consistent with the facts stated, although it be not the relief specifically demanded").

<sup>121</sup> CPLR 4103 provides:

Issues triable by a jury revealed at trial; demand and waiver of trial by jury. When it appears in the course of a trial by the court that the relief required, although not originally demanded by a party, entitles the adverse party to a trial by jury of certain issues of fact, the court shall give the adverse party an opportunity to demand a jury trial of such issues. Failure to make such demand within the time limited by the court shall be deemed a waiver of the right to trial by jury. Upon such demand, the court shall order a jury trial of any issues of fact which are required to be tried by jury.

*Id.*; see *Lane v. Mercury Record Corp.*, 252 N.Y.S.2d 1011, 1015 (1st Dep't 1964) (finding that CPLR 4103 dispels need to "perpetuat[e] the technicalities of pleading rules found in the decisions spawned by *Jackson v. Strong*"), *aff'd*, 223 N.E.2d 35 (N.Y. 1966); see also SIEGEL, *supra* note 34, § 209 (discussing effect of CPLR 209 on right to jury trial). Compare *Doherty v. Aaron Mach. Co.*, 238 N.Y.S.2d 179, 180 (2d Dep't 1963) (reversing trial court's award of specific performance but affirming alternative judgment for money damages in non-jury case) with *Newman v. Resnick*, 238 N.Y.S.2d 119, 123 (Sup. Ct. N.Y. County 1963) (denying specific performance after non-jury trial established right to legal damages, but granting plaintiffs leave to amend claim for legal remedy).

<sup>122</sup> See *supra* notes 108 and 110.

not the jury, would have made the findings of fact. Since both sides moved for a directed verdict, they thereby consented to have the judge make any necessary findings of fact;<sup>123</sup> and he made them in the plaintiff's favor. The conclusion on appeal that the reformation could not be considered because of the conceptual difference between estoppel at law and reformation in equity exalted the illusion of form over form itself.<sup>124</sup>

In addition, the *Kwiatkowski* case pushed *Jackson v. Strong* one step further. In the hypothetical modeled on *Steinbach v. Relief Fire Ins. Co.*,<sup>125</sup> the trial court excluded critical evidence offered by the plaintiff. Thus, the plaintiff would be alerted in a timely fashion to the necessity of amending his complaint to seek reformation or, if amendments were precluded under *Jackson v. Strong*, at least to seek leave to discontinue without prejudice to

<sup>123</sup> See *McCormack v. Security Mut. Life Ins. Co.*, 116 N.E. 74, 76 (N.Y. 1917) (stating that motion by both sides for directed verdict implies consent to judge determining issues); *accord* *Smith v. Weston*, 54 N.E. 38, 39 (N.Y. 1899); *Daly v. Wise*, 30 N.E. 837, 838 (N.Y. 1892); *Dillon v. Cockcroft*, 90 N.Y. 649, 650-51 (1882); *McCall v. Sun Mut. Ins. Co.*, 66 N.Y. 505, 517 (1876); *Leggett v. Hyde*, 58 N.Y. 272, 275 (1874).

By an amendment to Civil Practice Act section 457-a in 1940, the rule changed and a motion for a directed verdict no longer waived the right to trial by jury. See N.Y. CPLR 4401 (McKinney 1992) ("Any party may move for judgment . . . . The motion does not waive the right to trial by jury . . . ."); see also *In re La Manna*, 259 N.Y.S.2d 987, 988 (4th Dep't 1965) ("Even though both sides moved for directed verdict, this did not waive right to trial by jury . . . ."); *McTiernan v. Little Falls*, 130 N.Y.S.2d 214, 215 (4th Dep't 1954) (stating that defendant could have reserved or requested right to jury trial).

<sup>124</sup> Over fifty years earlier, the New York Court of Appeals had a similar situation in which a plaintiff in a jury trial sought to avoid the effect of a warranty on the theory of estoppel and recovered judgment against the defendant insurer. That judgment was reversed by the General Term. *McCall v. Sun Mut. Ins. Co.*, 7 Jones & Spen. 330, 338 (1875), *rev'd*, 66 N.Y. 505 (1876). On further appeal, the Court of Appeals reversed the General Term and the plaintiffs' judgment was reinstated. *McCall*, 66 N.Y. at 517 (1876). The court held that the facts pleaded and proved justified reformation by striking out the warranty, and that since the defendant had moved for a directed verdict, it was proper for the trial court to find the necessary facts. *Id.*; see also *Meyer v. Lathrop*, 73 N.Y. 315, 320-22 (1878) (applying reformation theory on appeal to uphold finding of referee who accepted parol evidence on erroneous interpretation theory).

The only legitimate concern underlying *Jackson v. Strong* was that a defendant's right to trial by jury on a legal claim not be bypassed. *Kwiatkowski* was the reverse of *Jackson*; the legal claim failed at trial and the proof disclosed an equitable claim. If, although doubtful, the significance of the facts might have been different under a reformation analysis than under an estoppel analysis, the New York Court of Appeals need not have affirmed, as it did in *McCall* and *Meyer*, but it could have remanded for a new trial.

<sup>125</sup> See *supra* text accompanying notes 33-37.



a new action.<sup>126</sup> In *Kwiatkowski*, the trial court admitted the evidence and the plaintiff obtained judgment in her favor. All seemed well. It was not until her judgment was reversed in the New York Court of Appeals that she learned of her procedural misstep. When this happened in *Jackson v. Strong*, the Court of Appeals reversed the judgment and granted a new trial. The ultimate insult to Ms. Kwiatkowski lay in the court's final disposition of her action—complaint dismissed.<sup>127</sup>

<sup>126</sup> See *Arthur v. Homestead Fire Ins. Co.*, 78 N.Y. 462, 466-67 (1879) (noting that lower court gave plaintiff leave to amend complaint), *modified*, 79 N.Y. 640 (1879); *Newman v. Resnick*, 238 N.Y.S.2d 119, 123 (Sup. Ct. N.Y. County 1963) (granting plaintiff leave to serve amended complaint for legal relief).

<sup>127</sup> This holding, under a supposedly merged system, was less liberal than contemporary federal cases under a system in which law and equity were formally separated. In a case similar to *Kwiatkowski*, the Fourth Circuit Court of Appeals agreed with the district court that, without reformation of an insurance policy, the plaintiff had no cause of action at law. However, the case was remanded to the equity side of the court because, as the court stated, the litigant should not be denied relief "to which upon his pleadings and proofs he is entitled, merely because his counsel have come in by the wrong door of the Court." *Clarksburg Trust Co. v. Commercial Cas. Ins. Co.*, 40 F.2d 626, 634 (4th Cir. 1930). A simple affirmation of the district court's judgment for the defendant would have finished the plaintiff because the short period of limitations written into the policy had expired. *Cf. Arthur*, 78 N.Y. at 467-70 (stating that plaintiff's cause of action that demanded equitable relief was unnecessary after legal cause of action).

In New York, then as now, a court had authority to grant a new trial when "necessary and proper." N.Y. CIV. PRAC. ACT § 584 (1921) (stating that "the appellate division of the supreme court, or appellate term, ... shall ... render judgment ... except where it may be necessary or proper to grant a new trial."); *Gerbig v. Zumpano*, 165 N.E.2d 178, 181 (N.Y. 1960) (reversing judgment and granting new trial). Under N.Y. CIV. PRAC. ACT §§ 23 (1921), it was not necessary to dismiss Kwiatkowski's complaint. "If an action is commenced ... and a judgment therein is reversed on appeal without awarding a new trial ... the plaintiff ... may commence a new action for the same cause ... ." N.Y. CIV. PRAC. ACT § 23 (1921); *see also* *Walrath v. Hanover Fire Ins. Co.*, 110 N.E. 426, 427-28 (N.Y. 1915) (reversing judgment for plaintiff on written contract but granting new trial on possible claim on oral contract); *Ripley v. Aetra Ins. Co.*, 30 N.Y. 136, 164-65 (1864) (reversing judgment based on written contract but recognizing possible reformation claim and granting new trial). *Cf. New York Ice Co. v. North W. Ins. Co.*, 23 N.Y. 357, 359-60 (1861) (stating that it was error to dismiss legal claim on contract where reformation claim was not established at trial).

To be distinguished are cases where the New York Court of Appeals dismissed a complaint after reversing a plaintiff's judgment because it was clear that no viable alternative existed. *Model Bldg. & Loan Ass'n v. Reeves*, 140 N.E. 715, 718 (N.Y. 1923) (reversing money judgment erroneously granted on equitable claim; finding that facts disclosed purely legal claim for money had and received; and dismissing complaint because such action was barred by statute of limitations); *accord Saperstein v. Mechanics' & Farmers' Sav. Bank*, 126 N.E. 708, 710 (N.Y. 1920) (finding that plaintiff was not entitled to either legal or equitable relief and reversing judgment); *Whalen v. Stuart*, 87 N.E. 819, 822 (N.Y. 1909) (reversing judgment and

As stated earlier, under *Steinbach*, the final judgment in Kwiatkowski's action on the contract precluded her from starting a new action to recover the same proceeds on a different theory. One can only speculate whether the New York Court of Appeals had this case in mind when it finally dismissed her complaint. Given the cases on the books at the time, it would have required great prescience on the part of her lawyer to have anticipated the cul-de-sac into which the case was eventually steered. Indeed, once the trial court admitted the evidence contradicting the written warranty, the plaintiff's fate was out of her lawyer's hands; the favorable verdict and the appellate process inexorably led to a final dismissal of the complaint.

Readers will have to decide for themselves whether the law should have allowed Kwiatkowski another chance at having her evidence heard in a reformation action. Many will say too bad, there are hundreds of bungled cases where the lawyers or the courts or both get it wrong the first time; that is not a reason to allow a second action on the same claim; finality means finality, right or wrong. For this writer, the case seems sufficiently analogous to the *Steinbach* and *Northern Assurance* cases relied on by the Law Revision Commission, in which claim preclusion was deemed inappropriate because the claim presented in the second action never had a fair chance of being heard in the first one. This is not to applaud the statute adopted on the Commission's recommendation. In the first place, the statute is overbroad in relation to its legitimate rationale as applied to plaintiffs while ignoring the same issue in relation to defendants.<sup>128</sup> In the second place, any legitimate cases (now necessarily rare) in which a second action is justified can be better accommodated within the claim preclusion doctrine as flexibly developed in the case law.<sup>129</sup>

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dismissing plaintiff's complaint).

<sup>128</sup> See *supra* text accompanying notes 81-86.

<sup>129</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 25, cmt. h., illus. 15 (1982) suggests that road blocks erroneously placed on a plaintiff's ability to present a new theory of recovery are correctable on appeal and should not diminish the preclusory effect of a resulting final judgment. *Id.* The comments do not address the problem of road blocks imposed by the court of last resort. Section 26(1)(c), comment (c), states that where "formal barriers" operated to deprive a plaintiff of a meaningful opportunity to obtain relief theoretically applicable to the facts of the case, "it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first." *Id.* § 26(1)(c), cmt. c.

## CONCLUSION

The predecessor of section 3002(d) of the CPLR was anomalous when it was enacted in 1939. Not only was it incompatible with claim preclusion theory as it stood at the time, but the legitimate difficulty identified in the *Steinbach* and *Northern Assurance* cases had largely become obsolete through federal court reform. Even with reference to election of remedies, the statute was an unnecessary attempt to solve a nonexistent problem.<sup>130</sup>

Developments in claim preclusion doctrine since the statute's enactment only accentuate its regressive character. Facts relevant to the meaning of a written contract and facts supporting reformation of the contract certainly arise from the same transaction when applied to the same performance obligation.<sup>131</sup> If the Restatement of Judgments and recent New York Court of Appeals cases are good law, the statute is bad law and deserves repeal.

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<sup>130</sup> It has long been held in New York that mere commencement of an action on a written contract, without a final judgment on the merits, is not a conclusive election of remedy barring a later action to reform the contract and recover on it as reformed. *Baird v. Erie R.R.*, 104 N.E. 614, 616 (N.Y. 1914); *Arthur*, 78 N.Y. at 466-70 (1879) (decided same year as *Steinbach*).

In both *Baird* and *Arthur*, the plaintiffs in their earlier actions suffered nonsuits, and no case was submitted to the juries for verdicts. Such a disposition was not then considered a final judgment on the merits and did not operate to preclude a later action on the same claim. 2 FREEMAN, *supra* note 16, §§ 724, 755. Similar to the effect of a successful demurrer to a complaint, a nonsuit was only conclusive as to the insufficiency of the same evidence when presented in support of the same theory in a second trial. *Id.* Modern practice is substantially different. See RESTATEMENT (SECOND) OF JUDGMENTS § 20(b), cmt. f.-g. (explaining effects of voluntary and compulsory nonsuits); see also SIEGEL, *supra* note 34, §§ 297-98 (discussing discontinuance of action by plaintiff).

In *Steinbach*, the plaintiff in the New York action had previously been defeated in a Maryland federal action, which had gone to final judgment based on a jury verdict. *Steinbach v. Relief Fire Ins. Co.*, 80 U.S. (13 Wall.) 183 (1871). Not only did the Report of The New York Law Revision Commission, *supra* note 1, fail to analyze the peculiar circumstances arising from the limited subject matter jurisdiction of the pre-merger federal court system, but it apparently failed to appreciate the difference then existing between a nonsuit and a final judgment.

<sup>131</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 25, illus. 20 (1982) (illustrating situation where plaintiff who brings legal action for money damages and later sues in equity to reform contract will present evidence of parties' intentions in both cases).