EQUITABLE DEFENSES TO ACTIONS AT LAW UNDER THE MISSOURI CODE*

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INTRODUCTION

As is well known, New York in 1848 enacted the first code of civil procedure in which an attempt was made to abolish the distinctions between actions at law and suits in equity.[1] In the following year, Missouri enacted a similar code[2] which was patterned after the New York enactment.[3] Since then many other states have followed the example set by New York.[4]

Under the present provisions of the Missouri code of civil procedure, the plaintiff is permitted to unite in the same petition several causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they arise out of the same transaction or some similar situation,[5] and the defendant is permitted to set forth by answer as many defenses

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1. Hepburn, *Historical Development of Code Pleading in America and England* (1897) 92, sec. 88; Pomeroy, *Equity Jurisprudence* (4th ed. 1919) 43, sec. 40; Clark, *Code Pleading* (1928) 18, sec. 7; McCaskill, One Form of Civil Action (1935) 30 Ill. L. Rev. 415, 419.

2. See Mo. Laws of 1848-49; also Hepburn, op. cit. supra note 1, at 93, sec. 89, and Clark, op. cit. supra note 1, at 19, sec. 8.

3. New York Laws of 1848, c. 379, sec. 62: "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."

Mo. Laws of 1848-49, 73, sec. 1, now R. S. Mo. (1929) sec. 696: "There shall be in this state but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant." Also see Hepburn, op. cit. supra note 1, at 93, sec. 89.

4. Clark, Trial of Actions under the Code (1926) 11 Corn. L. Q. 482. For status of the various states, see Clark, op. cit. supra note 1, at 19, sec. 8, showing that up to 1928 twenty-five states had adopted the new procedure. Illinois joined this number of states when the legislature adopted its Civil Practice Act which, however, is far in advance of the codes of other states for which the "Field Code" served as a model. Ill. Laws of 1933, 784; Ill. Rev. Stat. (1937) tit. 110, sec. 125.

5. R. S. Mo. (1929) sec. 765, originally R. S. Mo. (1855) 1228, sec. 2.

and counterclaims as he might have, whether they are such as were formerly denominated legal or equitable, or both,[6] and new matter opposing the new matter in the answer can be set up in the reply.[7]

This attempted blending of law and equity necessarily created a number of new legal problems. Their solutions have not been the same in all jurisdictions which have adopted the new procedure. Some states have retained many of the old distinctions, while others have to a large degree carried out the apparent intent of the codes.[8] Missouri is among those which have continued to adhere rather closely to the old distinctions.[9] This has been due chiefly to the provision of the state constitution guaranteeing that the right of trial by jury "shall remain inviolate,"[10] which, as construed by the courts, has been held to mean a jury trial with all of the essentials of such a trial under the common law.[11] Consequently, the courts have been obliged to

6. R. S. Mo. (1929) sec. 777, originally Mo. Laws of 1848-49, 80, sec. 8. See also R. S. Mo. (1929) sec. 776, originally Mo. Laws of 1848-49, 80, sec. 7, as to contents of the answer.

7. R. S. Mo. (1929) sec. 779, originally Mo. Laws of 1848-49, 80, sec. 9; and R. S. Mo. (1929) sec. 781, originally Mo. Laws of 1848-49, 80, sec. 10.

8. A system of procedure which provides for separate law and equity dockets, labeling them as such, and in which the pleadings characterize legal and equitable remedies, when joined in one suit, so that the one may be distinguished from the other, has been called the "hangover" system. Clark, op. cit. supra note 1, at 46, 66. For a defense of such a system, see McCaskill, supra note 1.

9. Maguire v. Vice (1855) 20 Mo. 429; Richardson v. Means (1856) 22 Mo. 495; Hunter v. Hunter (1872) 50 Mo. 445; Kelly v. Hurt (1881) 74 Mo. 561; McFarland v. Missouri Pac. R. R. (1894) 125 Mo. 253, 28 S. W. 590; State ex rel. I. O. O. F. v. Evans (1903) 176 Mo. 310, 75 S. W. 914; Sandwich Mfg. Co. v. Bogie (1927) 317 Mo. 972, 298 S. W. 56; Fowles v. Bentley (1909) 135 Mo. App. 417, 115 S. W. 1090.

10. Mo. Const. of 1820, art. XIII, sec. 8: " * * * the right of trial by jury shall remain inviolate." Mo. Const. of 1867, art. XVII, sec. 1: "The right of trial by jury shall be inviolate." Mo. Const. of 1875 (the present constitution), art. II, sec. 28: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate." Also see Palmer v. Marshall (Mo. App. 1930) 24 S. W. (2d) 229.

11. State ex rel. Kansas City & S. E. Ry. v. Slover (1896) 134 Mo. 607, 36 S. W. 50; Hewitt v. Duncan (1931) 226 Mo. App. 254, 43 S. W. (2d) 87; Ex parte Higgins v. Hoctor (1933) 332 Mo. 1022, 62 S. W. (2d) 410; Barnard Mfg. Co. v. Monett Milling Co. (1899) 79 Mo. App. 153. Also see Clark, op. cit. supra note 1, at 52. This view is in consonance with that expressly enunciated by the act of Congress extending the rule-making power of the Supreme Court: "The Court may at any time unite the general rule prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided,* however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." (1934) 48 Stat. 1064, c. 651, 28 U. S. C. A., sec. 723b, 723c.

determine whether the case was one which did or did not require a jury trial at common law,[12] and this necessarily has meant a retention of the former distinctions as a basis for the determination of the method of trial.[13] In other words, the constitution recognizes the right of a litigant to have an action at law tried by a jury and an equitable controversy dealt with as a proceeding in equity.[14] This right is further recognized by two provisions of the code requiring an issue of fact in an action for the recovery of money only, or of specific real or personal property, to be tried by a jury, unless waived or a reference ordered,[15] and requiring that all other issues shall be tried by the court.[16] These provisions have been held to constitute an attempt to designate what are legal and what are equitable actions.[17] But for many purposes, the old distinctions between actions at law and suits in equity are no longer recognized. Yet, in the light of the provisions of the statute,[18] it is apparent that a complete union of law and equity was not intended.[19]

Studies have been made of the problems created in the various states[20] and in the federal courts[21] by equitable defenses to actions at law. It is, however, the purpose of this article simply to consider the problems which have been created by such defenses to legal actions in Missouri under the existing code of procedure and to note the solutions found for them by the courts.

12. "We need to remember the differences between actions at law and suits in equity, and of the flexible scope of different types of remedies before the codes, not because we are reluctant to give up the obsolete formalities of the past, but in order to know when jury trial is demandable of right and when not." McCaskill, supra note 1, at 441.

13. McFarland v. Missouri Pac. R. R. (1894) 125 Mo. 253, 28 S. W. 590; Lee v. Conran (1908) 213 Mo. 404, 111 S. W. 1151; Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432. See also, Clark, supra note 4.

14. Clark, supra note 4, at 497.

15. R. S. Mo. (1929) sec. 948.

16. R. S. Mo. (1929) sec. 949.

17. Conran v. Sellew (1859) 28 Mo. 320.

18. R. S. Mo. (1929) secs. 765, 777, 779, 781.

19. The following comment concerning the New York Code seems equally applicable here: "The distinctions abolished all deal with outworn and useless form, which causes conflict and confusion, instead of harmony and clarity. There is no more suggestion that actions at law and suits in equity should disappear than there is that judgments and decrees vanish." McCaskill, supra note 1, at 420.

20. Hinton, Equitable Defenses under Modern Codes (1923) 32 Yale L. J. 645. Clark, supra note 4.

21. McBaine, Equitable Defenses to Actions at Law in the Federal Courts (1929) 17 Calif. L. Rev. 591. See also relative to the extension of the Supreme Court's rule-making power, McCaskill, supra note 1.

THE EQUITABLE DEFENSE

Undoubtedly, as a preliminary step, it would be well to determine what an equitable defense is. Pomeroy has answered this question substantially as follows: "Equitable" is used in its technical sense as contrasted with "legal"; that is, the right which gives it its efficacy is an equitable right—a right formerly recognized and enforced only in courts of equity, and not in courts of law. "Defense" in its legal connotation is something which prevents or defeats the recovery of a remedy in an action or suit, and not something by means of which the party who interposes it can obtain relief for himself. A "defense" is essentially negative, and not affirmative. It is not to be conceived of as the means of acquiring positive relief or any remedy, legal or equitable, for such would constitute a cause of action, not a defense.[22] But this conception, as applied to equitable defenses in actions at law, has not been universally accepted. A few code states apparently hold that the defendant cannot avail himself of facts which entitle him to equitable relief against the plaintiff's legal action, simply as a negative defense going to defeat the claim, but that, in order to interpose such a defense, he must demand affirmative relief, which, when granted, destroys the plaintiff's cause of action.[23] Thus, in Indiana, where the plaintiff brought an action against the maker of a promissory note and the defendant alleged in his answer that the note was not due because the due date which appeared was the result of a mistake, defendant's plea was held to constitute no defense since he did not ask for a reformation or affirmative relief of some nature.[24] This view is analogous to the common law, under which a matter of equitable cognizance was not a defense to an action at law but could be made the basis of an affirmative bill in equity, for example, to reform, cancel, or rescind an agreement. Pomeroy criticizes this construction of the code. According to his view, a defense is a negative resistance or an obstacle which prevents a recovery, whether it be legal or equitable, and if every equitable defense in order to be available must consist in an affirmative recovery of specific relief against the plaintiff, for the same reasons and with the same force, it might be said that

22. Pomeroy, *Code Remedies* (5th ed. 1929) 46, sec. 27.
23. Pomeroy, op. cit. supra note 22, at 48, sec. 29.
24. Scott v. Norris (1892) 6 Ind. App. 102, 32 N. E. 332, rehearing den. (1893) 33 N. E. 227.

every legal defense, in order to be available, must consist of a counterclaim. And in further support of his view, he mentions the fact that the sections of the statutes which prescribe the form and content of the answer, enumerate counterclaims as well as legal and equitable defenses, thereby expressly distinguishing between the equitable defense as such and the recovery of affirmative equitable relief.[25] The construction followed by Missouri, and the correct one according to Pomeroy,

> * * * is that whenever equity confers a right, and the right avails to defeat a legal cause of action,—that is, shows that the plaintiff ought not to recover in his legal action—then the facts from which such right arises may be set up as an equitable defence in bar.[26]

In other words, the defendant should be able to set up as a defense in bar any matter which formerly a court of equity would have permitted him to use as the basis of an original proceeding in equity for obtaining relief against a legal demand. From the foregoing, therefore, it would seem that historically the matter should be considered as a counterclaim, but analytically and practically it should be considered as a defense.[27]

While Missouri adheres to the view that all matters formerly cognizable in courts of equity are now proper defenses in bar to actions at law,[28] the counterclaim is used whenever the defendant desires affirmative relief rather than simply to defeat the plaintiff's action.[29] It is to be noted, however, that the Missouri courts do not generally speak of this method of obtaining equitable relief as a counterclaim. Instead it is usually designated as the setting up of an equitable defense coupled with a prayer for affirmative equitable relief,[30] although occasionally it is referred to as a counterclaim,[31] a cross-petition,[32] a cross-bill,

25. Pomeroy, op. cit. supra note 22, at 48, sec. 29. Clark & Surbeck, The Pleading of Counterclaims (1927) 37 Yale L. J. 300, 303.

26. Pomeroy, op. cit. supra note 22, at 50, sec. 30. Cook, op. cit. supra note 20. See also Sachleben v. Heintze (1893) 117 Mo. 520, 24 S. W. 54; Kostuba v. Miller (1897) 137 Mo. 161, 38 S. W. 946.

27. Clark, op. cit. supra note 1, at 429, sec. 96.

28. See Clark, supra note 4, at 497. But there are some exceptions to this general statement, as will hereinafter appear.

29. See discussion infra regarding defenses in bar and equitable counterclaims. Also see Seiberling, Miller & Co. v. Tipton (1893) 113 Mo. 373, 21 S. W. 4.

30. See infra, page 67.

31. Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432; Dahlberg v. Fisse (1931) 328 Mo. 213, 40 S. W. (2d) 606.

32. Keltner v. Threlkel (1927) 316 Mo. 609, 291 S. W. 462.

or a cross-action.[33] When analyzed in comparison with the counterclaim of those states which do not recognize an equitable defense to an action at law unless set up as a counterclaim, the Missouri equitable defense coupled with a prayer for affirmative relief appears to be the same as the counterclaim. Each constitutes a complete case in itself and, under the old as well as the new system, would have entitled the defendant to maintain an independent suit in equity.

In a few states, cross-petitions or cross-complaints are expressly recognized by the codes in addition to counterclaims;[34] but the Missouri code recognizes the counterclaims alone.

THE EQUITABLE DEFENSE IN BAR

The general rule, now well established in Missouri, is that the setting up of an equitable defense, along with a general denial or an affirmative legal defense, in the answer to an action at law leaves the case one at law.[35] In other words, the issue created by the equitable defense in bar in no manner affects the trial of the case, or, in the language employed by the courts, the pleading of an equitable defense does not convert an action at law into one in equity.[36] This was the result where the defendant in an ejectment action set up in his answer a general denial and the equitable defense that the plaintiff held the land involved by a resulting trust for the defendant but sought no affirmative equitable relief.[37] The defense pleaded, were it sus-

33. Martin v. Turnbaugh (1899) 153 Mo. 172, 54 S. W. 515.

34. Pomeroy, op. cit. supra note 22, at 56, sec. 35.

35. Kerstner v. Vorweg (1895) 130 Mo. 196, 32 S. W. 298; Toler v. Edwards (1913) 249 Mo. 152, 155 S. W. 26.

36. Carter v. Prior (1883) 78 Mo. 222; Kerstner v. Vorweg (1895) 130 Mo. 196, 32 S. W. 298; Kostuba v. Miller (1897) 137 Mo. 161, 38 S. W. 946; Ridgeway v. Herbert (1899) 150 Mo. 606, 51 S. W. 1040; Hall v. Small (1903) 178 Mo. 629, 77 S. W. 733; Kessner v. Phillips (1905) 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368; Brooks v. Gaffin (1905) 192 Mo. 228, 90 S. W. 808; Toler v. Edwards (1913) 249 Mo. 152, 155 S. W. 26; Bell v. George (1918) 275 Mo. 17, 204 S. W. 516; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Koehler v. Rowland (1918) 275 Mo. 573, 205 S. W. 217; Citizens' Trust Co. v. Going (1921) 288 Mo. 805, 232 S. W. 996; Bush v. Stumpe (Mo. 1920) 222 S. W. 1009; Cullen v. Johnson (1930) 325 Mo. 253, 29 S. W. (2d) 39; Ebbs v. Neff (1930) 325 Mo. 1182, 30 S. W. (2d) 616; Wolf v. Schaeffer (1877) 4 Mo. App. 367; also see same (1880) 6 Mo. App. 589; (1881) 74 Mo. 154; Hodges v. Black (1880) 8 Mo. App. 389, aff'd (1882) 76 Mo. 537; Bank of Neelyville v. Lee (1916) 193 Mo. App. 537, 182 S. W. 1016.

37. Kessner v. Phillips (1905) 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368.

tained, would simply defeat the action at law;[38] and the case would end as though the defendant had merely set up a legal defense. It would operate as a bar to the plaintiff's claim in the same manner that a legal defense would. Indeed, it has been suggested that under the construction of the code which permits equitable defenses to be pleaded in bar, such defenses serve as legal defenses.[39] And the issue raised by the equitable defense in bar is tried by the jury along with, and in the same manner as, the legal issues in the same suit.[40]

But, if the defendant in his answer admits the plaintiff's cause of action and at the same time sets up an equitable defense and nothing more, the whole proceeding is converted into a case in equity.[41] The reason for this is obvious. By such conduct the defendant concedes the plaintiff's right to recover on his legal action, unless the equitable defense prevails. Consequently, only an equitable matter is presented for determination or adjudication. There are no legal issues involved. Nor is it necessary that the defendant, having admitted plaintiff's prima facie legal case, do anything except set up an equitable defense; that is, it does not seem necessary for him to seek any affirmative equitable relief under these circumstances in order to convert the case into one in equity.

Furthermore, if the defendant has an equitable defense, he must set it up either in bar or as the basis for affirmative relief.[42] He cannot later make it the ground for an independent suit in equity against a former plaintiff, since equitable defenses now occupy the same status as legal defenses.[43]

Inasmuch as the pleading of an equitable defense in bar along with a general denial or an affirmative legal defense does not convert the action into one in equity but leaves it a case at law, either party is entitled to have the whole case tried before a jury.[44] The equitable as well as the legal issues in the case are

38. Brooks v. Gaffin (1905) 192 Mo. 228, 90 S. W. 808.

39. Hinton, supra note 20, at 717, 719, 720; Cook, supra note 20, at 650, referring to the Hinton comment.

40. See cases cited supra, note 36; also infra, note 45.

41. Allen v. Logan (1888) 96 Mo. 591, 10 S. W. 149; Ridgeway v. Herbert (1899) 150 Mo. 606, 51 S. W. 1040; Lewis v. Rhodes (1899) 150 Mo. 498, 52 S. W. 11.

42. See infra page 71, as to the necessity of setting up the equitable counterclaim.

43. See infra page 71, for authorities and reasoning also applicable here.

44. Moline Plow Co. v. Hartman (1884) 84 Mo. 610; Estes v. Fry (1888)

for the jury, and the entire case is tried in the same manner as if all the issues were legal issues. As a result, a denial of the right to have the whole case tried before a jury constitutes reversible error.[45] And this view seems to be based upon the premise that the equitable defense goes only to defeat or bar the claim of the plaintiff and there is no demand or need for the court to exercise any of the powers of a court of equity. The issue is simply: should the plaintiff recover? But where the defendant admits the plaintiff's cause of action at law and sets up purely an equitable defense, the case is tried by the court as a proceeding in equity.[46] In this situation, the pleadings raise only an equitable issue; it is an equitable controversy.

THE EQUITABLE DEFENSE COUPLED WITH A PRAYER FOR AFFIRMATIVE RELIEF, OR THE EQUITABLE COUNTERCLAIM

If the answer of the defendant to plaintiff's action at law, in addition to the setting up of an equitable defense, also prays for affirmative equitable relief, the case is converted from one at law into a proceeding in equity;[47] that is, all the issues in

94 Mo. 226, 6 S. W. 660; Hall v. Small (1903) 178 Mo. 629, 77 S. W. 733; Lee v. Conran (1908) 213 Mo. 404, 111 S. W. 1151; Kansas City v. Smith (1911) 238 Mo. 323, 141 S. W. 1103; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Non-Royalty Shoe Co. v. Phoenix Assur. Co. (Mo. App. 1915) 178 S. W. 246, and for transfer to the Supreme Court, see (1919) 277 Mo. 399, 210 S. W. 37.

45. Moline Plow Co. v. Hartman (1884) 84 Mo. 610; Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Chilton v. Chilton (Mo. App. 1927) 297 S. W. 457.

46. Schuster v. Schuster (1887) 93 Mo. 438, 6 S. W. 259; O'Day v. Conn (1895) 131 Mo. 321, 32 S. W. 1109.

47. McCollum v. Boughton (1896) 132 Mo. 601, 30 S. W. 1028, 35 L. R. A. 480; Swon v. Stevens (1908) 143 Mo. 384, 45 S. W. 270; Dunn v. McCoy (1894) 150 Mo. 548, 52 S. W. 21; Lincoln Trust Co. v. Nathan (1903) 175 Mo. 32, 74 S. W. 1007; Bouton v. Pippin (1905) 192 Mo. 469, 91 S. W. 149; Pitts v. Pitts (1907) 201 Mo. 356, 100 S. W. 1047; Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104; Waters v. Hubbard (Mo. 1909) 117 S. W. 1112; Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432; Betzler & Clark v. James (1910) 227 Mo. 375, 126 S. W. 1007; Colburn v. Krenning (Mo. 1920) 220 S. W. 934; Jacobs v. Waldron (1927) 317 Mo. 1133, 298 S. W. 773; Seaboard Nat'l Bank v. Woesten (1897) 68 Mo. App. 137; Strong v. Gordon (1920) 203 Mo. App. 470, 221 S. W. 770; Roach v. Landis (Mo. App. 1927) 1 S. W. (2d) 203; Cohen v. Daily (Mo. App. 1932) 52 S. W. (2d) 199. But where plaintiff's action is for the recovery of money or specific property, by virtue of statute, R. S. Mo. (1929) sec. 948, there seems to be some confusion in the authorities. Some hold that the prayer for the affirmative relief does not convert the action into an equitable proceeding. Smith v. St. Louis Beef Canning Co. (1884) 14 Mo. App. 522, and cases there cited. See also Rand, McNally & Co. v. Wickham (1894) 60 Mo. App. 44; and West v. West (Mo. App. 1937) 110 S. W. (2d) 398, where plaintiff brought an action for waste and asked

the case, both legal and equitable, are for the chancellor.[48] This is illustrated by *Swon v. Stevens*,[49] a typical case, where the plaintiff brought an action in ejectment. The defendant in his answer claimed that the sale to the plaintiff under a deed of trust was invalid because it was made before the note had become due, and asked the court to declare the deed of trust null and void and to enter a decree cancelling the trustee's deed. As previously stated, this type of an answer may be regarded as a counterclaim.[50] It tends not only to defeat the plaintiff's action[51] but also to secure affirmative equitable relief for the defendant. Where such relief is sought, there is an appeal to the court to exercise its power as a court of equity. In other words, to use the language of the courts, if the issues joined entitled the parties to an ordinary judgment at law, then the case remains a case at law; but, if the issues tendered are equitable in their nature and call for affirmative equitable relief, the cause is converted into a suit in equity.[52] Of course, the facts pleaded must entitle the defendant to the affirmative relief sought;[53] and such

that defendant be enjoined from committing further waste. Others hold that the action is converted. Freeman v. Wilkerson (1872) 50 Mo. 554; Lincoln Trust Co. v. Nathan (1903) 175 Mo. 32, 74 S. W. 1007; Hughes v. Community Bank of Dawn (1934) 336 Mo. 305; 78 S. W. (2d) 98; Rienker v. Wesche (Mo. 1938) 117 S. W. (2d) 334; Strong v. Gordon (1920) 203 Mo. App. 470, 221 S. W. 770. The law today is undoubtedly represented by these last named cases. Some of the early cases also held that it was only where matters of law and equity are so blended that the case could not properly be tried by a jury, and equity alone could afford relief, that a conversion took place. Kortjohn v. Seimers (1888) 29 Mo. App. 271; Rand, McNally & Co. v. Wickham (1894) 60 Mo. App. 44; Grayson v. Weddle (1883) 80 Mo. 39. Or where the matter of defense is of purely equitable cognizance. Allen v. Logan (1888) 96 Mo. 591, 10 S. W. 149; Rand, McNally & Co. v. Wickham (1894) 60 Mo. App. 44. But the law now is undoubtedly as expressed in the text above.

48. But, even though the answer seeks affirmative relief, its withdrawal before trial leaves the case one at law. Marsden v. Nipp (1930) 325 Mo. 822, 30 S. W. (2d) 77.

49. (1908) 143 Mo. 384, 45 S. W. 270.

50. See supra, page 64.

51. Apparently, a cross-action will not convert a case into a suit in equity, unless the matters pleaded by the defendant will destroy plaintiff's case or show that he never had a valid cause of action. Hughes v. Community Bank of Dawn (1934) 336 Mo. 305, 78 S. W. (2d) 98.

52. Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Rains v. Moulder (1936) 338 Mo. 275, 90 S. W. (2d) 81. Also see Federal Land Bank v. McColgan (1933) 332 Mo. 860, 59 S. W. (2d) 1052; New Harmony Lodge v. Kansas City Ft. S. & M. R. R. (1903) 100 Mo. App. 407, 74 S. W. 5.

53. Hall v. Small (1903) 178 Mo. 620, 77 S. W. 733; Kessner v. Phillips (1905) 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368; Pitts v. Pitts (1907) 201 Mo. 356, 100 S. W. 1047; Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104; Waters v. Hubbard (Mo. 1909) 117 S. W. 1112; Armbruster v. Armbruster (1930) 326 Mo. 5, 31 S. W. (2d) 28, 77 A. L. R.

relief must be necessary for his defense, or such as can only be granted by a court of equity.[54] There must be a prayer for the relief desired,[55] and the prayer must be based on the defense set up in the answer.[56] In *Boehme v. Roth*[57] the court held that, in determining whether the answer calls for equitable relief, it would consider the answer as a whole, exclusive of the prayer. In this case, the plaintiff had instituted an action in replevin against the defendant, who answered and prayed "the court to protect the interest of the defendant and to adjudge a disaffirmance of the contract herein" and for the return of the property involved. The court declared that the demand for relief is no part of the cause of action as it does not classify the action and may be changed without changing the cause of action.[58]

782; Babcock v. Rieger (1933) 332 Mo. 528, 58 S. W. (2d) 722; Williams v. Walker (1933) 333 Mo. 322, 62 S. W. (2d) 840; Rains v. Moulder (1936) 338 Mo. 275, 90 S. W. (2d) 81; Rand, McNally & Co. v. Wickham (1894) 60 Mo. App. 44; Bank of Neelyville v. Lee (1916) 193 Mo. App. 537, 182 S. W. 1016; Berryman v. Maryland Motor Car Ins. Co. (1918) 199 Mo. App. 503, 204 S. W. 738. For a general discussion regarding the allegations of the counterclaim, see Clark & Surbeck, supra note 25, at 304-305.

54. Harris v. Vinyard (1868) 42 Mo. 568; Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432; Colburn v. Krenning (Mo. 1920) 220 S. W. 934; Aetna Life Ins. Co. v. Daniel (1931) 328 Mo. 876, 42 S. W. (2d) 584; Williams v. Walker (1933) 333 Mo. 322, 62 S. W. (2d) 840; Thompson v. National Bank of Commerce (1908) 132 Mo. App. 225, 110 S. W. 681; Stalter v. Stalter (1910) 151 Mo. App. 66, 131 S. W. 747; Long v. Montgomery (Mo. App. 1929) 22 S. W. (2d) 206. In this respect, it is of interest to note the holding where the action is based on an insurance policy, after the insured's death, and the defendant sets up fraud and misrepresentation and asks the court to decree the policy null and void. Since under the statute, R. S. Mo. (1929) sec. 5732, if the alleged fraud and misrepresentation did not actually contribute to the insured's death, no possible harm could result to the defendant in the future, the court, by being asked to annul the policy, is called upon to do a useless thing. See Schuermann v. Union Cent. Life Ins. Co. (1907) 165 Mo. 641, 65 S. W. 723; Kern v. Supreme Council (1902) 167 Mo. 471, 67 S. W. 252; Wollums v. Mutual Benefit Health and Accident Ass'n (1931) 226 Mo. App. 647, 46 S. W. (2d) 259.

55. Citizens Trust Co. v. Going (1921) 288 Mo. 505, 232 S. W. 996; Cullen v. Johnson (1930) 325 Mo. 253, 29 S. W. (2d) 39. Rains v. Moulder (1936) 338 Mo. 275, 90 S. W. (2d) 81.

56. Toler v. Edwards (1913) 249 Mo. 152, 155 S. W. 26; Citizens' Trust Co. v. Going (1921) 288 Mo. 505, 232 S. W. 996; Jacobs v. Waldron (1927) 317 Mo. 1133, 298 S. W. 773; Wolf v. Hartford Fire Ins. Co. (1925) 219 Mo. App. 307, 269 S. W. 701.

57. (Mo. App. 1926) 280 S. W. 730. See also Hauser v. Murray (1914) 256 Mo. 58, 165 S. W. 376; New Harmony Lodge v. Kansas City Ft. S. & M. R. R. (1903) 100 Mo. App. 407, 74 S. W. 5; State ex rel. Jackly v. Taylor (1922) 210 Mo. App. 195, 242 S. W. 997; Wollums v. Mutual Benefit Health & Accident Ass'n (1931) 226 Mo. App. 647, 46 S. W. (2d) 259.

58. Boehme v. Roth (Mo. App. 1926) 280 S. W. 730. See also Davidson v. Gould (Mo. App. 1916) 187 S. W. 591, which holds that the equitable counterclaim must satisfy all the requirements of a good bill in equity.

The nature of the equitable counterclaim, or the so-called crossbill, is revealed by those cases where the plaintiff dismisses his case after the defendant has filed an answer setting up an equitable defense and asking for affirmative equitable relief. The dismissal of the plaintiff's suit does not carry the defendant's counterclaim out of court, where the counterclaim makes a case entitling him to equitable relief against the plaintiff touching the subject matter of the plaintiff's case.[59]

This rule is based upon the statutory provision which provides that the dismissal of the plaintiff's suit shall not operate as a dismissal of the defendant's counterclaim.[60] Of course it is apparent from this that the mere setting up of an equitable defense in bar, without seeking affirmative relief, will not prevent defendant's answer from being carried out of court by plaintiff's dismissal of his own cause of action. And the foregoing indicates that the counterclaim is more than a mere defense, as it constitutes a complete cause of action in itself, and embodies matter which would have supported an independent proceeding in equity either prior to or after the enactment of the code.

As a general proposition, and as already pointed out,[61] affirmative equitable relief cannot be granted to a defendant on his answer by way of defense.[62] To obtain such relief, resort must be had to the counterclaim—an equitable defense coupled with a prayer for affirmative relief.[63] Unless the defendant asks for such relief, no reason apparently exists for granting it to him. But *Hauser v. Murray*[64] indicates that there may be an exception to the general rule whenever the defendant invokes an equitable defense to defeat a legal action, which for "all practical purposes" amounts to a request for affirmative relief. In *Hauser v.*

59. Lewis v. Rhodes (1899) 150 Mo. 498, 52 S. W. 11; Fulton v. Fisher (1912) 239 Mo. 116, 143 S. W. 438; Hodges v. Black (1880) 8 Mo. App. 389, aff'd (1882) 76 Mo. 537; Roach v. Landis (Mo. App. 1927) 1 S. W. (2d) 203; Dezino v. Drozda Realty Co. (Mo. App. 1929) 13 S. W. (2d) 659. This last named case holds that the same is true whether plaintiff voluntarily dismisses his suit or whether the court deems it necessary to dismiss it. Also see Clark Real Estate Co. v. Old Trails Inv. Co. (1934) 335 Mo. 1237, 76 S. W. (2d) 388.

60. R. S. Mo. (1929) sec. 849, originally R. S. Mo. (1889) sec. 8172.

61. See supra, page 69.

62. Harris v. Vinyard (1868) 42 Mo. 568; State ex rel. Townshend v. Meagher (1869) 42 Mo. 356, 100 Am. Dec. 298.

63. See supra, page 67.

64. (1914) 256 Mo. 58, 165 S. W. 376.

Murray[65] the plaintiffs brought the statutory action to quiet title to certain real estate. The defendants, who were husband and wife, filed an answer setting up, along with several legal defenses, two equitable defenses: (1) estoppel in *pais*, and (2) that the grantor of the plaintiffs had purchased the land in question with money held by him in trust, that the beneficiary of such trust was now dead, and that the defendant (wife) was the sole heir and entitled to the real estate. No affirmative equitable relief was requested by either of the defendants, but the court decreed title to a portion of the land to one of them, the wife. By the decision in this case, the formal distinction between an equitable defense in bar and an equitable counterclaim is practically destroyed. The matter of a jury trial is made to depend upon whether the answer in substance sought affirmative equitable relief, and not upon whether the answer in form sought affirmative equitable relief.

If a defendant has an equitable defense, he is obliged to set it up in his answer either in bar or as the basis for affirmative relief. He can avail himself of the defense only in this manner; he cannot afterwards make it the ground for an independent suit in equity against a former plaintiff. This rule was established in *Kelley v. Hurt*.[66] In that case the plaintiff brought an action against the defendant to set aside a sheriff's deed, alleging that the property included in the deed had been unnecessarily sold in Massachusetts in order to pay a judgment debt, and that as a result of such a sale the property was sacrificed. The plaintiff was the defendant in a former action in ejectment brought by the purchaser, the present defendant, but did not set up the

65. (1914) 256 Mo. 58, 165 S. W. 376. Also see Tapley v. Herman (1902) 95 Mo. App. 537, 69 S. W. 482; and States ex rel. Jackly v. Taylor (1922) 210 Mo. App. 195, 242 S. W. 997.

66. (1881) 74 Mo. 561. See also Preston v. Rickets (1886) 91 Mo. 320, 2 S. W. 793, where, in an ejectment suit, the defendant set up an equitable defense, and the cause was tried, and judgment rendered in favor of the plaintiff. The equitable defense was held *res judicata*, and the defendant could not thereafter recover by a proceeding to establish his equitable title passed upon in the former suit as a defense. But in some states, it has been held that while the defendant may set up an equitable defense in a legal action, he is not obliged to do so, particularly where it is not purely defensive but calls for affirmative relief. If a defendant has such a defense and omits to set it up in defense, and the plaintiff prevails, "the defendant is not precluded from asserting his equity in a separate action." Ayres v. Bensley (1867) 32 Cal. 620, 626. The holding, as indicated in this case, is based upon the construction of the act—that the defendant *may* set up such a defense at his option.

matter constituting the foundation of his present action as an equitable defense in the ejectment suit. It was held that he could not maintain his action to set the deed aside. In its opinion, the court stated that, before equitable defenses were cognizable at law, a party who had and was aware of his defense at law and failed to plead the same, could not afterwards successfully apply to a court of chancery for relief. It further stated that, in consequence of the change effected by the code, what was formerly denominated an equitable defense is just as available and just as potent in precluding recovery against the party pleading it as was a legal defense in a court of common law, and that under the new order the same doctrine, as applied to legal defenses in like circumstances at common law, should be applied to equitable defenses. A consideration of the purpose of the code and especially the expressed intent that all controversies respecting the matter involved in litigation should be determined in one action makes the correctness of this decision evident.

Whenever a case is converted into a proceeding in equity through the interposition of an equitable counterclaim in the manner we have already indicated,[67] the case is tried by the court sitting as a chancellor,[68] and neither party is entitled to a jury trial.[69] The case is tried like an original action in equity. The rule seems to be definitely established that the orderly way to try the case is to first dispose of the issues raised by the equitable counterclaim and then to try the legal action stated in the petition.[70] This rule is based upon the part played by the counterclaim, for the plaintiff cannot recover upon the cause of action stated in his petition if the equities set up by the defendant are established.[71] It is obvious, therefore, that a dis-

67. See cases cited supra, note 47.

68. Moline Plow Co. v. Hartman (1884) 84 Mo. 610; Estes v. Fry (1888) 94 Mo. 266, 6 S. W. 660; Lee v. Conran (1908) 213 Mo. 404, 111 S. W. 1151; Kansas City v. Smith (1911) 238 Mo. 323, 141 S. W. 1103; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Non-Royalty Shoe Co. v. Phoenix Assur. Co. (Mo. App. 1915) 178 S. W. 246; (1919) 277 Mo. 399, 210 S. W. 37.

69. Moline Plow Co. v. Hartman (1884) 84 Mo. 610; Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Chilton v. Chilton (Mo. App. 1927) 297 S. W. 457.

70. Martin v. Turnbaugh (1899) 153 Mo. 172, 54 S. W. 515; Keltner v. Threlkel (1927) 316 Mo. 609, 291 S. W. 462; Dahlberg v. Fisse (1931) 328 Mo. 213, 40 S. W. (2d) 606.

71. Allen v. Logan (1888) 96 Mo. 591, 10 S. W. 149; Keltner v. Threlkel (1927) 316 Mo. 609, 291 S. W. 462.

posal of the issues raised by the equitable counterclaim will generally (if found in favor of the defendant) dispose of the whole case and make unnecessary a trial of the legal issues. Consequently, in many cases, this order of trial, as well as being the logical method, results in a saving of time.

As has previously been stated,[72] in those cases where the defendant sets up in his answer a legal defense and also an equitable defense coupled with a prayer for affirmative equitable relief, all the issues are to be tried by the court, whether they are legal or equitable. By virtue of statute,[73] on the application of either party, the court may in its discretion[74] direct separate trials, if it be of the opinion that all or any issues in a case should be tried separately by the court or jury. Under the statutory authorization, the legal issues in the case can be submitted to the jury; but it is apparent from the language of the statute that neither party can as a matter of right demand a trial by jury of such issues. This is the logical, if not the only, interpretation of the enactment. There is no real reason why the action should, as a matter of right, be split up into legal and equitable issues and the former submitted to a jury, since the court is vested with power to award complete relief[75] as a court of equity under the old order, even to the extent of adjudicating matters of law.[76] But it may be urged against this view that to permit the court to try the legal issues would deprive the parties of their constitutional right to a trial by jury. This contention, however, is without merit. Since the case has been converted into a proceeding in equity, no jury can be demanded. The case

72. See supra, note 47.

73. R. S. Mo. (1929) sec. 951: "Where there are several causes of action united in a petition, or where there are several issues, and the court shall be of the opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials, which may be had at the same or at different terms of the court, as circumstances may require. In all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful party, unless for good cause it shall otherwise order. The judgment upon each separate finding shall await the trial of all the issues."

74. Osmak v. American Car & Foundry Co. (1931) 328 Mo. 159, 40 S. W. (2d) 714. Also see: Estes v. Fry (1888) 94 Mo. 266, 6 S. W. 660, and McFarland v. Missouri Pac. R. R. (1894) 125 Mo. 253, 28 S. W. 590.

75. Growney v. O'Donnell (1917) 272 Mo. 167, 198 S. W. 863.

76. Miller v. St. Louis & K. C. Ry. (1901) 162 Mo. 424, 63 S. W. 85; Waddle v. Frazier (1912) 245 Mo. 391, 151 S. W. 87, noting also cases there cited. Also see Grinnell Co. v. Farm Home Savings & Loan Ass'n (Mo. App. 1934) 75 S. W. (2d) 409.

is one in equity, and the court has complete power to dispose of all the issues in the pending litigation.[77]

While all the decisions do not clearly hold in express language that, where the proceeding has become one in equity through the interposition of an equitable counterclaim, the parties are not entitled to have the legal issues submitted to a jury as a matter of right, it is quite obvious from the language used that such is the law. They are uniform in holding that the action,[78] the case,[79] the whole case,[80] the suit,[81] or the cause[82] is converted into a suit or proceeding in equity, whether an equitable counterclaim is set up with a general denial or with an affirmative legal defense. None of the decisions hold that only a part of the cause of action is converted, or that only the equitable issues are for the court. This being true, the court has the power to dispose of the entire case as in any other proceeding in equity. Whether the legal issues shall be submitted to a jury is a matter resting solely in the discretion of the court, either by virtue of statute or of its general power as a court of equity to call a jury to its aid.[83] And there is no doubt as to the power of the court to call a jury to its aid where the action has been converted from one at law into one in equity,[84] but the jury's findings are not binding on the court but are merely advisory as in any other equitable proceeding.[85] The court may abide by them

77. Barnard v. Keathley (1910) 230 Mo. 209, 130 S. W. 306; Growney v. O'Donnell (1917) 272 Mo. 167, 198 S. W. 863.

78. McCollum v. Boughton (1896) 132 Mo. 601, 30 S. W. 1028, 35 A. L. R. 480; Swon v. Stevens (1908) 143 Mo. 384, 45 S. W. 270; Toler v. Edwards (1913) 249 Mo. 152, 155 S. W. 26; Schneider v. Schneider (1920) 284 Mo. 314, 224 S. W. 1; Seaboard Nat'l Bank v. Woesten (1897) 68 Mo. App. 137; Lawson v. Spencer (1899) 81 Mo. App. 169; Bank of Neelyville v. Lee (1916) 193 Mo. App. 537, 182 S. W. 1016.

79. Lincoln Trust Co. v. Nathan (1903) 175 Mo. 32, 74 S. W. 1007; Kessner v. Phillips (1905) 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368; Shaffer v. Detie (1905) 191 Mo. 377, 90 S. W. 131; Brooks v. Gaffin (1905) 192 Mo. 228, 90 S. W. 808.

80. Lewis v. Rhodes (1899) 150 Mo. 498, 52 S. W. 11; Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432.

81. Koehler v. Rowland (1918) 275 Mo. 573, 205 S. W. 217.

82. Pitts v. Pitts (1907) 201 Mo. 356, 100 S. W. 1047; Hubbard v. Slavens (1909) 128 Mo. 598, 117 S. W. 1104; Waters v. Hubbard (Mo. 1909) 117 S. W. 1112; Betzler & Clark v. James (1910) 227 Mo. 375, 126 S. W. 1007.

83. Estes v. Fry (1888) 94 Mo. 266, 6 S. W. 660.

84. Bouton v. Pippin (1905) 192 Mo. 469, 91 S. W. 141; Pitts v. Pitts (1907) 201 Mo. 356, 100 S. W. 1047; also see Northrip v. Burge (1914) 255 Mo. 641, 164 S. W. 584.

85. See cases cited supra, note 84.

or ignore them entirely. This is a further indication that the conversion is complete, and the whole case is for the court.

The case of *Short v. Kidd*[86] involved an action in ejectment, wherein the defendant set up a general denial, a plea of adverse possession under the ten year statute of limitations, and facts showing a resulting trust in defendant's favor. Affirmative equitable relief was sought through a prayer that the plaintiff be divested of the title to the land in question and that it be vested in the defendant. The issue regarding the resulting trust was tried by the court, and the remaining issues were continued and submitted to a jury at the next term of court. It was held that, even though the court had passed on the equitable defense at one term of court and at the next term had submitted the legal issues to the jury, the case remained one in equity. This decision clearly indicates that the whole case is converted through the interposition of an equitable counterclaim.

EQUITABLE MATTERS IN THE REPLY

In his reply the plaintiff may set up new matter in opposition to the new matter contained in the defendant's answer.[87] Consequently, the reply may set up equitable matter in bar of the defense or an equitable counterclaim to an affirmative defense in the answer. The same legal principles which apply to equitable defenses or equitable counterclaims in the answer are also applicable here,[88] but formerly there was one important exception. This exception denied the plaintiff the right to set up fraud in the procurement of a release, which rendered it voidable but not void,[89] in his reply to defendant's answer pleading

86. (Mo. 1917) 197 S. W. 64.

87. R. S. Mo. (1929) sec. 779: "And where the answer contains new matter, the plaintiff shall reply to such new matter within such time as the court by rule or otherwise shall require, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege in ordinary and concise language and without repetition, any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer." For original enactment, see Mo. Laws of 1848-9, 80, sec. 9.

88. R. S. Mo. (1929) sec. 781: "The reply shall be governed by the rules prescribed in relation to answers." For original enactment see, Mo. Laws of 1848-9, 80, sec. 10. See also Martin v. Turnbaugh (1899) 153 Mo. 172, 54 S. W. 515.

89. Fraud in the *factum* is frequently said to render a release void, and fraud in the inducement to render it voidable. The two terms are used here in this sense. McCoy v. McMahon Construction Co. (Mo. 1919) 216 S. W. 770; Metropolitan Paving Co. v. Brown-Crummer Inv. Co. (1925) 309 Mo. 638, 274 S. W. 815, and cases cited; George v. Tate (1880) 102

such release as a bar to plaintiff's action, but required him to resort to a court of equity in order to have the release set aside in a proceeding instituted for that express purpose.[90] The chief objection to raising the question of fraud in the reply appeared to be that such a procedure permitted questions of fraud to be tried by a jury instead of by a chancellor and that the recession of a release could thus be obtained upon evidence which would have been insufficient in a court of equity.[91] Since fraud, however, could be set up as a defense in bar in an answer to an action upon a voidable agreement,[92] the same should have been equally permissible by reply. The same objection is applicable in either instance. In order to remedy the situation, however, a statute was enacted under which the plaintiff was expressly authorized to allege in the reply any facts showing, or tending to show, that the release was fraudulently or wrongfully procured from the plaintiff, and the issues thus raised submitted to the jury for determination.[93] With the enactment of this provision, the same rule now applies to the reply as to the answer.[94]

THE APPEAL

Whenever a case at law is converted into a proceeding in equity by the interposition of an equitable defense and a prayer

U. S. 564. See infra, page 80, for further discussion regarding "voidable" and "void."

90. McFarland v. Missouri Pac. R. R. (1894) 125 Mo. 253, 28 S. W. 590; Homuth v. Metropolitan St. Ry. (1895) 129 Mo. 629, 31 S. W. 903; Och v. Missouri K. & T. Ry. (1895) 130 Mo. 27, 31 S. W. 962; Hancock v. Blackwell (1897) 139 Mo. 440, 41 S. W. 205; Althoff v. St. Louis Transit Co. (1907) 204 Mo. 166, 102 S. W. 642.

91. Girard v. St. Louis Car-Wheel Co. (1894) 46 Mo. App. 79, 27 S. W. 648.

92. See infra, note 120.

93. R. S. Mo. (1929) sec. 782: "Whenever a release, composition, settlement, or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from the plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient." It was not the purpose of the legislature by the enactment of this section "to change the law of accord and satisfaction, and the rules governing the rescission of contracts of settlements upon the grounds of fraud but the clear intention was to avoid multiplicity of suits by authorizing the fraud issue to be tried by the jury at the same time and in the same case involving the original cause of action." Althoff v. St. Louis Transit Co. (1907) 204 Mo. 166, 102 S. W. 642, 643.

94. Non-Royalty Shoe Co. v. Phoenix Assur. Co. (Mo. App. 1915) 178 S. W. 246; also (1919) 277 Mo. 399, 210 S. W. 37.

for affirmative relief, the case, when appealed, will be reviewed by the appellate court as a case in equity.[95] The court of appeals will examine the entire record as to the facts as well as to the law and review the case upon its merits.[96] Or, as generally said, the case will be tried *de novo*.[97] It will be examined or reviewed in this manner even though the trial court availed itself of the advice of a jury,[98] as in any suit in equity the verdict of the jury is not binding on the trial court.[99] On the other hand, if the case is not converted, it will be reviewed by the appellate court as an action at law.[100]

Where a case is tried below by both parties on the theory that it is one in equity or at law although actually the theory adopted was wrong, the appellate court will not reverse the case on that ground,[101] as the parties have waived the right to a jury trial if the case was converted into a proceeding in equity, or to an equity trial if the case remained one at law.[102] The reports reveal a number of cases involving equitable defenses and equitable counterclaims where the appellant, detecting the error after the trial, has sought unsuccessfully on appeal to obtain a reversal on the ground that the case was tried on the wrong theory.

THE PREDOMINATING EQUITABLE DEFENSES

The predominating equitable defenses in Missouri seem to be: estoppel in *pais*, laches, fraud, and mistake, although, as a general rule, any right formerly cognizable in a court of equity can

95. Kerstner v. Vorweg (1895) 130 Mo. 196, 32 S. W. 298; Myers v. Schuchmann (1904) 182 Mo. 159, 81 S. W. 618; Titus v. North Kansas City Develop. Co. (1915) 264 Mo. 229, 174 S. W. 432; Schneider v. Schneider (1920) 284 Mo. 314, 224 S. W. 1; Seaboard Nat'l Bank v. Woesten (1897) 68 Mo. App. 137; Lawson v. Spencer (1899) 81 Mo. App. 169; Long v. Montgomery (Mo. App. 1929) 22 S. W. (2d) 206; Beckmann v. Beckmann (Mo. App. 1932) 51 S. W. (2d) 136.

96. Brightwell v. McAfee (1913) 249 Mo. 562, 155 S. W. 820; Price & Anderson v. Morrison (1921) 291 Mo. 249, 236 S. W. 297.

97. Liflander v. Bobbitt (Mo. 1937) 111 S. W. (2d) 72.

98. Weeke v. Senden (1873) 54 Mo. 129; Signaigo v. Signaigo (Mo. 1918) 205 S. W. 23.

99. Bronson v. Wanzer (1885) 86 Mo. 408; Hall v. Harris (1898) 145 Mo. 614, 47 S. W. 506; Northrip v. Burge (1914) 255 Mo. 641, 164 S. W. 584.

100. Marsden v. Nipp (1930) 325 Mo. 822, 30 S. W. (2d) 77.

101. Maget v. Bartlett Bros. Land & Loan Co. (1931) 226 Mo. App. 416, 41 S. W. (2d) 849; Kimberlin v. Roberts (1937) 341 Mo. 267, 107 S. W. (2d) 24.

102. Kostuba v. Miller (1897) 137 Mo. 161, 38 S. W. 946; Kessner v. Phillips (1905) 189 Mo. 515, 88 S. W. 66; Brooks v. Gaffin (1905) 192 Mo. 228, 90 S. W. 808.

now be set up as an equitable defense to an action at law as a bar to recovery or by way of counterclaim.[103] The defenses enumerated, however, are of sufficient importance because of their frequent use, or because of some peculiar rule, to merit particular attention.

A plea of estoppel in *pais*,[104] although often called equitable estoppel, is not necessarily a matter of equitable jurisdiction,[105] but is also available at law.[106] It had its origin in equity but was at an early date taken over by the common law courts and applied in legal proceedings.[107] Under some circumstances, however, full effect cannot be given to the estoppel by a mere judgment at law. This situation arose in *Ming v. Olster*,[108] where the plaintiff instituted an action in ejectment. The defendant set up in his answer a partition by parol under which he claimed title to the land in question and asked the court to vest title in him. A court of common law in Missouri could have found for the defendant and against the plaintiff in the ejectment suit, but it could not decree title where it would have been if a deed had been executed by the parties at the time of the partition of the land. Thus, where it becomes necessary to fill a gap in a record title by a decree vesting title, estoppel in *pais* may be set up by the defendant as the basis for an equitable counterclaim on which to base a prayer for affirmative relief, although the estoppel might have been set up merely as a bar to plaintiff's action. Consequently, when estoppel in *pais* is set up as the basis for affirmative equitable relief in cases involving real estate, it is classified as purely equitable.[109] This is true as a

103. Pomeroy, op. cit. supra note 22, at 49, sec. 30; Cook, supra note 20; Sachleben v. Heintze (1893) 117 Mo. 520, 24 S. W. 54; Kostuba v. Miller (1897) 137 Mo. 161, 38 S. W. 946.

104. To constitute estoppel in pais, there must be: an admission, statement or act inconsistent with the claim afterwards asserted and sued on; an action by the other party on the faith of such admission, statement or act; and an injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement or act. See 2 Pomeroy, op. cit. supra note 1, at 1644, sec. 805.

105. Bank of Neelyville v. Lee (1916) 193 Mo. App. 537, 182 S. W. 1016; Ming v. Olster (1906) 195 Mo. 460, 92 S. W. 898; Powell v. Bowen (1919) 279 Mo. 280, 214 S. W. 142; McQuitty v. McQuitty (1933) 332 Mo. 1057, 61 S. W. (2d) 342; Clauson v. Larman (Mo. App. 1919) 211 S. W. 912; Hamburger v. Hirsch (Mo. App. 1919) 212 S. W. 49. See also Pitman v. 16 to 1 Mining Co. (1899) 78 Mo. App. 438.

106. See supra, note 105.

107. Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104.

108. (1906) 195 Mo. 460, 92 S. W. 898.

109. Schneider v. Schneider (1920) 284 Mo. 314, 224 S. W. 1.

court of equity alone can vest the title in the defendant where it rightfully belongs, if the estoppel is proved. Therefore, if the defendant sets up estoppel in *pais* and also seeks affirmative relief, the action is converted into a proceeding in equity.[110] But, on the other hand, if the defendant pleads facts constituting an estoppel in *pais* without seeking affirmative relief, the plaintiff's case remains one at law.[111] This is so whether the estoppel is regarded as an equitable defense in bar or a legal defense. In either instance, the plea simply goes to defeat the plaintiff's cause of action; and there is no demand upon the court for any relief peculiarly within the province of a court of equity.

Closely connected with estoppel in *pais* is the doctrine of laches. In fact, it has been said that laches is but a manifestation of estoppel in *pais*, the latter being the genus and the former a species.[112] But the defense of laches is available only where equitable relief is sought by the plaintiff.[113] In other words, it cannot be used as a defense in bar or as the basis for an equitable counterclaim[114] when the plaintiff's demand is one at law. It should be noted, however, that estoppel in *pais* and laches are not always clearly distinguished in the decisions. The rule has often been laid down that laches not amounting to an estoppel is a defense only to an equitable cause of action.[115]

110. Bouton v. Pippin (1905) 192 Mo. 469, 91 S. W. 149; Withers v. Kansas City Sub. Belt Ry. (1909) 226 Mo. 373, 126 S. W. 432; Newbrough v. Moore (Mo. 1918) 202 S. W. 547; Bank of Neelyville v. Lee (1916) 193 Mo. App. 537, 182 S. W. 1016.

111. See cases cited supra, note 110.

112. Powell v. Bowen (1919) 279 Mo. 280, 214 S. W. 142; Boals v. Garden City (Mo. App. 1932) 50 S. W. (2d) 179.

113. Kellogg v. Moore (1917) 271 Mo. 189, 196 S. W. 15, 16: "Laches is peculiarly a defense to an equitable claim. We do not always stop to distinguish between laches and estoppel in pais * * * laches is purely a creation of equity, and is only to be invoked by the defendant in a case where the plaintiff appeals to equity and seeks the enforcement of an equitable right. Laches is an equitable doctrine which partakes in the nature of the legal statutory limitation, but is not governed as to time by such statute. It may be inequitable to permit the establishment of an equitable right within a time less than the legal defense of the statutory limitations." Also see Bevier v. Graves (Mo. 1919) 213 S. W. 74.

114. See Hecker v. Bleish (1928) 319 Mo. 148, 3 S. W. (2d) 1008. This was an action in ejectment. The defendant filed a general denial, claiming title to the property, and praying that the patent from the country to the plaintiff be cancelled, and defendant decreed the owner. It was held that the plaintiff's action was one at law, wherein he grounds his right to a legal title. "Laches is peculiarly a defense to an equitable claim or cause of action, and has no place as a defense to an action at law, or to an action wherein plaintiff stands upon a legal claim of title." Hecker v. Bleish (1928) 319 Mo. 148, 3 S. W. (2d) 1008, 1018.

115. Paxton v. Fix (Mo. 1916) 190 S. W. 328, and cases there cited.

As has been heretofore indicated,[116] fraud in the procurement of a release could not formerly be set up as a defense in the reply to an answer which pleaded such release as a bar to the suit of the plaintiff. Prior to the enactment of the statute which now expressly permits fraud to be set up in the reply, the release could be impeached in an action at law when set up in bar to plaintiff's claim if the fraud were of such a character as to render the release void in the sense that the minds of the parties never met.[117] But if the fraud were only such as made the release voidable, the minds of the parties having actually met, it was a complete bar to the plaintiff's suit, until set aside in an equitable proceeding brought for that purpose.[118] The first situation arose in *Girard v. St. Louis Car-Wheel Co.*[119] where the plaintiff had been induced to sign a release when mentally incompetent and unaware of what she had signed. Such a release was held "void," and the facts making it so could be set up in the reply and tried before a jury. But, in *Och v. Missouri, Kansas & Texas Ry.*,[120] where the evidence showed that the plaintiff knew what the release was, but was induced to sign it on the assurance of defendant's agents and physicians that she was not seriously injured, the release was held voidable and hence could not be set up in the reply. In the first case, the law treated the result of the fraud as a nullity, when it had been ascertained, and passed on to judgment despite it. In the second case, the result of the fraud not being a nullity, it could not be passed over but was legal and binding until set aside in equity. Consequently, the plaintiff was forced to resort to an independent suit in equity or to include a count for cancellation or rescission in his action against the defendant.[121]

It seems that the defendant could always, under the code, set

116. See supra, page 75.

117. Homuth v. Metropolitan St. Ry. (1895) 129 Mo. 629, 31 S. W. 903; Girard v. St. Louis Car-Wheel Co. (1894) 46 Mo. App. 79, 27 S. W. 648; Non-Royalty Shoe Co. v. Phoenix Assur. Co. (Mo. App. 1915) 178 S. W. 246, also (1919) 277 Mo. 399, 210 S. W. 37.

118. Och v. Missouri K & T. Ry. (1895) 130 Mo. 27, 31 S. W. 962; Hancock v. Blackwell (1897) 139 Mo. 440, 41 S. W. 205; Althoff v. St. Louis Transit Co. (1907) 204 Mo. 166, 102 S. W. 642.

119. (1894) 46 Mo. App. 79, 27 S. W. 648; also see supra, note 89.

120. (1895) 130 Mo. 27, 31 S. W. 962; also see supra, note 89.

121. Hancock v. Blackwell (1897) 139 Mo. 440, 41 S. W. 205; Ezo v. St. Louis Smelting & Refining Co. (Mo. App. 1935) 87 S. W. (2d) 1051, and see supra, note 90.

up fraud by way of answer to plaintiff's petition, regardless of the nature of the fraud.[122] Where the result of the fraud was not a nullity, as discussed in the foregoing paragraph, the same reasons existed as in the case of the reply with reference to requiring the plaintiff to resort to a court of equity for relief. It would therefore appear, even in the absence of the statute permitting fraud in the procurement of a release, settlement, or compromise of a cause of action to be set up in the reply, that it should have been permissible.[123]

Fraud may also be set up in the answer as the basis for an equitable counterclaim to an action at law, and the entire case will be thereby converted into a proceeding in equity.[124] But the

122. Girard v. St. Louis Car-Wheel Co. (1894) 46 Mo. App. 79, 27 S. W. 648. And see Clough v. Holden (1893) 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393, where fraud was pleaded as a defense in bar to an action on a note. Also see infra, note 123, and Kitchen v. Cape Girardeau & State Line R. R. (1875) 59 Mo. 514; Earl v. Hart (1886) 89 Mo. 263, 1 S. W. 238; Routt v. Milner (1894) 57 Mo. App. 50.

123. Clark, op. cit. supra note 1, at 486, sec. 107.

124. Conrey v. Pratt (1913) 248 Mo. 576, 154 S. W. 749. This was a suit on a note asking for judgment and foreclosure of a mortgage on the land securing it. Defendant set up fraudulent misrepresentations in obtaining the note and mortgage, and asked for their cancellation. The court held that the case was converted into a proceeding in equity. Earl v. Hart (1886) 89 Mo. 263, 1 S. W. 238. But see Wollums v. Mutual Benefit Health & Accident Ass'n (1931) 226 Mo. App. 647, 46 S. W. (2d) 259, that even though the answer pleaded fraud in the procurement of an insurance policy and prayed for a cancellation of the same, that the action was not converted into one in equity and the court did not err in trying the case before a jury. The court said: "It is only under very unusual circumstances that a jury trial will be denied and defendant permitted to have the policy cancelled after the happening of said contingency or event. State ex rel. Life Ins. Co. v. Allen, 306 Mo. 197, 214, 267 S. W. 832. The only circumstance that we have been able to find where an insurance company was permitted in this state to maintain a suit in equity to cancel a policy under such conditions, was the presence of an incontestable clause in the policy. No action to enforce the policy had been instituted and by reason of the presence of such clause the right of the company to raise the issue involved in the suit for cancellation would expire at the expiration of the specified period of time. It was held that the company could maintain cancellation. New York Like Ins. Co. v. Cobb, 219 Mo. App. 609, 282 S. W. 494, a decision by the St. Louis Court of Appeals. However, the Springfield Court of Appeals has disagreed with the St. Louis Court of Appeals in this respect and holds that, under no circumstances, can a policy be cancelled after the happening of the contingency or event upon which it is to become payable. See Aetna Life Ins. Co. v. Daniel (Mo. App.) 33 S. W. (2d) 424. The Springfield Court of Appeals certified the last mentioned case to the Supreme Court, as being in conflict with the Cobb Case, and the Supreme Court held that there must be a jury trial where the beneficiary sues. Aetna Life Ins. Co. v. Daniel, 42 S. W. (2d) 584. The decision in those cases agreeing with the decision of the St. Louis Court of Appeals in the Cobb Case are based upon the ground that the only remedy the insurance

decisions are not clear whether an equitable counterclaim may be set up in the reply, although the apparent import of *Hancock v. Blackwell*[125] is to that effect. This case involved an action for damages alleged to have been caused by slander. The defendant denied generally the allegations of the plaintiff's petition and set up a written agreement or release by way of bar. The plaintiff filed a reply in which she admitted signing the release and alleged that it had been obtained by fraud but sought no affirmative equitable relief. A motion was filed by the defendant to strike out that portion of the plaintiff's reply which set up the alleged fraud because "said reply attempts to raise issues triable solely in a court of equity."[126] The trial court's action in overruling this motion was reversed on appeal. The opinion of the court is clarified by the opinion in the second appeal,[127] where the dissenting judge stated that the first appeal did not decide that the plaintiff could not in a reply invoke the equitable relief she afterwards sought by a separate count in her petition, but that "if the reply had been in proper shape, in effect a bill in equity praying a rescission of the contract, it would have been entirely valid under our code system of pleading."[128]

No valid reason is conceivable why fraud may not be made the basis for affirmative relief, since other equitable defenses may be coupled with a prayer for such relief in the reply. The scarcity of decisions on this phase of equitable defenses is perhaps accounted for by the fact that the plaintiff would generally prefer to have the question of fraud tried by a jury under section 782 of the Revised Statutes of Missouri (1929), rather than have the action converted into a proceeding in equity through the interposition of an equitable counterclaim where a more convincing degree of proof would be required in order to prove his case.[129]

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company has, under such circumstances, is a suit in equity to cancel the policy." Wollums v. Mutual Benefit Health & Accident Ass'n (1931) 226 Mo. App. 647, 46 S. W. (2d) 259, 262, 263. See also, Lilly v. Washington Fidelity Nat'l Ins. Co. (Mo. App. 1931) 44 S. W. (2d) 656.

125. (1897) 139 Mo. 440, 41 S. W. 205; for second appeal of same case, see Courtney v. Blackwell (1899) 150 Mo. 245, 51 S. W. 668, noting especially separate opinion of Marshall, J., at page 278, and also dissent of Valliant, J., at page 278.

126. Hancock v. Blackwell (1897) 139 Mo. 440, 41 S. W. 205, 206.

127. Courtney v. Blackwell (1899) 150 Mo. 245, 51 S. W. 668.

128. Courtney v. Blackwell (1899) 150 Mo. 245, 51 S. W. 668, 677.

129. Girard v. St. Louis Car-Wheel Co. (1894) 46 Mo. App. 79, 27 S. W. 648.

The power of a court of equity to relieve against the consequence of mistake has long been established beyond doubt.[130] Under the code such relief can be sought by answer.[131] Mistake of fact may, therefore, be set up as an equitable counterclaim by the defendant to an action at law, and where this is done, plaintiff's legal action is converted into one in equity.[132] As we have previously seen, it is a general rule under the Missouri code, that the defendant may either set up an equitable defense in bar or as a counterclaim, but, where the plaintiff's case is based on a written instrument, the equitable defense of mistake of fact cannot be pleaded in bar.[133] Unless affirmative relief is sought, the defense in bar amounts to an attempt to vary the terms of a written contract by parol evidence. Undoubtedly, under a liberal construction of the code, mistake should be allowed as an equitable defense going to show that the plaintiff ought not recover. And so far as oral agreements are concerned, the objection to permitting mistake as an equitable defense in bar obviously is not applicable.

LEGAL ACTIONS IN WHICH EQUITABLE DEFENSES PREDOMINATE

Pomeroy states that the actions to recover the possession of land (ejectment and actions analogous to it) are the ones in which the equitable defense is the most frequently used, although, of course, it assumes a great variety of shapes.[134] This statement is equally true with respect to the use of equitable defenses to actions at law in Missouri. Consequently, in the light of the apparent importance of such defenses in actions regarding real estate, this phase deserves some specific consideration.

While ejectment is an action at law, yet if the answer sets up an equitable defense and seeks affirmative relief based thereon, the action is converted into a proceeding in equity.[135] Failure

130. Mastin v. Halley (1875) 61 Mo. 196; Federal Land Bank v. McColgan (1933) 332 Mo. 860, 59 S. W. (2d) 1052; Goodin Mercantile Co. v. Organ (Mo. App. 1916) 186 S. W. 589; Wurlitzer Co. v. Rossmann (1916) 196 Mo. App. 78, 190 S. W. 636.

131. Engler v. Knoblaugh (1908) 131 Mo. App. 481, 110 S. W. 16.

132. Joyce v. Murnaghan (1885) 17 Mo. App. 11.

133. Wurlitzer Co. v. Rossmann (1916) 196 Mo. App. 78, 190 S. W. 636. Also see Farmers' Bank v. Redman (Mo. App. 1929) 24 S. W. (2d) 235.

134. Pomeroy, op. cit. supra note 22, at 51, sec. 32.

135. McCollum v. Boughton (1896) 132 Mo. 601, 30 S. W. 1028, 35 L. R. A. 480; Swon v. Stevens (1908) 143 Mo. 384, 45 S. W. 270; Dunn v.

to seek such relief leaves the case one at law.[136] From the foregoing it is apparent that all the general rules applicable to equitable defenses and equitable counterclaims are applicable to ejectment suits.

An equitable defense is not possible in cases of forcible entry and unlawful detainer. Exclusive jurisdiction over these matters is vested in the justice of the peace courts[137] which have no equitable jurisdiction.[138] Nor may an equitable defense be interposed on the transfer of such a case to the circuit court as no defense can be made there which could not have been made before the justice of peace.[139] Consequently, a defendant, wishing to rely on an equitable defense in an action of forcible entry and unlawful detainer must bring an original suit in a court of equity.

The contention has been constantly made that actions to quiet title are of themselves equitable. Sometimes the action is one at law, that is to say, a proceeding brought under the statute; and sometimes it is a proceeding in equity. The scope of the plaintiff's pleadings is the decisive factor.[140] It is an action at law if the plaintiff merely declares in the terms of the statute;[141]

McCoy (1899) 150 Mo. 548, 52 S. W. 21; Shaffer v. Detie (1905) 191 Mo. 377, 90 S. W. 131; Bouton v. Pippin (1905) 192 Mo. 469, 91 S. W. 149; Tetley v. McElmurry (1907) 201 Mo. 382, 100 S. W. 37; Hubbard v. Slavens (1909) 218 Mo. 598, 117 S. W. 1104; Betzler & Clark v. James (1910) 227 Mo. 375, 126 S. W. 1007; Titus v. North Kansas City Develop. Co. (1915) 264 Mo. 229, 174 S. W. 432; Myers v. Schuchmann (1904) 182 Mo. App. 159, 81 S. W. 618.

136. Swope v. Weller (1894) 119 Mo. 556, 25 S. W. 204; McCollum v. Boughton (1896) 132 Mo. 601, 34 S. W. 480; Martin v. Turnbaugh (1899) 153 Mo. 172, 54 S. W. 515.

137. R. S. Mo. (1929) sec. 2449; also see McQuoid v. Lamb (1885) 19 Mo. App. 153.

138. R. S. Mo. (1929) sec. 2168, provides: "No justice of the peace shall have jurisdiction * * * of any strictly equitable proceedings." See Small v. Speece (1908) 131 Mo. App. 513, 110 S. W. 7; Peycke v. Sandstone Co. (1915) 195 Mo. App. 417, 191 S. W. 1088; Boehme v. Roth (Mo. App. 1926) 280 S. W. 730.

139. Gruenewald v. Schaales (1885) 17 Mo. App. 324; State ex rel. Jackly v. Taylor (1922) 210 Mo. App. 195, 242 S. W. 997.

140. Doe Run Lead Co. v. Maynard (1924) 283 Mo. 646, 223 S. W. 690. See also: Minor v. Burton (1910) 228 Mo. 558, 128 S. W. 964; Babcock v. Rieger (1933) 332 Mo. 528, 58 S. W. (2d) 722; Slagle v. Callaway (1933) 333 Mo. 1055, 64 S. W. (2d) 923, 90 A. L. R. 1366; Stafford v. Shinabarger (1935) 336 Mo. 856, 81 S. W. (2d) 626; Rains v. Moulder (1936) 338 Mo. 275, 90 S. W. (2d) 81; Kimberlin v. Roberts (1937) 341 Mo. 267, 107 S. W. (2d) 24.

141. Mendenhall v. Pearce (1929) 323 Mo. 964, 20 S. W. (2d) 670; Wolfersberger v. Hoppenjon (1934) 334 Mo. 817, 68 S. W. (2d) 814.

but where he does not limit the allegations of his petition to the language of the statute but goes on and sets up matters of equitable cognizance, it is a proceeding in equity.[142] In other words, the action to quiet title, if going beyond the words of the statute and setting up equities, is an action in equity. Where the action is one at law, that is, based solely on the statute, the interposition by the defendant of an equitable defense with a prayer for affirmative relief, converts the case into one in equity.[143] Without such a prayer, the case remains one at law.[144]

A partition proceeding is but an ordinary civil action in this state[145] and is usually based on statute.[146] Besides statutory partition,[147] however, there is also what is referred to as equitable partition,[148] which deals with equitable estates and interests.[149] Obviously, therefore, this latter type is available where equitable interests in land are to be partitioned.[150] In other words, equity

142. Newbrough v. Moore (1918) 202 S. W. 547; Schneider v. Schneider (1920) 284 Mo. 314, 224 S. W. 1; Ebbs v. Neff (1930) 325 Mo. 1182, 30 S. W. (2d) 616; Bevier v. Graves (Mo. 1919) 213 S. W. 74; Kimberlin v. Roberts (1937) 341 Mo. 267, 107 S. W. (2d) 24.

143. Koehler v. Rowland (1918) 275 Mo. 573, 205 S. W. 217; Jacobs v. Waldron (1927) 317 Mo. 1133, 298 S. W. 773; Ebbs v. Neff (1930) 325 Mo. 1182, 30 S. W. (2d) 616; Wolfersberger v. Hoppenjon (1934) 334 Mo. 817, 68 S. W. (2d) 814; Dinkelman v. Hovekamp (Mo. 1935) 80 S. W. (2d) 681.

144. Turner v. Hine (1923) 297 Mo. 153, 248 S. W. 933.

145. Green v. Walker (1899) 99 Mo. 68, 12 S. W. 353; Benoist v. Thomas (1894) 121 Mo. 660, 27 S. W. 609; Moore v. Mansfield (Mo. 1926) 286 S. W. 353.

146. R. S. Mo. (1929) c. 7, art. 11.

147. R. S. Mo. (1929) secs. 1545, 1546; also see Flynn v. McNeely (Mo. 1915) 178 S. W. 69.

148. Flynn v. McNeely (Mo. 1915) 178 S. W. 69; Martin v. Martin (1913) 250 Mo. 539, 157 S. W. 575. See also Donaldson v. Allen (1908) 213 Mo. 293, 111 S. W. 1128, 1130: "Equitable features are every day incidents of partition suits; for example: The allowance of payments made by one co-tenant on account of the common property, as in the satisfaction of taxes, liens, and the like; compelling a co-tenant who has absorbed the common rents to account; adding, to his pro-rata share of the property, the expense and outlay of one co-tenant in bettering the common property, by erecting valuable improvements thereon in good faith; in equalizing advancements; and in divesting title, decreeing a trust, or establishing title as a step incident to partition. (Cases cited.) That such incidents are usually met in partition suits is common knowledge of the bench and bar. It is within bounds to say that much the greater number of such suits are equitable in their nature."

149. Coffman v. Gates (1909) 142 Mo. App. 648, 121 S. W. 1078.

150. Martin v. Martin (1913) 250 Mo. 539, 157 S. W. 575, 577: "That equitable interests in land may be partitioned in an appropriate proceeding for that purpose has been long settled in this state. While such a proceeding is called an equitable one in distinction from the action at law prescribed by the statute in such cases, it is also settled that the practice will be regulated by the statutory provisions so far as applicable. See also Reed v.

will entertain a bill to partition an equitable estate.[151] In all partition suits, the circuit court is vested with the jurisdiction and the power of a court of chancery, even though the procedure is partly regulated by statute.[152]

The partition act is, of course, independent of the code in all matters where special provision has been made.[153] Consequently, in such other matters, the provisions of the general code of procedure will naturally apply.[154]

Where the partition suit is based upon the statute, it is a proceeding at law;[155] or, stated in another manner, if no equitable features are stated in the pleadings, it is a legal or statutory action.[156] But even such a legal action is converted into a proceeding in equity,[157] or into an action for equitable partition, as it is sometimes called,[158] through the filing of an answer setting forth an equitable defense coupled with a prayer for affirmative relief. Thus, in *Rowley v. Rowley*;[159] the plaintiff instituted the statutory action for partition; and the defendants, in their answer, alleged the existence of a mistake in the description of the land in the conveyance under which the plaintiff claimed title and asked the court to correct such description and to deter-

Robertson (1870) 45 Mo. 580; Schowe v. Kallmeyer (1929) 323 Mo. 899, 20 S. W. (2d) 26.

151. James v. Groff (1900) 157 Mo. 402, 57 S. W. 1081; Armor v. Jester (1913) 253 Mo. 480, 161 S. W. 839.

152. Flynn v. McNeely (Mo. 1915) 178 S. W. 69; Devoto v. Devoto (1930) 326 Mo. 511, 31 S. W. (2d) 805.

153. Cochran v. Thomas (1895) 131 Mo. 258, 33 S. W. 6; note also Devoto v. Devoto (1930) 326 Mo. 511, 31 S. W. (2d) 805.

154. Bock v. Whelan (Mo. 1930) 30 S. W. (2d) 607.

155. Martin v. Martin (1913) 250 Mo. 539, 157 S. W. 575; Watson v. Priest (1880) 9 Mo. App. 263; and see Sawyer v. French (1921) 290 Mo. 374, 235 S. W. 126, 129, in which the court held: "The pleadings in this case are at law, no equitable features are alleged either in the petition or the answer, and no equitable relief is prayed for. The issues therefore are strictly legal, and, the case having been tried by the court sitting as a jury, we are bound by the decision of the lower court on the facts, and cannot consider the evidence in the case de novo."

156. Flynn v. McNeely (Mo. 1915) 178 S. W. 69; Sawyer v. French (1921) 290 Mo. 374, 235 S. W. 126; McQuitty v. McQuitty (1933) 332 Mo. 1057, 61 S. W. (2d) 342. Also see Ferrell v. Ferrell (1913) 253 Mo. 167, 161 S. W. 719.

157. Moore v. Mansfield (Mo. 1926) 286 S. W. 353; Sawyer v. French (1921) 290 Mo. 374, 235 S. W. 126; McQuitty v. McQuitty (1933) 332 Mo. 1057, 61 S. W. (2d) 342. Also see Ferrell v. Ferrell (1913) 253 Mo. 167, 161 S. W. 719.

158. Flynn v. McNeely (Mo. 1915) 178 S. W. 69; Rowley v. Rowley (Mo. 1917) 197 S. W. 152; Hiler v. Cox (1908) 210 Mo. 696, 109 S. W. 679.

159. (Mo. 1917) 197 S. W. 152.

mine and decree the title. Thereupon the action became one in equity. This view is in consonance with the general rule previously discussed regarding the effect of pleading an equitable defense coupled with a prayer for affirmative relief in the answer.[160] As a result, where the defendant's answer sets up no ground for equitable relief, it is error for the court to award such relief.[161] The action remains one at law. Consequently, whether an action for partition based on the statute is converted into a proceeding in equity is important chiefly as an element in determining relief to be awarded. The question, so important in most other actions, as to whether the parties are entitled to a jury trial is apparently of no consequence here. At one time the parties were held to be entitled to have certain issues arising in a partition suit tried by a jury;[162] but the rule now appears to be otherwise, although undoubtedly the court may call a jury to its aid.[163]

CONCLUSION

To summarize, it may be said, as a general rule, that any matter cognizable in a court of equity in 1849 may now be set up as a defense to a legal action. Such a defense may either be set up simply as matter in bar to plaintiff's action, or it may be interposed as the basis for affirmative equitable relief. In the first instance, the case remains one at law, triable with all the incidents of that type of case, while in the latter instance, the case is converted into one in equity and tried as a proceeding in equity. There are, however, exceptions to these general principles as we have seen.

Although there has not been a complete blending of law and equity, the rules of law now applied by the courts with reference to equitable defenses, either in bar or coupled with a prayer for affirmative relief, generally attain practical results. Perhaps in a few instances the adoption of a more liberal view would be

160. See supra, page 67.
161. Moore v. Mansfield (Mo. 1926) 286 S. W. 353.
162. Benoist v. Thomas (1894) 121 Mo. 660, 27 S. W. 609.
163. Flynn v. McNeely (Mo. 1915) 178 S. W. 69, 71: "I do not concur in the view that any trial judge sits as a jury in a statutory proceeding in partition. True it is that these proceedings are not denominated equitable, unless equities are invoked. Neither are they legal in the sense of requiring a jury upon demand. They are statutory, and in a sense a species of cases in a class to themselves. They are triable by the court without the intervention of a jury whatever may be the issues made by the pleadings."

more consonant with the purpose of the code. Especially is this true with the present rule which denies the defendant the right to set up mistake of fact as a bar to an action on a written instrument on the ground that it would amount to an attempt to vary its terms by parol evidence. No other reason supports the present rule. It has no better right to continued existence than did the former rule which prohibited the setting up of fraud in the reply.