

THE RIGHT TO TRIAL BY JURY IN CIVIL CASES IN
JURISDICTIONS WHERE THE PROCEDURE AT
COMMON LAW AND IN EQUITY ARE
BLENDED BY THEIR PRACTICE CODES.*

The discussion of a subject of such a wide scope concerning a very precious right which for centuries past has been regarded as one of the foundations of our liberties, necessarily demands a restricted treatment and the consideration of only certain phases of that right in a thesis of this character. No attempt will be made in this limited discussion to trace the historical evolution and development of trial by jury. The instant discussion will not have to do with that phase of the right of trial by jury which our forefathers so cherished but rather with the right of trial by jury in civil cases under the statutory codes of civil procedure, adopted by approximately two-thirds of the American States, and which right is by a few lawyers thought to be not only unnecessary but even an impediment in the way of an expeditious administration of justice. This article will only incidentally deal with the constitutional right but will primarily be concerned with trial by jury as a matter of right in civil cases under the reformed code procedure where legal and equitable rights are being tried in a regular court of ordinary jurisdiction. It will be my endeavor to treat of the right of trial by jury in cases where there is an ordinary contestation of legal and equitable claims which are justiciable in a general court that is firmly established as one of the integral parts of our judicial system as contradistinguished from special proceedings or particular actions so often dealt with in a summary manner in

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the regular courts or in quasi-judicial tribunals. And further, this thesis will treat of jury trial as a matter of right where a party is absolutely entitled to demand it, and not of the jury trial which may be granted only in the discretion of the court and in which the jury acts merely in an advisory capacity.

This discussion will treat of trial by jury in civil cases in all the American States where the procedure at common law and in equity has been blended by State statutory enactment.¹ Within this category will be included those States, commonly called "Code States," which have adopted codes of civil procedure similar to the first and great model code adopted in the American States, namely, the New York Code of Civil Procedure of 1848; and also those States which are designated by some writers as "Quasi-Code States," which have by State statutes adopted procedural reform along similar lines but have not made such radical changes as were brought about by the Code of Civil Procedure.

The adoption of the codes of civil procedure by many of the American States completely revolutionized the modes of pleading in all suits at law and in equity.² By the abolition of the many forms of action and the substitution of one civil action, a great change was wrought in all matters of procedure. It seems plain that it was the intent of the legislators to abolish merely the forms of action at common law and to make equity procedure applicable to both cases at law and in equity. According to an eminent authority, the true spirit of the code reform was to bring the trial of all cases "out of

1. Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming, have adopted codes of civil procedure. Alabama, Georgia, Massachusetts, Maryland, Mississippi, Tennessee, Texas and Florida have to a certain extent blended law and equity procedure by statute. The State of Louisiana will not be considered in this discussion.

2. Pattison's Missouri Code Pleading, p. 25; *Nichols v. Stevens*, 123 Mo., 96.

the bondage of the law into the liberty of the equitable mode of procedure."³ Some authorities have said that by the adoption of the codes, the court of chancery as a separate tribunal was abolished. If this is the true view of the result of the adoption of the practice codes, nevertheless we find that all the procedural attributes of the court of equity have entirely superseded those of the court of law and we have in the new reformed system all the modes and external forms of the equity procedure.

Beyond a procedural reform the legislatures could not hope to go, for the fundamental distinctions between law and equity were not only inherent in the nature of things but were also so firmly established and so interwoven in jurisprudence by the course of decisions for centuries, that it would be most difficult to abrogate them. So the essential and inherent differences between the substantive rights at law and in equity remain today unchanged by the practice acts of the various States.⁴ And it has been held in our own State of Missouri that the principles which distinguish an action at law from a suit in equity are to be as clearly regarded and preserved under our code of civil procedure as they were when law and equity were administered in different courts.⁵ It has also been held in the State of Missouri that under the code, a party is entitled to all the relief he could have formerly obtained both from a court of law and equity upon the facts.⁶ So we may safely say that the Missouri Code of Civil Procedure recognizes the distinctions between law and equity and the test for determining the mode of trial is whether under the old system, the case was cognizable at law or in equity.⁷ And

3. 31 Harv. Law Review, 669.

4. *Smith v. Rowe*, 4 Cal., 6; *Meyers v. Field*, 37 Mo., 434; *Maguire v. Tyler*, 47 Mo., 115.

5. *Miller v. St. Louis & Kansas City Ry. Co.*, 162 Mo., 424.

6. *Ranken v. Charles Co.*, 19 Mo., 490.

7. *Conran v. Sellow*, 28 Mo., 320; *Ellis v. Kreutzinger*, 31 Mo., 432.

as the Court said in another Missouri decision: Notwithstanding the adoption of the code of civil procedure, "equitable rights are still to be adjudged according to principles of equity jurisprudence and legal rights are to be determined and adjudged by the principles of law."⁸ And such is the firmly established course of decision in most of the States that have adopted the reformed procedure. While some statements are found to the effect that the codes abrogate certain equitable primary rights and curtail the equity jurisdiction, yet on the whole it may be safely said that the essential differences which inhere in the very nature of equitable and legal rights still exist as clearly fixed as before the codes were adopted.⁹ Granting this, it necessarily follows that the adoption of the codes of civil procedure did not substantially change the cases in which jury trial was a matter of right at common law.

It seems that about two-thirds of the American States have guaranties in their constitutions, of the right of trial by jury in civil cases. In some of the States, the constitutions specifically guarantee the right of trial by jury in civil cases; and in others, the application to civil cases is in a general provision, such as—"the right of trial by jury, as heretofore enjoyed, shall remain inviolate."¹⁰ Such a provision is a guaranty of the right of trial by jury in general, which leaves it to judicial construction to determine the civil cases in which the right existed according to the course of the common law or former procedure in the State before the adoption of the Constitution.

It is fundamental that a constitutional provision cannot be impaired by legislative enactment. So when the reformed procedure was adopted, the legislators could not by enactment impair the constitutional guaranties; and so it is held

8. Pattison's Mo. Code Pleading, p. 27; *Meyers v. Field*, 37 Mo., 434.

9. Pomeroy, *Equity Jurisprudence*, sec. 354.

10. Missouri Constitution, Art. II, sec. 28.

that wherever the right of trial by jury is preserved in the organic law of the State, it must exist in the cases in which it was formerly allowable before the adoption of the code, and the old distinctions between law and equity must determine the right. The constitutions of the various States only guarantee the right of jury trial as it existed at common law or was secured by statute or recognized by rule of court at the time of their adoption.¹¹ Of course, the constitutional guaranties extend only to the fundamental right of trial by jury and are not violated by minor procedural changes which do not substantially impair the right. It has also been held, quite uniformly, that the constitutional guaranty of jury trial applies only to cases where an issue of fact is joined on the pleadings.¹² And as succinctly stated by the Court: "There must be an action at law, as contradistinguished from a suit in equity and from a special proceeding * * *, and an issue of fact joined on the pleadings before a jury trial can be claimed as a matter of right under the constitutions."¹³

After having reviewed the effect of the adoption of the practice codes upon civil cases at law and in equity and briefly treated the prevailing constitutional guaranties of the right of trial by jury in civil cases, generally in vogue in the American States, we will now take up the principal discussion of trial by jury as a matter of right in civil cases at law and in equity. It is a well recognized rule that in an action at law, either party ordinarily is entitled to a jury trial as a matter of right.¹⁴ On the other hand, it is equally well settled that trial by jury does not as a matter of right extend to equity

11. *Lake Eric. Wabash & St. Louis Rd. Co. v. Heath*, 9 Ind., 557; *Oregon v. Sengsterken*, 61 Ore., 455; *Williams v. Citizens etc.*, 40 Ark., 290.

12. *Koppikus v. State Capitol Commissioners*, 16 Cal., 249; *Minor v. Burton*, 228 Mo., 358.

13. *Porter v. Armstrong*, 134 N. C., 447; *Koppikus v. State Capitol Commissioners*, 16 Cal., 249.

14. *Olsen v. Marquis*, 88 Neb., 610; *Morton Brick and Tile Co. v. Sodergren*, 130 Minn., 252.

cases.¹⁵ However, at common law, there were two exceptions to this rule. It appears that trial by jury was a matter of right in the following cases of equitable cognizance, namely, where the suit was to divest the title of an heir of a freehold estate of which his ancestor had died seised; and in cases where the common law right of the rector of a parish to tithes was drawn in question.¹⁶ However, these two exceptions have become relatively unimportant in recent times. Of course the right in equity cases may be guaranteed by the State constitutions or given by legislative enactment.¹⁷ But the general rule appears to be that cases of clear equitable cognizance are always triable by the court,¹⁸ and in these cases the court may determine the issues of fact as well as law.¹⁹

These observations afford the great test for the existence of the right of trial by jury. Is the action cognizable at law or in equity? So the right to a jury trial depends upon whether the cause of action is essentially legal or essentially equitable.²⁰ And it has been held that if the case is not essentially equitable or some essentially equitable remedy is not invoked, the parties are entitled to a jury as a matter of right.²¹ And in all cases where legal rights are involved and issues of fact arise upon the pleadings, the parties are entitled to a jury trial.²² Of course this only applies to actions at law as distinguished from special proceedings.

It is generally held that the nature of the cause of action must be determined from the substantive facts pleaded and

15. *Brown v. Grier*, 16 Ariz., 215; *Gresens v. Martin*, 27 N. Dak., 231; *Pacific Ry. Co. v. Wade*, 91 Cal., 456; *Small v. Binford*, 41 Ind. App., 440.

16. *Raymond v. Flavel*, 27 Ore., 219; 2 *Daniel on Chancery Practice*, sec. 1080; *Proffatt on Jury Trial*.

17. *Proffatt on Jury Trial*.

18. *Ely v. Coontz*, 167 Mo., 371; *Long v. Long*, 141 Mo., 352.

19. *Sharmer v. McIntosh*, 43 Neb., 509.

20. *Harrigan v. Gilchrist*, 121 Wis., 127; *Gallagher v. Basey*, 1 Mont., 457; *Smith v. Rowe*, 4 Cal., 6.

21. *Martin v. Martin*, 118 Ind., 227; *McCoy v. Oldham*, 1 Ind. App., 372.

22. *Andrews v. Pritchett*, 66 N. Car., 387.

not from the kind of relief prayed for or the name given to the action. In other words, the right of trial by jury must be determined from the real meritorious controversy between the parties as shown by the whole case and not from the form in which the issues are set forth.²³ And whether an action is legal or equitable depends on the issues presented and the relief required at the time of the trial.²⁴ And these things must be determined from all the pleadings.²⁵

The statutory practice acts in many of the States provide that all issues of fact in actions for the recovery of money only, or of specific property must be tried by a jury, unless waived; and every other issue must be tried by the court.²⁶ What is the effect of these statutory provisions specifically giving the right of jury trial in some cases and withholding it in others? In accordance with these specific enactments, it is generally held in most of these States that the right of trial by jury must be granted in actions for the recovery of real property; of personal property; for damages for breach of contract, and in actions for the recovery of money only.²⁷

In construing these code provisions, it has been held in some of the code States that the right of trial by jury does not depend upon the character of the principles upon which the right to relief is based but upon the nature and character of the relief sought. So if the relief asked for is an action for money only, "that is all that is required and it is immaterial whether the right of action is based on what were formerly regarded as legal or equitable principles."²⁸ But notwithstanding those decisions, it is usually held that these statutes,

23. *Gordon v. Munn*, 83 *Kans.*, 242; *Bell v. Merrifield*, 109 *N. Y.*, 202.

24. *Taylor v. Brown*, 92 *Ohio St.*, 287.

25. *Boam v. Cohen*, 94 *Kansas*, 42.

26. *Missouri Code of Civil Procedure*, sec. 1398. (R. S. 1919).

27. *Gordon v. Munn*, 83 *Kans.*, 242; *Snell v. Niagara Paper Mills*, 193 *N. Y.*, 433; *So. Milwaukee Co. v. Murphy*, 112 *Wis.*, 614; *Ragan v. McCoy*, 29 *Mo.*, 356.

28. *Alsdorf v. Reed*, 45 *Ohio St.*, 653; *Cobb v. Edwards*, 117 *N. Car.*, 244.

which set out specific cases for jury trial, recognize the distinctions between law and equity and that the right of trial by jury is to be determined as at common law before the adoption of the reformed procedure.

As a party may under the code procedure, obtain both legal and equitable relief in the same action, it becomes necessary to consider whether in cases where legal and equitable claims are joined, the party is entitled to a trial by jury. It is usually held in accord with the New York decisions that where legal and equitable causes of action are united, the legal issues must be submitted to a jury.²⁹ This is simply an extension of the theory that the right of trial by jury cannot be impaired by the modes of pleading under the codes of civil procedure. However, it has been held in the New York cases that an action for both legal and equitable relief in respect of the same cause of action, is not of right triable by a jury.³⁰ But on the other hand, it seems that where legal and equitable defenses are united under the code, the defendant is deemed to have waived his right to a trial by jury.³¹

Under the code form of procedure, a defendant may set up defenses and counterclaims triable and recoverable upon in the same action. As an equitable defense may be set up to an action at law, it becomes necessary to determine whether the action remains one at law and is triable by a jury or whether it is converted into a case in equity and is triable by the court. The remaining discussion will be confined to a consideration of this very important question upon which the right of trial by jury so often depends.

It has been uniformly established that an equitable defense will not convert an action at law into a suit in equity, where

29. *Davis v. Morris*, 36 N. Y., 569.

30. *Cogswell v. N. Y., N. H. & H. Ry. Co.*, 105 N. Y., 319.

31. *Bodley v. Ferguson*, 30 Cal., 512; *Davison v. Associates of the Jersey Co.*, 71 N. Y., 333.

no affirmative relief is asked.³² Neither the plaintiff nor defendant loses the right of trial by jury when mere equitable defenses are interposed.³³ The test for the ascertainment of the right of jury trial is whether the equitable defense is interposed merely for the purpose of defeating the plaintiff's claim, or for the purpose of obtaining affirmative equitable relief from him in the same action. So the prevailing rule in most of the code States is, that if the answer contains not merely a technical defense, interposed merely for the purpose of defeating the plaintiff's action, but an independent equitable cause of action which constitutes a counterclaim or cross demand and prays for or is entitled to affirmative equitable relief in favor of the defendant, the action at law is converted into a suit in equity and is triable by the court.³⁴ The reason for the distinction seems to be that a mere equitable defense cannot draw to itself a different mode of trial from the action at law, but an affirmative equitable defense, being a distinct and independent cause of action, is of equal dignity with the claim set forth in the plaintiff's petition and therefore equally entitled to an appropriate method of trial. So it has been stated by some authorities that where the allegations in the answer amount to a cross action or counterclaim, but for the statutes allowing equitable defenses and cross actions, a separate suit in equity for affirmative relief would have to be maintained, such cross action is

32. *Kostuba v. Miller*, 137 Mo., 161; *Lincoln Trust Co. v. Nathan*, 175 Mo., 32; *Shaffer v. Detla*, 191 Mo., 377; *Bouton v. Pippin*, 192 Mo., 469; *Thompson v. National Bank of Commerce*, 132 Mo., App., 225.

33. *Moline Plow Co. v. Hartman*, 84 Mo., 610; *Lincoln Trust Co. v. Nathan*, 175 Mo., 32.

34. *Buckner v. Mear*, 26 Ohio St., 514; *Gill v. Pelkey*, 54 Ohio St., 348; *Fish v. Benson*, 71 Cal., 428; *Marling v. Burlington, Cedar Rapids & Northern Ry.*, 67 Ia., 331; *Lewis v. Rhodes*, 150 Mo., 498; *Pitts v. Pitts*, 201 Mo., 356; *Withers v. K. C. Suburban Belt Ry. Co.*, 226 Mo., 373; *Pendleton v. Hubbard*, 231 Mo., 314.

treated like any other suit in equity.³⁵ Or if the defendant's answer admits the facts of the plaintiff's action at law and sets up facts of an equitable character in avoidance which, if established, will extinguish or supersede the plaintiff's claim, the whole case is converted into a suit in equity and the issues of fact as well as law are triable by the court.³⁶

The qualifications to these general rules should now be called to mind. In order to convert an action at law into a suit in equity, the defense set up must be substantially equitable and not a legal defense disguised by the defendant's allegations that an affirmative equitable claim is involved.³⁷ Of course the defendant must file his cross petition, showing facts under which he cannot obtain an adequate remedy and complete relief at law before the case is properly of equitable cognizance;³⁸ for if such relief is not necessary to sustain the defendant's rights and a legal action would afford him adequate relief, the plaintiff is not deprived of the right of trial by jury.³⁹ And, further, it has been held that the defense interposed must be a virtual admission of the plaintiff's legal right, as set forth in the petition, before the whole case will be cognizable in equity.⁴⁰

It has been quite uniformly held that the affirmative equitable defense so interposed should be tried by the court in the first instance before the rest of the issues are considered.⁴¹ However, this is not the invariable rule except

35. *Card v. Deans*, 84 Neb., 4; *Maas v. Dunmyer*, 21 Okla., 434; *Lombard v. Cowham*, 34 Wis., 486; *Marling v. Burlington, Cedar Rapids and Northern Ry.*, 67 Ia., 331.

36. *Lewis v. Rhodes*, 150 Mo., 498; *Allen v. Logan*, 96 Mo., 591.

37. *Locke v. Moulton*, 108 Cal., 49; *Sloan v. Courtenay*, 54 S. Car., 314.

38. *Marling v. Burlington, Cedar Rapids & Northern Ry.*, 67 Ia., 331; *Withers v. K. C. Suburban Belt Ry. Co.*, 226 Mo., 373.

39. *Thompson v. National Bank of Commerce*, 132 Mo. App., 225; *Shaffer v. Dettie*, 191 Mo., 377.

40. *O'Day v. Conn*, 131 Mo., 321; *Schuster v. Schuster*, 93 Mo., 443.

41. *Peterson v. Phila. Mortgage & Trust Co.*, 33 Wash., 464; *Pennlinger Lateral Co. Ltd. v. Clark*, 22 Idaho, 397; *Cotton v. Butterfield and Demares*, 14 N. Dak., 465; *Hotaling v. Tecumseh National Bank*, 55 Neb., 5.

when the defendant's allegations really entitle him to affirmative relief and are of such a character as would result, if established, in superseding and destroying the plaintiff's action at law.⁴²

If the affirmative equitable defense is established so that it entirely supersedes the plaintiff's claim, there being nothing further to try, there is of course no occasion for a jury trial.⁴³

But on the other hand, if the affirmative equitable defense or counterclaim is adjudged insufficient and does not supersede the plaintiff's action, we are confronted with a much more difficult question. When the cross action is deemed insufficient and is decided against the defendant, will the plaintiff be entitled to a trial by jury on his original claim or will the whole case remain in equity to be tried by the court? It is a well recognized rule that when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all matters put in issue in the case.⁴⁴ And it would seem that the court of equity, having acquired jurisdiction by the interposition and trial of the affirmative equitable defense, would retain such jurisdiction to final judgment. But however plausible that may be, such is not the rule in a great many States. It is in those jurisdictions established that if the affirmative equitable defense is held insufficient and does not supersede and extinguish the issues of the petition, the original claim or legal issues should be tried by a jury.⁴⁵ These decisions are based on the theory

42. *Swasey v. Adair*, 88 Cal., 179.

43. *Cornelius v. Kessel*, 58 Wis., 237; *Cotton v. Butterfield and Demares*, 14 N. Dak., 465.

44. 1 *Pomeroy Equity Jurisprudence*, sec. 181; 1 *Story Equity Jurisprudence*, 70; *Gantz v. Gease*, 82 Ohio St., 34; *Morrissey v. Broomal*, 37 Neb., 766.

45. *Smith v. Moberly and wife*, 54 Ky. (B. Mon.) 70; *Buckner v. Mear*, 26 Ohio St., 514; *Corbin v. Pollock*, 28 Iowa, 596; *Moline Plow Co. v. Hartman*, 840 Mo., 610; *Pattison's Mo. Code Pleading* (2nd. Ed.) p. 19; *Swasey v. Adair*, 88 Cal., 179; *Miller v. St. Louis & Kansas City Ry. Co.*, 162 Mo., 424; *Parker v. Daly*, 58 Ore., 564.

that the court of equity acquires jurisdiction of the cause merely for the purpose of trying the affirmative equitable defense, and if it is not sustained, the plaintiff may proceed with his cause of action in a trial at law. So it is held in many of the code States that if the trial of the equitable defense does not obviate the necessity of a trial of the issues of law, they must be tried in the same manner as if no equitable defense had been interposed.⁴⁶ And there is a decision in our own State of Missouri, not overruled, which holds that if in a case of this kind the equitable defense is denied, the remaining legal issues should be submitted to a jury.⁴⁷ That decision was founded on the proposition that the pleading of an affirmative equitable defense does not convert the suit into an equity case unless there exists in the defense some equity upon which the court of chancery exercises its peculiar jurisdiction. However, the question seems to be involved in considerable difficulty because in so many cases the courts have overlooked the point, when there was nothing more to be tried after the equitable defense was denied; and have been very reluctant in ruling upon the question.

In the discussion of the cases, we have treated of the plaintiff's and not of the defendant's right of trial by jury. But this may be disposed of by saying that the defendant is not entitled to demand a jury trial when he sets up an affirmative equitable defense for the same reason that if, instead of interposing the defense, he had instituted his claim as a separate action against the plaintiff, he would not have a right of trial by jury.

In the review of authorities immediately preceding, actions at law with equitable defenses pleaded have been considered. We will now turn to a brief consideration of those cases originally brought in equity and to which legal defenses are interposed. There is a general unanimity of opinion in the

46. *Swasey v. Adair*, 88 Cal., 179.

47. *Miller v. St. Louis & Kansas City Ry. Co.*, 162 Mo., 424.

various States that in cases properly brought in equity, there is no right to have any issues of fact tried by a jury, and this, even though a legal defense in the nature of a counterclaim is pleaded.⁴⁸ While there are a few cases to the contrary,⁴⁹ it is the well established rule in most of the American States that where a counterclaim or a defense of an affirmative legal nature is interposed, it cannot interject into the equitable action a new legal cause of action but the action remains in equity and is not triable of right by a jury.⁵⁰

In conclusion, it may be said that the reformed procedure as adopted in the Codes of Civil Procedure of many American States has not substantially changed the right of trial by jury as it existed at common law any more than it has altered the old essential distinctions between law and equity. As the adoption of the code reform only brought about a procedural change, it did not materially alter the substantive right of trial by jury. The right of trial by jury survives today in practically the same form as it existed before the adoption of the codes of civil procedure and at the time of the adoption of the State constitutions; and it may certainly be said that the right of trial by jury in civil cases, "as heretofore enjoyed," has truly been preserved inviolate by the courts of all the States that have adopted the reformed procedure.

In these jurisdictions today, as at common law, a party is absolutely entitled to a trial by jury in civil cases as a matter of right, wherever issues of fact arise upon the pleadings in an ordinary action at law justiciable in a regular court of ordinary jurisdiction.

ROBERT WILSON BARROW, '22

48. *McBride v. Stradley*, 103 Ind., 465; *Ryman v. Lynch*, 76 Iowa, 587; *McLaurin v. Hodges*, 43 S. Car., 187.

49. *Sandstrom v. Smith*, 12 Idaho, 446; *Robertson v. Moore*, 10 Idaho, 115.

50. *Crissman v. McDuff*, 114 Iowa, 83; *Morrissey v. Broomal*, 37 Neb., 766; *Johnson Service Co. v. Kruse*, 121 Minn., 28; *Reichert v. Krass*, 13 Ind. App., 348.

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