inviolate function of the legislature and which affected the right or duties of the citizens of the state. They pronounced the rule with that in mind. Such application was carrying out the purpose and policy of the rule.

In the *Harbage* case, no such situation prevails. Impeachment of the journals will not interfere with the legislature in its official duties nor will it confuse the rights of the public. In applying the doctrine to the present facts certain questions should be asked. Does the legislature's appropriation of unearned mileage allowance to itself constitute a situation similar to the decided cases? Will the questioning of the journal records in this case violate the separation of powers? Does it upset the rights and duties of the people by disclosing a mere procedural defect? These questions must be answered in the negative. Every rule of law should have a reason and a purpose and these should be kept in mind. Otherwise, by blind application, the court becomes a legal mechanic and not a referee dispensing justice. Allowance of parol testimony to show the actual facts here will not violate either of the policies giving rhyme and reason to the rule.

Here is a case which falls without the rule and the latter should not be mouthed by courts divorced from the purpose and policy which created it. Here is not a respected and impeccable legislative action, but here is merely a legislative "steal"—a recompense for doing nothing.

At this writing, *Harbage* v. *Tracy* is still in the throes of controversy in the court of common pleas, but if the case be appealed, it will be hoped the superior courts will abstain from a mechanical adherence to a rule which has no relation to the facts at hand.

JAMES M. GORMAN

EQUITY

THE FUSION OF LAW AND EQUITY — VENDOR AND PURCHASER

The Supreme Court of Ohio has recently considered the question whether a vendor in an executory contract of sale containing dependent covenants may, after tender of deed and deposit thereof in court, maintain an action at law on such executory contract for the unpaid purchase price. The court repudiated the holdin gof the Court of Appeals for the Ninth District[1] on this point of law, although it affirmed the decision because the tender was not good in fact.[2]

The two traditional remedies available to the vendor, upon default

[1] *Fairlawn Heights Co.* v. *Theis*, 27 Ohio L. Abs. 19 (1938).
[2] *Fairlawn Heights Co.* v. *Theis*, 133 Ohio St. 387, 14 N.E. (2d) 1 (1938).

of the vendee in an executory contract, were an action at law for damages for breach of the contract[3] or a suit in equity for specific performance.[4] There is a pronounced divergence of opinion as to the availability of a third remedy; *viz.*, an action at law on the contract for the purchase price, which was sought in the principal case. A substantial minority allow such an action at law,[5] thus awarding what really amounts to specific performance in a legal action.[6] However, other jurisdictions

[3] *Eisenstadt* v. *Lucke*, 25 Ohio C.C. (N.S.) 225, 35 Ohio C.D. 244 (1915); see cases collected in 52 A.L.R. 1511 (1928).

[4] *The Eleventh St. Church, etc.* v. *Pennington*, 18 Ohio C.C. 408, 10 Ohio C.D. 74 (1896); *Brewing Co.* v. *Maxwell, et al.*, 78 Ohio St. 54, 84 N.E. 595 (1908).

[5] *California: North Stockton Lot Co.* v. *Fischer*, 138 Cal. 100, 70 P. 1082 (1902); *Bonner* v. *Finney*, 110 Cal. App. 518, 294 Pac. 466 (1930); *Amaranth Land Co.* v. *Corey*, 182 Cal. 66, 186 Pac. 765 (1920). *Code of Civil Procedure adopted* 1850.

Colorado: Gilpin Co. Mining Co. v. *Drake*, 8 Colo. 586, 9 Pac. 787 (1886); *Code of Civil Procedure* adopted 1877.

Georgia: Morris v. *McKee*, 96 Ga. 611, 24 S.E. 142 (1895); *Reed* v. *Dougherty*, 94 Ga. 661, 20 S.E. 965 (1894); see also *Crim* v. *Southern Realty Co.*, 38 Ga. App. 502, 144 S.E. 342 (1928). Georgia is a *quasi-code* state. See, CLARK, CODE PLEADING, p. 19.

Idaho: Smith v. *Independent School District*, 48 Idaho 295, 282 Pac. 84 (1929). *Code of Civil Procedure* adopted 1864.

Illinois: Gray v. *Meek*, 199 Ill. 136, 64 N.E. 1020 (1902); *Thurman* v. *Alcott*, 235 Ill. App. 545 (1924). (Ill. is a *common-law* state.)

Maine: Oatman v. *Walker*, 33 Me. 67 (1851).

Michigan: Kreuger v. *Campbell*, 264 Mich. 449, 250 N.W. 285, *dictum* (1933); *St. John* v. *Richard*, 272 Mich. 670, 262 N.W. 437 (1935).

Mississippi: Hodges v. *Moore*, 102 Miss. 432, 59 So. 827 (1912). Miss. is a *quasi-code* state. See CLARK, CODE PLEADING, p. 19.

Nevada: Southern Pac. Co. v. *Miller*, 39 Nev. 169, 154 Pac. 929 (1916); Adopted *Code of Civil Procedure* 1860.

North Carolina: Garrard v. *Dollar*, 49 N.C. 175, 67 Am. Dec. 271 (1856); *Paschal* v. *Brandon*, 79 N.C. 505 (1878). Adopted *Code of Civil Procedure* 1868.

Oklahoma: Dubois v. *Andrews*, 57 Okla. 227, 152 Pac. 440 (1916) (suit on a note); but see *Scott* v. *Norris*, 62 Okla. 292, 162 Pac. 1085 (1917). *Code of Civil Procedure* adopted 1890.

Pennsylvania: McClenachan v. *Malis*, 310 Pa. 99, 164 Atl. 780 (1933); *Heights Land Co.* v. *Swengel's Estate*, 319 Pa. 298, 179 Atl. 431 (1935) (where the court held an action for the purchase price was really a substitute for specific performance). Pa. is a *quasi-code* state. See CLARK, CODE PLEADING, p. 19.

Texas: Phillips v. *Macabees*, 50 S.W. (2d) 478 (1932).

Virginia: Turner v. *Hall*, 128 Va. 247, 104 S.E. 861 (1920).

Washington: Stevens v. *Irwin*, 132 Wash. 389, 231 Pac. 783 (1925).

Wisconsin: Foster v. *Lowe*, 131 Wis. 54, 110 N.W. 829 (1907); *Oconto Co.* v. *Bacon*, 181 Wis. 538, 195 N.W. 412, 40 A.L.R. 175 (1923); *Jefferson Gardens, Inc.* v. *Terzan*, 216 Wis. 230, 257 N.W. 154 (1934). Adopted *Code of Civil Procedure* 1856.

Iowa and New York have overruled their positions allowing the vendor to recover the purchase price at law. See: *Prichard* v. *Mulhall*, 127 Iowa 545, 103 N.W. 774, 4 Ann. Cas. 789 (1905), overruling the view in *Goodpaster* v. *Porter, et al.*, 11 Iowa 161 (1860); also *Bensinger* v. *Erhardt*, 74 App. Div. 169, 77 N.Y. Sup. 577 (1902), overruling *Richards* v. *Edick*, 17 Barb. (N.Y.) 260 (1853). But see *Queen's Park Garden* v. *Spar*, 234 N.Y. Sup. 404 (1929), where the contract gave the vendor an option to sue for the purchase price. Those cases allowing such an action by the vendor while still possessed of the title and property, proceed upon the theory that, although the action is in form at law, it still invokes the equitable powers of the court to such a degree as to enable it to make such orders and directions in respect to enforcement of the judgment as to protect all parties concerned.

[6] "An action at law by the vendor for the unpaid purchase price of an executory contract is in effect an action for specific performance of the contract." *Black, et al.* v. *American International Corp.*, 264 Pa. 260, 107 Atl. 737 (1919); *Hoover, et al., Exrs.* v.

adopt the position that no such remedy exists at law, but that the vendor is confined to his remedies of specific performance or an action for damages for breach of contract.[7]

Though the court in the principal case purported to follow *Will-O-Way Development Co.* v. *Mills*,[8] this question had never previously been passed upon in Ohio by the highest tribunal.[9] The Court of Appeals for the Fourth District held, on comparable facts in *Rowland, Adm'r, etc.* v. *Stout, Ex'r, etc.*,[10] precisely the contrary view to that considered in the principal case; that is, that such an action at law would not lie. It would seem, however, that the principal case lays down the present rule in Ohio, although the Supreme Court did not distinguish the *Rowland* case or mention it in the opinion. The theory of the Supreme Court was that the allowance of such an action was sanctioned by the liberality of procedure and practice established by the

[7] *Alabama: Maury* v. *Unruh*, 220 Ala. 455, 126 So. 113 (1930); Alabama is a *quasi-code* state. See CLARK, CODE PLEADING, p. 19.

Florida: Wood Hoskins Young Co. v. *Dittman*, 102 Fla. 1000, 136 So. 710 (1931). Florida adopted the *Code of Civil Procedure* in 1870, but repudiated it in 1873 and went back to the common law system.

Indiana: Goodwine v. *Kelley*, 33 Ind. App. 57, 70 N.E. 832 (1904). Adopted *Code of Civil Procedure* 1852.

Iowa: Prichard v. *Mulhall*, 127 Ia. 545, 103 N.W. 774, 4 Ann. Cas. 789 (1905); But see *First Nat. Bank* v. *Le Barron*, 201 Iowa 853, 208 N.W. 364 (1926). Adopted *Code of Civil Procedure* 1851.

Massachusetts: Old Colony R. R. Co. v. *Evans*, 72 Mass. (6 Gray) 25 (1856). Mass. is a *quasi-code* state. See, CLARK, CODE PLEADING, p. 19.

Minnesota: Freeman v. *Paulson*, 107 Minn. 64, 119 N.W. 651, 131 Am. St. Rep. 438 (1909). See also *Noyes* v. *Brown*, 171 N.W. 803 (1919), effect of independent covenants.) *Code of Civil Procedure* adopted 1851.

Missouri: Scudder v. *Waddingham*, 7 Mo. App. 26 (1879). Adopted *Code of Civil Procedure* 1849.

Nebraska: Colson v. *Johnson*, 111 Neb. 773, 197 N.W. 674, 35 A.L.R. 924 (1924). Adopted *Code of Civil Procedure* 1855.

New Hampshire: Griswold v. *Sabin*, 51 N.H. 167 (1871).

South Dakota: Jones v. *Tschetter*, 46 S.D. 520, 194 N.W. 839 (1923). Adopted *Code of Civil Procedure* 1862.

[8] 122 Ohio St. 242, 171 N.E. 94 (1930).

[9] Distinguish the cases allowing recovery of purchase price, on theory of equitable conversion, when the vendee is in possession. *Woloveck* v. *Schueler*, 19 Ohio App. 210 (1922); *Purcell* v. *Heeny*, 28 Ohio St. 39 (1875).

Compare Ohio Gen. Code Sec. 11902, wherein it is stated that in actions for recovery of purchase price of real estate, the vendee may set up the defense of breach of covenants of title by way of counter-claim, the statute presupposing the vendee in possession and holding title. For interpretation, see *Cincinnati* v. *Brachman*, 35 Ohio St. 289 (1880).

[10] 8 Ohio L. Abs. 376 (1930) [approved by Court of Appeals in *Fairlawn Heights Co.* v. *Theis*, 27 Ohio L.Abs. 19 (1938)]. Mauch, J., speaking for the court, felt that their position was even more secure due to the fact that the court through Allen, J., in *Will-O-Way-Development Co.* v. *Mills* (see note 8, *supra*.) expressly approved *Prichard* v. *Mulhall*, 127 Iowa 545, 103 N.W. 774, 4 Ann. Cas. 789 (1905), which stated that, "Upon breach by the vendee of an executory contract of sale of land, the vendor's remedy is an action for specific performance or at law for damages, and an ordinary action for the recovery of the purchase price will not lie." Mauch, J., also pointed out that there was no necessity in the *Will-O-Way* case to decide whether an action at law for the purchase price was maintainable, for there was no proper tender.

code. An examination of the record and parties' briefs in the principal case demonstrates that all concerned, both court and counsel, thought of this action as purely legal, for the pleadings were so drawn and the judgment so framed as to constitute an action for the recovery of money only.

A single court of law and equity combined has taken the place of the former independent and separate courts of law and equity since the adoption of the Code of Civil Procedure in 1853.[11] There now exists but one system of jurisprudence to be administered in an action called a "civil action,"[12] the distinction between actions at law and suits in equity having been abandoned so far as relates to mere matters of form and procedure.[13] If a cause of action is stated in the pleadings, the nature and character of relief to be awarded is determined by the court, whether legal or equitable, or both, according to the facts pleaded,[14] and the mere form of the action is to be disregarded.[15] However, the Code expressly states that no substantive rights are affected thereby.[16] "What was equitable continues to be equitable, and what was legal continues as before. But all forms of relief may be had under the Code in a single action, settling every controversy between the parties, whether legal or equitable."[17]

[11] "This system can not be called either legal or equitable as these terms were anciently used. It is a combination of the two, wherein the substantive jural relation enforced by the court in the first instance is the same as would ultimately have been preserved under the old system by a roundabout method of a proceeding in equity to prevent its unenforcement at law." 32 Yale L.J. 701 (1922).

[12] Ohio Gen. Code Sec. 11238: "There shall be but one form of action, to be known as a *civil action*. This requirement does not affect any substantive rights of liability, legal or equitable." For definition of a "civil action," see *Barger* v. *Cochran*, 15 Ohio St. 460 (1864); *State ex rel Board of Education* v. *Steeley*, 21 Ohio App. 396, 153 N.E. 285 (1926).

[13] *Klonne* v. *Bradstreet*, 7 Ohio St. 322 (1857); *Neilson* v. *Fry*, 16 Ohio St. 552, 91 Am. Dec. 110 (1865); *Culver* v. *Rodgers*, 33 Ohio St. 537 (1878); *Porter* v. *Wagner*, 36 Ohio St. 471 (1880). But see *De Ran* v. *Colonial Savings Bank & T. Co.*, 20 Ohio App. 370, 152 N.E. 303 (1925); *Raybuck* v. *Raybuck*, 25 Ohio App. 365, 157 N.E. 831 (1927).

[14] *Wilson* v. *Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477 (1859); *Culver* v. *Rodgers*, 33 Ohio St. 537 (1878); *Chapman* v. *Lee*, 45 Ohio St. 356, 13 N.E. 736 (1887); *Wall* v. *Federation Co.*, 121 Ohio St. 334, 337, 168 N.E. 847 (1929). See, *Routson* v. *Jackson*, 21 Ohio N.P. (N.S.) 521, 528, 30 Ohio D.N.P. 145 (1918) (affirmed by Court of Appeals, motion to certify record overruled in 17 Ohio L. Rep. 363, 64 Bull. 462), which states, "Where a petition states a case which entitles the plaintiff, to an equitable remedy but furnishes no basis for legal relief, the court may disregard the prayer if it be for a judgment at law, and grant the appropriate equitable remedy."

[15] See note 12, *supra*.

[16] See note 11, *supra*; also, *Glass* v. *Courtright, et al.*, 14 Ohio N.P. (N.S.) 273, 23 Ohio Dec. 253, 58 W.L.B. 165 (1913); *Hollowell* v. *Schrader*, 96 Ohio St. 599 (1917) (memorandum opinion following *Wagner* v. *Armstrong*, 93 Ohio St. 443, 113 N.E. 397 (1910); Cook, Equitable Defenses, 32 Yale L.J. 645 (1923); Clark, The Union of Law and Equity, 25 Col. L. Rev. 1 (1925).

[17] WALSH, EQUITY (text-book ed-1930), 98-note 3; See 16 Ohio Jur., Equity, at p. 28: "The result, in general, is that equitable principles and modes of procedure may be

The court in the principal case stated, "Actually this procedure is equivalent to a suit for specific performance, since the vendor is asking payment of the agreed consideration in exchange for his deed, and its sanction accords with the liberality established by our Code of Civil Procedure."[18] The above statement evidences a shift by the Supreme Court in legal theory; that is, as before stated, the action was treated by the Counsel and Court as being purely legal and one for the recovery of money only (a jury trial having been given), whereas the Supreme Court treated it as equitable. If we have only one form of action in Ohio, is it material whether we call it an action for the recovery of money only or a suit for specific performance of the contract?[19] If, as the Supreme Court stated, a judgment for the full purchase price under an executory contract of sale is virtually a decree of specific performance, it would seem advisable to inquire whether legal administrative devices are adequate for specific performance. Will the equitable doctrines of discretion, laches, mistake, hardship, *etc.*, be utilized in administering relief in actions such as this which aim at specific performance? Must a contract be capable of specific performance before the court will render a judgment for the purchase price? It has always been held that: "A decree of specific performance is not a matter of right but of grace, granted on equitable principles, and rests in the sound discretion of the court. This discretion is not, however, arbitrary or capricious, nor is it

applied, under the Codes, to actions which formerly would have been legal, and that as to equitable actions, remedial rights formerly existing are unimpaired."

But see Marshall, Ch. J. (dissenting), in *Union Savings Bank & T. Co.* v. *Alter*, 103 Ohio St. 188, 215, 132 N.E. 834 (1928) " . . . equity is a separate system of jurisprudence having fixed precedents and principles." For general discussion see Sidney Thompson, "Fifty Years of American Equity," 50 Harv. L. Rev. 171-252 (1937).

The code in New York caused much dissension on the bench. J. Selden, in *Reubens* v. *Joel*, 13 N.Y. 488, 491 (1856), stated that the two modes of relief (legal and equitable) could not be made identical. He conceded the possibility of abolishing one or the other, or both, but thought that the distinctions between them could not be abolished. " . . . They cannot make trial by jury and trial by court the same thing." Accordingly, he continues, the only way we can have a homogeneous form of action for all cases "is by abolishing both the forms of trial and the mode of relief in one or the other of the two classes of actions. . . . " This, admittedly, the legislature has no power to do, and he therefore concludes that "the essential distinctions between actions at law and suits in equity are preserved." To same effect see *Jackson* v. *Strong*, 222 N.Y. 149, 18 N.E. 512 (1917).

But see *N. Y. Ice Co.* v. *The North Western Ins. Co.*, (1861), where Comstock, J., thought anything beyond the decision in *Reubens* v. *Joel* was individual opinion only. For comment on the N. Y. cases see 32 Harv. L. Rev. 166 (1918).

[18] See note 2, *supra*.

[19] A seeming conflict in statements is contained in the syllabus, by the court, in the principal case. In paragraph two (2) it is stated, "The vendor . . . *may maintain an action on the contract* for the unpaid purchase price. . . . " In paragraph three (3) the court said, "Before the vendor *can enforce the payment* of the full purchase price. . . . " Query whether the court realized the implication of the above statements. Is not an action on a contract commonly thought of as being legal, whereas an attempt to *enforce* payment is considered equitable?

governed by the mere pleasure of the court, or by the chancellor's whims, but it is a judicial discretion controlled by the established doctrines and settled principles of equity, and by considerations of justice and fair dealing."[20] The general rule is that specific relief will be granted when it is apparent that it will subserve justice; and it will be withheld when it appears that it will produce hardship to the defendant.[21] If the contract is not certain in its terms,[22] and if the undertaking to be enforced is not founded upon a sufficient and actually valuable consideration, the specific performance will be withheld.[23] If the agreement is voluntary, no relief is obtainable in equity.[24] A vendor who comes into equity to enforce the payment of the purchase price must have performed or made all reasonable efforts towards performance of the obligations on his side of the contract.[25] Other factors given consideration by the courts of equity before their discretion is exercised are laches,[26] fraud,[27] duress,[28] mistake,[29] marketable title,[30] *etc.* The judgment rendered in the principal case was conditioned upon proper tender of deed and deposit of the same in court. A condition of marketable title was also imposed. All of the foregoing discretionary and extraordinary principles were developed because specific performance was necessary for more adequate relief in the contract area. The court of appeals in the principal case thought of the action under discussion as one before a court of law.[31] However, the attitude of the Supreme Court was slightly different. It can best be summarized by a quotation from its opinion: "The Code of Civil Procedure, effective since 1853, abolished the distinctions between actions at law and suits in equity. Under our system of jurisprudence, the same court is vested with law and chancery jurisdiction. Consequently the general jurisdiction of the court of common pleas, both at law, and in

[20] 37 Ohio Jur., p. 24 *et seq.*, and cases there cited.

[21] *Ambrose* v. *Kuhn*, 11 Ohio Dec. Rep. 338, 26 Bull. 127 (1891); *Huntington* v. *Rogers*, 9 Ohio St. 511 (1857).

[22] *State* v. *Baum*, 6 Ohio 383 (1834); *Trent Mill Co.* v. *Wells-Abbott-Nieman Co.*, 10 Ohio App. 297 (1918); *Lindner Co.* v. *Myrod Shoe Co.*, 38 Ohio App. 182, 175 N.E. 879 (1930); 25 R.C.L., p. 218.

[23] *Hite* v. *Hite et al.*, 120 Ohio St. 253, 166 N.E. 193 (1929); *Douglas* v. *Dangerfield et al*, 10 Ohio 152 (1840).

[24] *State* v. *Baum*, 6 Ohio 383 (1834); *Moeller* v. *Poland*, 80 Ohio St. 418, 89 N.E. 100 (1909).

[25] *Wilson* v. *Tappan*, 6 Ohio 172 (1834); *Tuttle* v. *Burgett*, 53 Ohio St. 498, 42 N.E. 427, 30 L.R.A. 214, 53 Am. St. Rep. 649 (1895); *Brown* v. *Haines*, 12 Ohio 1 (1851).

[26] *Harris* v. *Wallace Mfg. Co.*, 84 Ohio St. 104, 95 N.E. 559 (1911). 16 Ohio Jur., *Equity*, p. 192 *et seq.*

[27] See annotation in 87 A.L.R. 1345.

[28] 25 R.C.L., p. 240.

[29] 25 R.C.L., p. 241; 65 A.L.R. 97.

[30] *Galloway* v. *Barr*, 12 Ohio 354 (1843); *Tiffin* v. *Shawhan*, 43 Ohio St. 178, 1 N.E. 581 (1884); *Walker* v. *Scott*, 7 Ohio App. 335, 29 O.C.A. 89 (1914).

[31] See note 1, *supra*.

equity, renders the question involving the boundary line between law and chancery of less practical importance in the administration of justice than under judicial systems where courts of law and chancery were distinct tribunals, or where the two forms of action were strictly preserved in the same court."[32] Perhaps the Supreme Court was acting in accordance with a general desire for simplifying practice and unifying law and equity. Under the Code, the differences between specific and substitutionary relief and discretionary and rigid application of remedies have no longer a reason for existence.[33] The Ohio General Code states that: "The defendant may set forth in his answer as many grounds of defense, counter-claim, or set-off as he may have, whether such as heretofore been denominated legal, or equitable, or both."[34] Since the vendee may not have any defenses cut off that would have been available in an action for specific performance, and the court can impose conditions such as marketable title and proper tender of deed and deposit thereof in court, as was done in the principal case, it would seem that complete relief can be given in the "civil action."[35]

Though the holding of the principal case adequately disposed of the controversy between this plaintiff and defendant, it is appropriate to give some consideration to the implications and inferences that may arise in future cases as a result of allowing an action for the purchase price. Though the only object of the action was to require the defendant to pay money, if the complaint contains allegations sufficient to maintain an action for specific performance, the demand for a money judgment should not necessarily control, characterize the action, or limit the plaintiff in respect to the remedy which he may have.[36] Merely because the plaintiff has demanded judgment for a sum of money should not, under the Code of Civil Procedure, preclude the recovery of the same amount by way of equitable relief if the facts entitle the plaintiff to such relief. "An action for specific performance of a contract for the sale of land is, in substance, an action to recover the purchase price of land."[37] But, though there was no necessity for discussion of such questions as the right to trial by jury and the right to appeal in the present case, these problems will indubitably arise in the future, and these constitutional rights may be used as a means of testing the procedure used by the Ohio Supreme Court.

[32] Citation note 2, *supra*, at page 393.

[33] See 3 WILLISTON, CONTRACTS, Sec. 1376 (1931) where he states that where the courts of law can reach the same results as a court of equity, the court of law should invade the province of equity if the equity rule is more just.

[34] Ohio Gen. Code, Sec. 11316.

[35] See note 11, *supra*.

[36] *Bensinger* v. *Erhardt*, 74 App. Div. 169, 77 N.Y. Supp. 577 (1902).

[37] See note 6, *supra*.

Those who feel that old distinctions are inherent in the nature of things ultimately argue the constitutional right of trial by jury. In Ohio, such right is preserved and cannot be invaded or violated by either legislative act or judicial decree.[38] The Ohio General Code recites in part, " . . . Issues of fact arising in actions for *the recovery of money only*, or specific real or personal property, shall be tried by a jury unless a jury trial be waived . . . "[39] Since, before the Code of Civil Procedure was adopted, the existence of separate tribunals kept court and jury trials apart, the question is substantially an historical one as to the situation that existed at the time of the adoption of the Code.[40] Whether an action is triable to a court[41] or to a jury is determined by the issues presented, and relief required at the time of the trial.[42] The courts of Ohio have been in some disagreement as to the meaning of "actions for the recovery of money only."[43] The Supreme Court held in one group of cases that the legislature had, by force of the statute, extended the right of trial by jury to issues of fact arising in actions for the recovery of money only, even though "the action may be founded on principles which are of an equitable nature and origin."[44] However, a later case held that "this section[45] does not extend the right of trial by jury to cases which call for any form of relief peculiar to a court of equity."[46] The code provisions in a majority of code states enumerate, as does the Ohio code,

[38] *Newnam's Lessee* v. *Cincinnati*, 18 Ohio 323 (1849); *Gibbs* v. *Girard*, 88 Ohio St. 34, 102 N.E. 299 (1913). Under the Ohio Bill of Rights, "the right to trial by jury should be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Ohio Const., Art. 1, Sec. 5; See: *Work* v. *State*, 2 Ohio St. 296, 59 Am. Dec. 671 (1853).

[39] Ohio Gen. Code, Sec. 11379, (italics inserted). For history of section, see *Ireland* v. *Cheney*, 129 Ohio St. 527, 2 Ohio Op. 523, 196 N.E. 267 (1935).

[40] *Wagner* v. *Armstrong*, 93 Ohio St. 443, 113 N.E. 397 (1910); *Ireland* v. *Cheney*, 129 Ohio St. 527, 2 Ohio Op. 523, 196 N.E. 267 (1935).

[41] Ohio Gen. Code, Sec. 11380: "All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred."

[42] *Taylor* v. *Brown*, 92 Ohio St. 287, 110 N.E. 739, 63 W.L.B. 184 (1915); *Brick & Mining Co.* v. *Schatzinger*, 16 Ohio C.C. (N.S.) 356, 28 Ohio C.D. 654 (1905).

[43] See note 38, *supra*.

[44] *Webb* v. *Stasel*, 80 Ohio St. 122, 88 N.E. 143 (1909); *Improvement Co.* v. *Malone*, 78 Ohio St. 232, 85 N.E. 51 (1908), overruling *Black* v. *Boyd*, 50 Ohio St. 46, 33 N.E. 207 (1893)—"If the relief sought is a judgment for money only, the fact that before the adoption of our code the proper remedy would have been a suit in equity does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings." *Gansaullus* v. *Pettit*, 46 Ohio St. 27, 17 N.E. 231 (1888). See also *Hull* v. *Bell*, 54 Ohio St. 228, 43 N.E. 584 (1896).

[45] See note 38, *supra*.

[46] *Huling* v. *Columbus*, 13 Ohio N.P. (N.S.) 409 (1912); [affirmed, *Walcutt* v. *Huling*, 5 Ohio App. 326 (1913), affirmed *Walcutt* v. *Huling*, 92 Ohio St. 518 (1915), criticizing, *Lange* v. *Lange*, 69 Ohio St. 346, 69 N.E. 611 (1904); *Improvement Co.* v. *Malone*, 78 Ohio St. 232, 85 N.E. 51 (1908); *Webb* v. *Stasel*, 80 Ohio St. 122, 88 N.E. 143 (1909)]. See also 24 Ohio Jur., Jury, 144.

actions in which the right to trial by jury shall exist.[47] These statutes are generally construed as declaratory of the actions at law in which the right of trial by jury existed when the constitutional provision was established.[48]

It is generally agreed that trial by jury is in no way inconsistent with code merger of law and equity. If the facts pleaded call for legal relief (which the court must decide as a matter of law), the case should be tried to a jury; if equitable relief is needed instead of, or in addition to, legal relief, the judge presiding is a court of equity with full power to grant the relief required within the facts as pleaded and established.[49] "The jury should be considered only as one of several bodies available for determining the facts, as it is, and not as a central pivot about which the whole case revolves, the only result being to require the use of this particular body as the fact-finding machinery in this case."[50]

The test as laid down by this section[51] of the General Code is not whether a personal judgment is asked, but whether or not the action is for the "recovery of money only."[52] On the assumption that a vendor's suit for the purchase price under an executory contract of sale is an "action for the recovery of money only," the parties would be entitled to a jury trial. However, there is *dictum* in Ohio to the effect that "an action for the recovery of the entire purchase price would still be a pro-

[47] See references to codes of many states: CLARK, CODE PLEADING, 56, note 51. *Conn. Gen. St.* 1918, Sec. 5752: providing that all matters which, prior to Jan. 1, 1880, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, unless otherwise ordered, shall be heard and decided by the court without a jury, in the manner theretofore practised by the courts of equity.

[48] See cases cited CLARK, CODE PLEADING, p. 59, note 62; 35 C.J., p. 159 *et seq.* "Jury trial does not prevent the merger of systems, actions, and courts as expressly provided in the Code. . . . Just as the bringing together of law and equity does not change substantive equity or substantive law, so also it does not change, and was not intended to change, the method of trial of issues of fact used in applying legal and equitable remedies."—WALSH, EQUITY, 116 (1930). See also, *Schwindt* v. *Graeff*, 109 Ohio St. 404, 406, 142 N.E. 736 (1924); *Belding* v. *State*, 121 Ohio St. 393, 169 N.E. 301 (1929).

[49] WALSH, EQUITY, pp. 120-21 (1930), and cases there cited; Also, *Rowland* v. *Entrekin*, 27 Ohio St. 47 (1875); *Vose* v. *Murray*, 50 Ohio St. 19, 32 N.E. 1112 (1893); *Taylor* v. *Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915); *Mining Co.* v. *Schatzinger*, 16 Ohio C.C. (N.S.) 356, 28 Ohio C.D. 654 (1913).

[50] Comment, 32 Yale L.J. 707 (1922), showing history and development of the jury as a fact finding body. The writer concluded by saying that, "the jury is a kind of safety valve for the judicial system. It relieves the judges of the burden and odium of deciding close questions of fact in cases . . . where feelings of litigants are apt to run high. Surely it is a loss to extend the field of its application by the application of the constitutional strait jacket where not necessary."

See Clark, The Union of Law and Equity, 25 Col. L. Rev. 1 (1925); "This constitutional right (of trial by jury) causes sufficient bother in trials, is a sufficient hindrance to effective trial work; we ought, therefore, by no means to give more scope than it actually deserves."

[51] See note 38, *supra*.

[52] *Hague* v. *Hague*, 11 Ohio C.C. (N.S.) 406 (1908), *affirmed without opinion*, 81 Ohio St. 488 (1909); *Maginnis* v. *Schwab*, 24 Ohio St. 336 (1873); *Goble* v. *Howard*, 12 Ohio St. 165, 168 (1861).

ceeding for specific performance,"[53] and as before stated, the Supreme Court in the principal case made a statement very similar to the above *dictum*.[54] If such be true, in a civil action, where the facts stated in the petition and the nature of the relief primarily demanded are solely equitable, neither party can, of right, demand a jury trial.[55] However, in an action primarily for money, and where a personal judgment is claimed, though equitable relief is sought thereby, the parties may demand a jury trial.[56] Thus we see that a very real question may arise in the future as a result of the holding in the principal case. Another equally important possibility of controversy is the right of appeal. It would serve no immediate purpose to develop the history and present availability of this means of review, as was done above in the right to a jury trial, it being sufficient to suggest appealability as a difficulty that may arise from a court's holding that the vendor may maintain an action for the purchase price on an executory contract of sale.

Aside from the foregoing possible barriers, it would seem that if the vendor wishes to rely on a general money judgment, when the vendee is protected by the conditional decree, there is no real reason to refuse such relief when the facts stated show the plaintiff to have a cause of action, even though the granting of such necessitates a shifting of theory from that employed by counsel and the trial court. Whether this be considered as a suit for specific performance with a decree of money only, or a legal action for the recovery of money only with equitable principles carried over in the granting of the legal relief asked, at least the Supreme Court of Ohio erased the lines of demarcation between the two in the principal case, and did not, as the counsel for the plaintiff-appellant in their brief filed in the Supreme Court accused the court of appeals, "render a decision that is a 'throw back' to a system long discarded."

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[53] *Pierce* v. *Stewart*, 61 Ohio St. 422, 426, 56 N.E. 201 (1900) (no right to a jury trial in specific performance action). See, *Jones* v. *Booth*, 38 Ohio St. 405 (1892) [cited *Hull* v. *Bell*, 54 Ohio St. 228 (1896)]—an action for the specific performance of a contract and for the payment of money held for the court.

[54] See note 17, *supra*.

[55] *Rowland* v. *Entrekin*, 27 Ohio St. 47 (1875). But see *Hager* v. *Reed*, 11 Ohio St. 626, 635 (1860), where in an action for judgment value of stock contracted to be bought by the defendant, specific performance was decreed though it was not stated to be such an action, and the court held that it was competent for the court to permit the jury to find issues of fact, for their finding was approved by the court and judgment entered for the plaintiff.

[56] *Brundbridge* v. *Goodlove*, 30 Ohio St. 374 (1876).