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Civil Practice Act Cases - Action - Legal or Equitable - Propriety of Dismissal of Action for Plaintiff's Refusal to Consent to Transfer of Cause from Law to Equity Docket; Notes and Comments

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NOTES AND COMMENTS
CIVIL PRACTICE ACT CASES

ACTION — LEGAL OR EQUITABLE — PROPRIETY OF DISMISSAL OF ACTION FOR
PLAINTIFF'S REFUSAL TO CONSENT TO TRANSFER OF CAUSE FROM LAW TO EQUITY
DOCKET.—Plaintiff's complaint at law in Barger v. First National Bank of
Danville sought to recover damages for an alleged mismanagement of
his property caused by defendant's negligence. The facts disclosed there-
in, however, showed that actually the legal title to the property was in
the defendant and plaintiff's rights, if any, were those of a beneficiary
under a trust, hence equitable in nature. Defendant moved to dismiss
the complaint on the ground that it failed to state a cause of action at
law, since all questions relating to the establishment, enforcement, pro-
tection and preservation of trusts were properly cognizable in a court hav-
ing equitable jurisdiction. The trial judge indicated a willingness to
transfer the cause to the equity docket, but the plaintiff refused to permit
such change or to amend his complaint. Defendant's motion was there-
upon sustained and plaintiff's action was dismissed. On appeal from such
judgment, it was held that the trial court's action was warranted.

The historical differences between actions at law and proceedings in
equity were not eliminated by Section 31 of the Illinois Civil Practice
Act, and the pleader, in setting forth the cause of action, should not fail
to distinguish between the several possible theories supporting each and
the relative advantages and disadvantages incident to using one system
in preference to another. Furthermore, under Rule 9 of the Illinois
Supreme Court, the pleader must label his complaint as one “at law” or
“in chancery” and thus give warning as to the particular system to which
he addresses his case. In order, however, that the mistaken pleader's
client should not lose his rights by dismissal of an action erroneously
instituted, as would formerly have been the case, the Illinois Civil
Practice Act wisely provides that “any cause of action or counter-
claim may be transferred at any time, by order of the court, from the

1 310 Ill. App. 628, 35 N.E. (2d) 556 (1941).
2 The facts indicated that plaintiff, being indebted to the defendant bank, had
given an unconditional conveyance of his property. Plaintiff contended such
deed was, in fact, a mortgage, but the language used more nearly indicated a
conveyance with power of sale and authority to use the proceeds to pay the
debt due, hence not subject to defeasance.
4 Ill. Rev. Stat. 1941, Ch.110, § 155. See also Roger L. Severns, “Equity and
5 Not the least important consideration is the nature of the tribunal which
will ultimately hear the case. In the instant litigation, for example, plaintiff
would have been entitled to demand a trial by jury if he had been able to
6 Ill. Rev. Stat. 1941, Ch.110, § 259.9.
7 Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1923), where legal action was
brought and plaintiff's claim was equitable; Parker v. Shannon, 114 Ill. 192, 28
N.E. 1099 (1885), where equitable action was begun and plaintiff should have
sued at law.
law docket to the equity docket, or vice versa, as convenience and the nature of such action may require. . . ." Such provision was applicable in the instant case; and the plaintiff was offered an opportunity to preserve his rights, if any, by exercising the privilege it afforded, but he deliberately refused the proffered help. The judgment, therefore, became inevitable.

The language of Section 44 (2) of the Illinois Civil Practice Act gives rise to a query whether the court might not have compelled the transfer despite plaintiff's refusal to request or permit the same. That the transfer is to be effected only "by order of the court" suggests that complete control over the process is in the hands of the trial judge. The decision in the instant case, however, adopts the idea that the section is merely permissive and the order of court is required simply to establish, of record, the choice made by the litigant when presented with the alternative between transfer or dismissal of his case. Some doubt as to the constitutionality of the section would arise had the court taken any other view.

D. Ryan

8 Ill. Rev. Stat. 1941, Ch.110, § 168(2).
9 Inasmuch as plaintiff appears to have stood by for eight years while the defendant expended large sums of money caring for the trust premises and, shortly before filing suit, confirmed the original title by a second deed, his refusal to permit a transfer of the case was probably dictated by a belief that the defendant's defense of estoppel and laches would be upheld.
10 Ill. Rev. Stat. 1941, Ch.110, sec. 168(2).
11 It should be noted that the text of Sec. 44(2), Illinois Civil Practice Act, [Ill. Rev. Stat. 1941, Ch.110, § 168(2)] contains the words "may be" transferred rather than "shall be" transferred.