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EQUITABLE DEFENSES UNDER MODERN CODES

AN equitable defense to a legal right of action involves a contradiction in terms. Either the equity is no defense at all, or it has become a legal defense.

If a court of law will render judgment in favor of a plaintiff on a given claim in spite of certain other facts, it is obvious that such facts have no legal effect to destroy the demand in question. In other words, they do not amount to a defense.

And from this standpoint, it is not material that they may serve as the basis of some affirmative action which will destroy or defeat the plaintiff's claim.

On the other hand, if any given combination of facts when presented to a law court does result in a judgment for defendant, where otherwise the judgment would have been for plaintiff, then such matters must be considered as truly a legal defense as any other.

In short, if the only test of a legal right of action is the recognition of it as such by a law court in rendering judgment thereon in favor of the plaintiff, it must be equally true that the only test of a legal defense is the recognition of it as such by the same court in rendering judgment for the defendant where otherwise the judgment would have been for the plaintiff.[1]

Suppose, for example, a rule of substantive law to the effect that a tenant's obligation to pay rent, in the absence of any agreement to the contrary, is not affected by the accidental destruction of the

[1] We speak of a defense as destroying or defeating a right of action. This is only true in case of a defense that comes into existence after the right of action arose, as accord and satisfaction, release and other matters of discharge. In many cases, the existence of a defense simply means that no right of action arose. Certain elements in the combination of events, so to speak, neutralize the whole. A right of action would have arisen from a part of the happening but for the additional events.

leased building. Suppose further that in the negotiations for a lease it was agreed that it should contain a proviso terminating the obligation to pay rent in case of a destruction of the building, but by some oversight this part of the agreement was omitted from the formal lease embracing an unqualified covenant for the payment of rent during the full term, and that such instrument was executed by both parties without noticing the omission. Now, if the building should be destroyed by fire, and upon the tenant's refusal to pay the rent thereafter accruing, an action should be brought on the covenant, it is well settled at common law that he could not successfully defend on the ground of such omitted provision. He was legally bound by the covenant as written, and not as it should have been written.

But the tenant might bring a suit in equity for reformation of the lease, and if, as the result of that suit, he obtained a cancellation of the old lease and the execution of a new one with the proper proviso, he would then have a perfect defense which would defeat the action for rent.

It is clear that the mistake, in the case supposed, was not a defense of any kind, but formed the basis of a suit in equity resulting in a reformed lease which gave a defense because of the proviso therein contained.

In such a case neither the mistake nor the decree for reformation amounts to a defense. Formerly, at least a decree in chancery had no more effect on legal rights and titles than the equities themselves.[2] In the case supposed, the defense is purely legal because it rests on one of the terms of the reformed lease which has superseded the original lease. The sole effect of the decree was to bring pressure to bear on the lessor, which induced him to execute a new lease in place of the former one.

Suppose, however, a change in the law so that a decree for reformation works a change in the instrument without any act of the party. Under this rule the decree itself has become a defense, and a legal defense at that, because of the new rule of law, although the facts upon which it was based had no such effect. Again, suppose a further change in the common law, either through natural evolution or by statute, so that the original parol agreement remained fully effective and binding, though accidentally omitted from the lease.

Under this hypothesis, the proviso, terminating the obligation to

[2] *Anon.*, Jenkin's Century Cases, 108. (1459).

pay rent in case of a destruction of the premises, is just as effective as if it had been incorporated in the lease, and the tenant has as complete a legal defense as he would have had in the case of a reformation of the instrument. If this analysis is sound, it follows that in strictness there can be no such thing as an equitable defense to a legal right or title. Either the equitable matter is not a defense at all, because it does not destroy the legal right, or it is a legal defense because it does destroy the legal right.

Of course, there were equitable defenses to equitable claims, where there were no similar defenses to corresponding legal claims. For example, the doctrine of laches might defeat a suit for an injunction in a case where the plaintiff would have no difficulty in recovering damages at law. Or, a court of equity might recognize various matters as sufficient to defeat a suit for specific performance without questioning the plaintiff's right to sue at law for a breach of the contract.

Little or no attempt has been made to extend such equity doctrines as these into the field of law.

On the other hand, many of the so-called equitable defenses which courts of law have been called on to examine during the last fifty or sixty years were not recognized as defenses by courts of chancery any more than they were by courts of law. For example, it was held by the Supreme Court of the United States, in *Ford* v. *Douglas*,[3] that it was no defense to a bill setting up title under a judicial sale that the judgment had been procured by fraud, but that the defendant should have proceeded by cross-bill to vacate the judgment. True, this decision is placed on the ground that such was the law of Louisiana under which the case arose, but apparently the rule that a judgment of a competent court is binding until set aside by affirmative action is not confined to Louisiana.

So, in *Vansycle* v. *Dalrymple*,[4] it was decided that it was no defense to a bill to foreclose a mortgage that an agreement for an extension had been accidentally omitted, but that the remedy was by cross-bill for reformation. In other words, that the mortgage was equally binding in equity as written, until reformed.

In *Beck* v. *Beck*,[5] the same court held that it was no defense to a bill setting up title under an absolute deed, that there was a resulting trust in favor of the defendant, but that such trust must be

[3] 5 Howard, 143. (1846).
[4] 32 N. J. Eq. 233. (1880).
[5] 43 N. J. Eq. 39. (1887).

established and enforced by original suit, or a cross-bill in the pending action.

Of course, the equity rule might have developed somewhat differently. Relief might have been refused to a complainant because his title was the result of fraud or mistake, or was held on a resulting, or constructive, trust in favor of the defendant.

In that case such matters would have been recognized as equitable defenses to equitable claims. But as a matter of sound analysis these things constituted equitable causes of action, and the Chancellor preferred to deal with them as such, rather than to turn them into defenses, because the equity procedure was not well adapted to handling them as mere defenses. The complainant could not meet them by an affirmative replication, but would have been driven to the cumbersome expedient of amending his bill so as to anticipate and avoid them, if the facts warranted it; and the complainant would have been deprived of the benefit of an answer, thus enabling the facts to be established against him on less proof than was required in an affirmative proceeding.

Further, to have allowed such matters as defenses would have probably resulted in a simple dismissal of the bill without a complete and satisfactory adjustment of the entire controversy.

And finally, in many instances, the matter could not have been settled in accordance with equitable principles without bringing in additional parties, which could hardly be done without a cross-action.

If, then, the equitable defense, with which the courts are struggling, was as unknown in equity as it was at law, it may be asked what is really meant by the expression?

Unfortunately, it is used indiscriminately to denote two radically different things:

1. That the defendant in a legal action has a right of action in equity, the enforcement of which will give him a defense to the legal claim, as in the case supposed, where reformation of the lease was necessary to defeat the action.

2. That the defendant has a new defense as a result of some change in the law, where formerly there was no defense, but an equitable right of action which might result in a true defense. To call the first a defense at all is to confuse a right of action with a defense, and leads to endless difficulties, sometimes resulting in the development of new defenses in fields that might well have been left to the exclusive jurisdiction of courts of equity.

To call certain new defenses equitable is certainly inaccurate,

because, as already pointed out, they are always strictly legal, and are frequently made so by express statute.[6]

When properly understood, the expression may be justified as a convenient method of indicating the equitable origin of these new defenses.

This development of an equitable cause of action into a legal cause of action, or into a defense to a legal action, has been fairly common in the later period of the common law.

For example, as late as 1819, it was settled law in England that a decree in chancery for the payment of a fixed sum of money, unless based on a prior legal obligation, created an equitable obligation merely, which would not support an action of debt or *indebitatus assumpsit*.[7]

But by 1835 the law had developed to such a point in the United States that a decree was regarded as creating a legal obligation which would support a common law action of debt.[8]

The evolution of a defense at law from an equitable cause of action is illustrated by the doctrine of equitable estoppel.

Formerly, a defendant, when sued at law, had no defense on the ground of equitable estoppel, but was forced into equity for an injunction to restrain the prosecution of the action.[9]

In the course of time, however, in spite of theoretical objections and practical difficulties,[10] equitable estoppels became generally recognized as defenses at law, even in ejectment based on regular record title.[11]

In most of the states the common law rule still obtains, that a conveyance of land, absolute in terms, passes title to the grantee, to which it is no defense that the deed was in fact executed for the purpose of securing a debt. The grantor had no defense to his

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[6] E. g., Mo. R. S. 1909, Sec. 1812, making fraud a defense to a release, and thus changing former rule that affirmative equitable action was necessary. *Hancock* v. *Blackwell*, 139 Mo. 440. (1897).

[7] *Carpenter* v. *Thornton*, 3 B. & Ald. 52. (1819).

[8] *McKim* v. *Odom*, 12 Mc. 94. (1835).

[9] *Stors* v. *Barker*, 6 Johnson Ch. 166. (1822).

[10] In *Jones* v. *Sasser*, 1 Dev. & Batt. (Law) 452, (1836), Judge Gaston pointed out that the organization of law courts presented certain inherent difficulties in the way of an unqualified adoption of equitable estoppels as defenses to certain legal claims:

"So far as equitable estoppels have been definitely recognized as rules of law, this court will unhesitatingly and cheerfully respect them. But it cannot but apprehend that they have sometimes been incautiously admitted in courts of law, from a solicitude to advance the justice of a particular case, although from the nature of their jurisdiction, and the inflexible forms of proceeding, these courts were not competent to the exact administration of equity. Thus it has happened that legal certainty has been prejudiced, without the compensating advantage of effecting complete justice."

[11] *Kirk* v. *Hamilton*, 102 U. S. 68. (1880).

deed, but could obtain redemption and reconveyance by proper proceedings in equity.[12]

In several states this equitable cause of action has developed into a legal defense to a claim of title based on such a conveyance.[13] Certain courts, holding the lien theory of mortgages, argued that a mortgage did not pass title, but merely a lien; that a conveyance intended as a security was in substance a mortgage, no matter what form it took, and hence that such a conveyance did not pass title any more than a formal mortgage, and on this basis that proof of the facts defeated the apparent title of the grantee.

Accordingly, the Supreme Court of California ruled that this defense was available under a general denial in ejectment because it controverted legal title in the plaintiff.[14] One may possibly share Judge Gaston's doubts as to the ability of a court and a common law jury to try such questions to the best advantage.

However, the jury has been called on of late to deal with more complicated equities than this.

In the main, the common law courts were conservative and did not, of their own initiative, undertake to deal with more complicated equities for which their mode of trial was not at all adapted.

In a most interesting and valuable essay on Specialty Contracts and Equitable Defenses,[15] the late Professor Ames has traced the history of a number of the so-called equitable defenses to sealed instruments, such as duress, fraud, illegality, and payment. He found that duress became a defense at an early period, probably as the result of a forgotten statute.

The others were never recognized at law until the Common Law Procedure Act of 1854 turned them into legal defenses. The language of that act[16] left little room for construction, and as a result a great number of equity doctrines became rules of law to be administered as best they could in a trial by jury.

It is difficult to determine how well this change worked in actual

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[12] *Peugh* v. *Davis*, 96 U. S. 332. (1877).

[13] *Dobbs* v. *Kellogg*, 53 Wis. 448, (1881); *Lock* v. *Moulton*, 108 Cal. 49. (1895).

[14] *Smith* v. *Smith*, 80 Cal. 323. (1889).

[15] 6 HARV. L. REV. 49.

[16] "It shall be lawful for the Defendant or Plaintiff in replevin in any cause in any of the Superior Courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and the said courts are hereby empowered to receive such defense by way of plea; provided that such plea shall begin with the words 'For defence on equitable grounds,' or words to the like effect." 17 & 18 Victoria, page 809, Sec. 83.

practice, because it was soon supplanted by the more elastic procedure of the Judicature Act.

In the more simple cases it is probable that no great difficulty was experienced. Juries have long dealt with fraud as the basis of a cause of action and with fraud as a defense to simple contracts. The problem would be much the same with fraud as a defense to a specialty.

Juries have always dealt with payment as a defense to simple debts, and with payment as applied to specialties, for that matter, where by the terms of the instrument it was to become void on payment. *Solvit ad diem* was a well-known plea, and the new defense was not unlike it. The same thing may be said for illegality with which juries had to deal in many other cases.

These simple matters would doubtless have developed into legal defenses without the aid of any statute, but for the peculiar sanctity attached to sealed instruments and the inherited prejudice against allowing them to be overturned by the verdict of a jury. This seemingly instinctive feeling against leaving the validity of a solemn instrument to the whim of a jury probably survived from that earlier period when the attaint had ceased to keep the jury within bounds of reason, and the later methods of control had not developed.

Even under the Common Law Procedure Act, it does not appear that the law courts ever assumed to take over the whole field of equity jurisdiction.

In the United States, as already seen, some equities passed over into the field of law by the natural process of evolution. But the process, to say the least, was greatly stimulated by certain notions as to the amalgamation of law and equity under the New York Code of Civil Procedure. This code was adopted in a majority of the states and is responsible for far-reaching changes that are just coming to be recognized. The original New York Code of 1849 was silent on the subject of equitable defenses.

In the first case[17] under it in which the matter was discussed by the Court of Appeals, it was assumed that an equitable defense was available as a matter of course because the code in terms had abolished the forms of action and the distinction between actions at law and suits in equity.[18]

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[17] *Haire* v. *Baker*, 5 N. Y. 357. (1851).

[18] "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

In *Haire* v. *Baker,* a defendant who had been sued for breach of covenant against incumbrances brought an independent equitable suit to stay the first action and obtain a reformation of the covenant so as to except the incumbrance in question, according to the alleged parol agreement of the parties. It was objected that there was no longer any occasion for an equitable suit, since the mistake would be available as an equitable defense to the action on the covenant.

The court agreed that the matter might be used as a defense, but sustained the equitable suit because on the mere defense the defendant could not obtain the affirmative relief of reformation. Apparently, neither counsel nor the court for a moment doubted that mistake was a defense. The only question was whether the fact that it could be used as a defense precluded an equitable suit for reformation. Thus a new defense was started to work havoc with the so-called "parol evidence rule" which had for so long protected written instruments from addition or subtraction by the verdict of a jury.[19]

In 1852 the following amendment was added to Section 150 of the code:

> *"The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."*

This provision has been adopted in substance in nearly all of the code states.

It may be noted that the code, unlike the Common Law Procedure Act or the statutes found in some of the common law states,[20] does not anywhere attempt to define equitable defenses, but refers to

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rights and the redress of private wrongs, which shall be denominated a civil action." CODE OF PROCEDURE of N. Y. of 1849, Sec. 69.

[19] The constitution of New York preserved trial by jury in cases where the right existed at common law, and the Code expressly provided for trial by jury of all issues of fact in such actions. The language is as follows: "Whenever in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury unless a jury trial be waived, as provided in Sec. 266, or reference be ordered, as provided in sections 270 and 271." CODE OF PROCEDURE of N. Y. of 1849, Sec. 253.

Under this statute it was assumed as too clear for question, that an equitable defence was to be tried by jury as in case of any other defence.

If, however, the defendant availed himself of an equitable counter-claim, as he might, where he was entitled to affirmative relief, the counter-claim was treated for that purpose as an equitable action, and was triable by the court as in other equity cases. *Born* v. *Schenkeisen,* 110 N. Y. 55. (1888).

[20] E. g., MAINE REV. STAT. 1903, Ch. 84, Sec. 17. "Any defendant may plead in defense to any action at law in the Supreme Judicial Court, any matter which would be ground for relief in equity, and shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff; such matter of defense shall be pleaded

them as something apparently well known and understood. But, unfortunately, they were neither well known nor well understood.

There were some defenses of equitable origin which had gained recognition in law, and there were many equitable causes of action which had not at that time been recognized as defenses at all.

Three views appear to have been taken by different courts as to the effect of this permission to plead equitable defenses.

1. That it gave to the defendant a defense in any case where formerly a court of equity would have given him relief against the legal demand in question.

2. That it created some new defenses, but did not go to the full extent of making a defense out of every possible ground of equitable relief against a legal right. Under this view the defendant might set up some equitable matters as a defense, while others were unavailable except by way of cross-action or counter-claim.

3. That it did not create any new defenses, but merely permitted a defensive cross-action by way of counter-claim where the equity had not become a legal defense.

The first view had the support of the late Professor Pomeroy,[21] and was fairly consistently followed by the Court of Appeals of New York in the earlier cases.

The first case to reach that court after the amendment of the code was that of *Dobson* v. *Pierce*.[22] It was an action on a New York judgment to which the defendant set up fraud in obtaining it, in violation of an agreement for the dismissal of the original action; that an action had been brought on the judgment in the State of Connecticut, and that defendant had there brought a suit in chancery and obtained a permanent injunction against the prosecution of the action. The case was tried by jury and resulted in a verdict and judgment for defendant, which was affirmed on appeal. The reasoning of the court, in substance, was that fraud was a good equitable defense to the judgment,[23] because a court of equity would

in the form of a brief statement under the general issue. And, by counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of the defendant."

[21] POMEROY, CODE REMEDIES, [4th Ed.] pp. 44-46.

[22] 12 N. Y. 156. (1854).

[23] On the strength of this case the Supreme Court of Missouri sustained fraud as an equitable defense to an action on a judgment of another state, *Ward* v. *Quinliven*, 57 Mo. 425. (1874).

Dobson v. *Pearce* was also followed in *Burnley* v. *Stevenson*, 24 Ohio St. 474. (1873).

give relief on that ground, and that the foreign decree conclusively established fraud, though it had no effect as an injunction outside of Connecticut.

A year later the case of *Crary* v. *Goodman*[24] came before the same court. That was an action of ejectment in which the plaintiff relied on a regular chain of title. Defendant set up that he was in possession of the tract in controversy as tenant of H., who had purchased the same with other lands from plaintiff's grantor, but by mistake the tract in dispute had been omitted from the deed, and that plaintiff had notice, etc.

This was likewise sustained as an equitable defense on the authority of *Dobson* v. *Pierce,* the court observing that now,

> "the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for."

This case shows an extraordinary development of the idea of an equitable defense. Under the former state of the law, the defendant, a mere tenant for a term, would have had neither a right of action nor a defense in equity, and obviously he would have had no defense at law. According to the older law, the plaintiff's legal title embraced as one of its constituents the right to possession.

Nor could the defendant have maintained a bill against plaintiff for reformation of the deed from plaintiff's grantor to defendant's landlord. That right of action, if it existed, belonged to the landlord, and not to the defendant.[25] And even he could not have maintained a bill for specific performance without making plaintiff's grantor a party. Here, then, a defendant who could not have obtained relief in equity was allowed a defense evolved from an equitable cause of action in favor of his landlord against plaintiff's grantor.[26]

Two years later, in *Despard* v. *Walbridge,*[27] a defendant was

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[24] 12 N. Y. 266. (1853).

[25] *Gillespie* v. *Torrance,* 25 N. Y. 306 (1862); *Ettlinger* v. *Natl. Surety Co.,* 221 N. Y. 467. (1917).

[26] In a later case, *Hoppaugh* v. *Struble,* 60 N. Y. 430 (1875), the defence that a part of the land had been omitted by mistake was allowed between the original parties.

[27] 15 N. Y. 374. (1857).

allowed to show as an equitable defense that a conveyance absolute in form was made to secure a debt which had since been paid.

In *Chase* v. *Peck*,[28] a plaintiff who had obtained title by execution sale was defeated in ejectment by an equitable mortgage in favor of the defendant in possession, and plaintiff was accordingly forced to bring an equitable action to redeem.

These earlier cases seem to support to the full extent the contention of Professor Pomeroy that the code permitted a defendant to avail himself of any equitable matter as a defense where he could have obtained protection in a court of equity against the demand in question.

In other words, if such matters as mistake in a covenant, constructive trust in the case of an absolute conveyance given as a security, the right to specific performance of a contract for the conveyance of land, or the rights of an equitable mortgagee in possession, are available as defenses, it is difficult to conceive of any equity that would be excluded, except possibly where a court of equity would only grant relief on terms. This limitation was fully recognized under the Common Law Procedure Act. Thus, in *Mines Royal Society* v. *Magnay*,[29] in an action on a covenant in a lease, the court refused to allow an equitable plea setting up a partially performed oral agreement for a surrender, because a court of equity would not have granted unconditional relief, but would have imposed terms. As Mr. Baron Parke put the matter:

> "In my opinion, the equitable defense allowed to be pleaded by this statute means such a defense as would in a court of equity be a complete answer to the plaintiff's claim, and would, as such, afford sufficient ground for a perpetual injunction, granted absolutely and without any conditions. But, according to the statement in the plea, a court of equity would not interfere, except upon the condition of the execution of a valid surrender by the defendant."

A later case in New York, *Born* v. *Schrenkeisen*,[30] throws some doubt on the extent to which the Court of Appeals now accepts the doctrine of the earlier cases. In this case the plaintiff sued on a contract for the payment of royalties under a patent. The defendant set up mistake in reducing the contract to writing. This was pleaded in the form of a defense merely, and not as a counter-

[28] 21 N. Y. 581. (1860).
[29] 10 Exch. 489. (1854).
[30] 110 N. Y. 55. (1888).

claim or cross-action. The case was tried at special term without a jury, and resulted in a finding of facts supporting the defense, on which judgment was entered for the defendant. On appeal, the objection was made that the answer was insufficient because it did not pray for reformation, and that the judgment was erroneous because it did not reform the contract.

The court agreed with the plaintiff on both points, but thought the error technical and harmless, observing:

> "As the writing stood unreformed the plaintiff was entitled to recover; * * * as the facts found clearly entitled the defendant to a reformation of the agreement, the omission to provide for the reformation must have been by inadvertance. * * * It is clear that the case was tried upon the assumption by both parties that if the defendants proved the facts alleged in their answer they were entitled either to a dismissal of the complaint or to a reformation of the written agreement. * * * Our conclusion, therefore, is that the judgment should be modified so as to reform the agreement in accordance with the findings of fact."

This case seems to stand for the doctrine that the mistake *per se* was no defense, and hence reformation was necessary; but that an answer in the form of a defense might be treated as in substance a cross-action for reformation. Thus the Court of Appeals appears to have abandoned the first view in favor of the second, namely, that in some cases an equitable right to affirmative relief has not become a defense, though the form in which it is set up is not very important.

In one of the early cases in Wisconsin, *Gunn* v. *Madigan*,[31] a defendant in an action on a written guaranty pleaded mistake in the form of a defense merely, and the court refused a jury trial on the issue thus raised. This was affirmed on appeal on the ground that, although pleaded as a defense, it was in substance an equitable cause of action for reformation triable by the court,[32] and that it was only on this basis that "parol evidence" was admissible to contradict the writing.

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[31] 28 Wis. 158. (1871).

[32] Such cases as this and *Born* v. *Schrenkeisen* seem responsible for the broad statement frequently found in the cases that while equitable defences may be pleaded in a legal action, the equitable issues are triable by the courts without a jury. Now this is far from being invariably true. It appears to be true only where the equitable matter is regarded as in substance a cross-action and not a defence at all.

There has been a growing tendency to make the form in which the matter is pleaded the test as to the mode of trial, and a sort of rule of thumb has been evolved to the

This case seems to be in line with *Born* v. *Schrenkeisen,* except that in the latter the court thought that the form of a counter-claim should have been used, while in the former the form of a defense was thought to be unobjectionable. Soon after *Gunn* v. *Madigan,* the Supreme Court of Wisconsin apparently adopted the third view, that the code had not created any new defenses, but that a counter-claim or cross-action was necessary to make the equity available.

The question arose in *Lombard* v. *Cowham,*[33] where the defendant had purchased at a void administration sale. The plaintiff obtained a deed from the heir and brought ejectment. The defendant was allowed to show as a defense that the plaintiff obtained the deed by representing that it was to perfect the defendant's title. There was a trial by jury and a verdict for defendant. On appeal, the judgment was reversed on the ground that a cross-action was necessary. The reasoning of the court was broad enough to exclude all equitable defenses as such.

> "To prove that the conveyance under which the plaintiff claims title is void is merely one method of proving that the title to the land is in some third party. This is strictly a legal defense, is admissible under the general denial, and, when proved, defeats the action.
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> "But the conveyance being a valid one to pass the legal title to the plaintiff, the defense that it inures to the benefit of the defendant is purely an equitable defense in that, if established, it results in the declaration and enforcement of a trust, which is a matter cognizable in courts of equity alone.

effect that if the matter is pleaded in the form of a defence it is triable by jury as any other issue in a legal action, but if affirmative relief is asked, it becomes an equitable counter-claim or cross-action, triable as other equity cases without a jury.

Thus in *Gill* v. *Pelkey,* 54 Ohio St. 348, (1896), this rule is stated as follows: "It may be quite true that an equitable defence merely, that is, one which sets forth some equitable considerations for the sole purpose of resisting the plaintiff's demands, without asking any affirmative action of the court whatever, will not affect the mode of trial, although it would have done so if the party had invoked some affirmative relief. The difference between them being that the first simply is a defence to the cause of action stated in the petition, while the other is a cross-demand constituting a cause of action in itself, on which separate action might have been maintained. The former being merely a defence, cannot draw to itself a mode of trial different from that prescribed for the cause of action to which it relates. The latter being a distinct cause of action, is of equal dignity with the one set forth in the petition, and is therefore equally entitled to its appropriate method of trial."

This may mean that some equitable causes of action have also become legal defences, so that the defendant has the choice of using them either as defences or as the basis of an affirmative relief, and that the prayer determines the aspect in which the matter is presented.

[33] 34 Wis. 486. (1874).

> The issue upon such a defense, if affirmative relief is demanded by the defendant, is triable by the court, unless the court shall order the same to be tried by jury, as it may order other questions of fact to be so tried in other equity cases, in its discretion. * * * A mere equitable defense is not sufficient. There must be a counter-claim also."

In *Gunn* v. *Madigan,* mistake giving an equitable right to reformation was set up in the form of a defense, but was treated as substantially an equitable cross-action, and therefore triable as such. In *Lombard* v. *Cowham,* the equitable right to enforce a constructive trust was denied efficacy as a defense, and the form of a cross-action insisted on in order that it might be properly tried.

In *Chicago & Northwestern Ry. Co.* v. *McKeigue,*[34] the view adopted in *Lombard* v. *Cowham* was considerably modified. The facts were these: the next of kin of a railroad employee, who had been killed in an accident, settled the claim and received satisfaction; afterwards the administrator of the deceased brought an action under the death statute for the benefit of the next of kin; the defendant thereupon brought an independent suit in equity to enjoin the action by the administrator, who demurred on the ground that these matters were available as an equitable defense; it was argued on the other side that such a defense could only be made by equitable counter-claim, and that this was impossible because the next of kin was not a party to the action at law. The Supreme Court sustained the demurrer to the complaint in equity on the ground that the compromise with the next of kin was available as an equitable defense, and that an equitable counter-claim was not necessary because no affirmative relief was needed. The court observed:

> "The code recognizes equitable defenses as well as equitable counter-claims when it provides that the defendant may 'set forth by answer as many defenses and counter-claims as he may have, whether they be such as were formerly denominated legal or equitable, or both.' * * *
>
> "The true and logical rule doubtless is, that where facts are relied on which in equity simply defeat the plaintiff's cause of action and go no further, they may be set up by equitable defense, just as facts which at law go simply to defeat the plaintiff's cause of action may be set up by legal

[34] 126 Wis. 574. (1906).

> defense, but in those cases where the action at law can only be defeated by virtue of an affirmative judgment by a court of equity, such, for instance, as the reformation of the contract sued on at law, the equitable defense must be made by way of counter-claim."

This case, then, appears to adopt the second view, that some, but not all, equities are available as defenses.

The Code of Oregon contains the usual provision abolishing the forms of action and the distinction between actions at law and suits in equity. Like the original New York Code, it is silent on the subject of equitable defenses, but does provide equitable cross-actions.

Under this statute the Supreme Court of Oregon has consistently held that an equitable cause of action was not available as a defense, and could only be taken advantage of by appropriate cross-action.[35]

Space does not permit a review of the various decisions in the other code states.

The cases already noticed are sufficient to indicate the problem and the ways in which it has been handled. It is not vitally important whether a defendant, with an equitable cause of action by which he can obtain protection against a legal demand, is forced to begin an original suit in equity for that purpose, as the rule in the Federal courts required; or whether he can accomplish the same thing under the name of an equitable counter-claim to the legal action. Or whether such equitable cause of action must be pleaded in the form of a cross-complaint; or whether it may be stated in the form of a defense. For example, it has been recently held in New Hampshire, in *McIsaac* v. *MacMurry*,[36] that a reply of mistake to a plea of release might be treated as a bill in equity to set the release aside.

Such matters do not ordinarily affect substantive rights, and it is not difficult to conform to such technical or formal requirements as may be adopted.

The matter of real importance is whether any given right of action in equity has become a defense in the sense that it carries with it the right of trial by jury in case the defendant elects to stand on it as a defense merely; or whether it is in that transition state so that the defendant may use it as the basis of an equitable

[35] *Tooze* v. *Heighton*, 79 Ore. 545. (1916).
[36] 77 N. H. 466. (1915).

cross-action triable as an equity case,[37] or, if he prefers, as a defense triable by jury.[38]

The first view in New York, that all equitable causes of action were available as defenses, probably conforms to the actual intention of the framers of the code to completely amalgamate law and equity. It also has the advantage of simplicity and logical consistency. The code in terms provided for equitable defenses, and did not limit them. Hence, the easy test, suggested in the early New York cases, whether a court of equity would have afforded protection against the legal claim in question. But there are some serious practical objections to the unqualified acceptance of this view.

The lack of proper parties may produce endless difficulties in the litigation of certain equities. It might happen, for example, in such a case as *Crary* v. *Goodman,* that although the defendant established his defense by the verdict of a jury, his landlord might fail in a suit for specific performance. And to say the least, some equitable questions are extremely difficult to try by jury. Suppose, for example, a defense in ejectment that the defendant was in possession under a parol contract for the sale of the land, with part performance to take the case out of the statute of frauds. The equity rules on this subject are not sufficiently clear-cut to be administered easily in the form of instructions to a jury.

In such a case the court must, of necessity, state the rule in general terms, instead of concretely, leaving the jury a very large field in the application of it to the disputed facts.

Certainly the jury works best when its problem is limited to the existence of fairly specific facts.

For the enforcement of some equities, such as mistake as the basis for reformation, courts of equity have always required a higher degree of certainty and credibility in the evidence than is

[37] Some equitable causes of action have been so completely turned into defences that a defendant can no longer set them up as equitable counter-claims and thereby obtain a trial without a jury. As already seen this has taken place in California and Wisconsin in the case of an absolute conveyance given to secure a debt. *Smith* v. *Smith,* 80 Cal. 323; *Lock* v. *Moulton,* 108 Cal. 49; *Dobbs* v. *Kellogg,* 53 Wis. 448. And the rule seems to be the same in case of an equitable estoppel, *Guaranteed Investment Co.* v. *Consolidated Copper Co.,* 156 Wis. 173. (1914).

[38] The proper mode of trial is equally important as bearing on the proper mode of appellate review.

If the matter has become a defence triable by jury, the facts, of course, are not open to re-examination by an appellate court, but merely errors and exceptions taken to the rulings of the judge. Even where no jury is used in such a case, the scope of review is not greater, *Insurance Co.* v. *Folsom,* 18 Wall. 257. Where, however, the trial is under the equity practice, the appellate court has a free hand in dealing with the facts.

necessary to support the verdict of a jury, but is manifestly impossible to enforce any such rule on a jury.

When the question becomes one for the jury it is inevitable that it will be dealt with on the same basis as other questions for the jury.

In short, the most ardent advocates of the jury can hardly contend that all questions are adapted to the common law mode of trial. These practical considerations have consciously or unconsciously led to some modifications.

The third view, that the code did not create any new defenses, has also the advantage of simplicity and consistency.

When any given equity had become recognized as a defense, it was, of course, available as such. Otherwise, a cross-action in substance was necessary. In other words, a defendant who was really a plaintiff in equity must shoulder the same burden as any other plaintiff in equity.

This view, however, had to ignore the fact that the code evidently contemplated some sort of new defenses as well as equitable cross-actions. As a compromise between these extremes, the second view seems to have been quite generally accepted.

It involves two difficulties. First, that there is no basis in the code for discrimination between equities. Second, that the test proposed in *C. & N. W. Ry.* v. *McKeigue* is impossible of application, because there never were any equities which of themselves defeated a legal right. Whenever they came to have that effect they were legal defenses and needed no aid from a statute or code.

When they had no such effect, affirmative relief was always necessary by way of injunction or otherwise.

Nor can the line be drawn between those cases where a plaintiff had a legal right which was against conscience for him to enforce, and those cases where the plaintiff had a right or title which in conscience he ought to convey or surrender to the defendant.

In *Ward* v. *Quinliven*,[39] the Supreme Court of Missouri allowed fraud as a defense to a judgment, but the courts of that state do not allow mistake as a defense to a written contract.[40] Here a cross-action for reformation is required. Yet both seem to be cases of a right which it is against conscience to enforce. The holder of the fraudulent judgment no longer has a legal right, since the fraud *per se* defeats him, while the holder of the mis-written contract still

[39] 57 Mo. 425. (1874).
[40] *Rudolph Wurlitzer Co.* v. *Rossman*, 196 Mo. App. 78.

has a legal right, though he may lose it through a decree for reformation.

In the case of a right or title which the plaintiff ought in conscience to surrender to the defendant, it is doubtless equally true that it is against conscience for him to use it against the defendant. Yet in some instances the courts will allow the defense, and in others, such as *Lombard* v. *Cowham,* they will not.

In truth, then, is the second view really different from the third? Does it mean anything more than that through the influence of the term, "equitable defense," some equitable causes of action have gained a footing as defenses and others have not? Some have not encountered much difficulty, while others have been met by an instinctive feeling that the subject was not a proper one for jury trial.

Apparently there is no test by which it can be determined what equities are thus available as defenses. The affirmative relief test is not helpful because it furnishes no means of determining where affirmative relief is necessary.

For the present, at least, precedent seems to be the only guide. It is not surprising that the Federal courts persistently refused to acknowledge or recognize the equitable defense of the code. Even those which unquestionably had become defenses in code states were still regarded by the Federal courts as equitable causes of action, and nothing more. And since they were not recognized as defenses, a separate suit on the equity side was necessary, because no provision had been made for engrafting an equitable counterclaim onto a legal action.[41] In fact, such a course was considered as impliedly prohibited by the various Acts of Congress providing for separate law and equity jurisdiction, nor were the different methods of appellate review adapted to such a combination.

The Supreme Court of the United States, however, in some instances has been called on to deal with such a procedure in cases coming to it from some of the territories. Thus, in *Philippine Sugar Co.* v. *Philippine Islands,*[42] the defendant answered, setting up mistake in the contract and prayed reformation under the Philippine Code, and it was held that this transformed the case into one in equity, reviewable on appeal instead of writ of error.

In 1915 Congress adopted the following amendment to the Judicial Code of the United States:

[41] *Standard Portland Cement Co.* v. *Evans,* 125 C. C. A. 1, (1913), and cases cited in *dicta* thereto.

[42] 247 U. S. 385. (1915).

"Sec. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication, without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The material does not yet exist for determining the effect of this innovation. There are dicta[43] to the effect that this statute abolishes all technical distinctions between proceedings at law and in equity, but the few decisions under it indicate that it has provided for a cross-action in equity, without the formality of filing a bill, rather than created new defenses.

Thus, in *Keatley* v. *Trust Co.*,[44] it was held that it did not authorize a reply attacking a release on equitable grounds, but that such release must be set aside by direct proceeding in equity.

In *Upson Nut Co.* v. *Am. Shipbuilding Co.*,[45] it was held that it did authorize a defendant, sued on a written instrument, to seek reformation by cross-petition.

And in *Breitung* v. *Packard*,[46] it was held that it did not authorize the defendant to set up an equity where a third person would be a necessary party.

So far, at least, the Federal courts have not recognized any new defenses, but simply a new method of bringing a suit in equity to obtain protection against a legal demand.

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[43] *U. S.* v. *Richardson*, 223 Fed. 1010, (1915).
[44] 249 Fed. 296. (1918).
[45] 251 Fed. 707. (1918).
[46] 260 Fed. 895. (1919).