

THE GENERAL DENIAL IN MISSOURI

Although it is the most frequently used plea in Missouri civil procedure, the denial has received almost no analytical consideration. In practice, a general denial is incorporated in the answer as a matter of course, followed by such affirmative defenses as experience has taught cannot be sneaked past the court under a denial alone. It is intended here to examine the theory of the general denial and the availability of certain defenses under it in Missouri. While in almost every instance the rule with its exceptions has been long established, these rules have not, so far as is known, been set out clearly in any one place. It is hoped that this treatment will expose such inconsistencies as may have developed, in order that modifications may be made better effectuating the purposes of the Civil Practice Act.

A defense in bar must deny that the plaintiff has a cause of action. Logically, such defenses fall into two classes:

I. Defenses which deny that the plaintiff ever had a cause of action.

This class must either,

A. Deny the truth of the facts upon which the plaintiff rests his *prima facie* case; or

B. Show that the plaintiff's apparently valid *prima facie* case never arose, because of the existence of additional facts not alleged in the petition.

II. Defenses which admit that plaintiff's cause of action once existed but show that it no longer exists.¹

At common law, although the exact scope of the general issue varied according to the individual writ, it was generally held equivalent to a denial of liability. The defendant in most instances was allowed to prove either that the plaintiff never had a cause of action (class I), or that subsequent facts had extinguished the cause of action alleged (class II).² The immense scope of the defenses which could be presented under the uninformative general issue deprived pleadings of their notice value. The resulting inconvenience of administration led to attempted reform, in England by the "Hilary Rules,"³ in the United States by the Dudley Field Code of civil procedure. The latter was adopted as the Missouri Civil Practice Act.

1. Compare classification in Pomeroy, *Remedies and Remedial Rights* (1st ed. 1876) 679, sec. 644.

2. Pomeroy, *op. cit.* supra note 1, at 679-686, sec. 645-653.

3. See the opinion of Selden, J., in *McKyring v. Bull* (1857) 16 N. Y. 297, for an account of the English experience.

The Missouri Code of 1849 abolished the general issue and created as sole defensive plea the answer:

[This answer] shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief * * *; second, a statement of any new matter constituting a defense or counterclaim * * *.⁴

A comparison of this provision with the outline of defensive pleading set forth above shows that class I A defenses were intended to be available under a general denial, and that class II defenses were to be pleaded specially. The Code provision does not distinguish between defenses which deny that a cause of action ever existed and those which admit that a cause of action once existed but claim that subsequent events have destroyed it. Such a distinction is not really necessary under the Code at all, if the phrase "any new matter" is interpreted as including class I B as well as class II defenses. Under this construction everything would have to be specially pleaded except denials of facts alleged in the petition. This construction, arbitrary though it be, would have left little doubt in the minds of lawyers concerning what defenses should be pleaded specially. The court, in an early case, *Northrup v. The Mississippi Valley Insurance Co.*, expressed this view very clearly:

Under the old system, by pleading the general issue everything was open to proof which went to show a valid defense. But the practice act, which has substituted for the general issue an answer, and requires a statement of any new matter constituting a defense, in addition to a special denial of the material allegations of the petition intended to be controverted, has worked a complete and total change in the principles of pleading. The defendant, by merely answering the allegations in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely on new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on. It follows that when a defendant intends

4. R. S. Mo. (1929) sec. 776. The section as originally adopted was held not to permit a general denial but only a specific denial of each allegation controverted. It was amended in 1875. The fact that many of the cases considered in this paper arose under the earlier version of the statute is not material to the discussion. The scope of evidence admissible under the denial of a particular allegation of the petition will be identical whether that denial is specific or general.

to rest his defense on any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial.⁵

But prior to this decision, in *Greenway v. James*, the court had introduced a different construction:

When a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded. But when the cause of action never existed the appropriate defence under the law is a denial of the material allegations of the petition and such facts as tend to disprove the controverted allegations are pertinent to the issue.⁶

This language distinguishes between defenses which deny that a cause of action ever existed and those which claim that a valid cause of action was later extinguished. It identifies the first type of defenses as a denial of facts alleged in the petition, and the second as based on "new matter." It is precisely on this point that class I B defenses give trouble, for they are ambiguous: they deny that a cause of action ever arose, but they depend upon additional facts not alleged or denied in the petition. The difficulties experienced by the Missouri courts in applying the code provision to specific cases are most apparent in its treatment of defenses of this class. However, chiefly for imperfectly expressed reasons of policy, certain defenses of classes I A and II have also been distorted from their positions in the logical scheme of pleading set forth in the code. These inconsistencies also will be considered in this paper. It should be remembered, however, that the great bulk of I A and II defenses present no problem, since the code provision for them is clear and is generally adhered to.

THE STATUTE OF FRAUDS

It may properly be argued that non-compliance with the statute of frauds is not a defensive plea at all. The failure goes not to the factual requisites of the cause of action but only to the method of proving such facts. Plaintiff's evidence, however conclusive, will be excluded because he is unable to present it in a form acceptable to the court. In short, proof of the cause of action is frustrated by a rule of evidence.

5. (1871) 47 Mo. 435, 444.

6. (1864) 34 Mo. 326, 328.

This fact was recognized very early in *Hook v. Turner*,⁷ where the court held that a general denial of a contract forces plaintiff to prove its existence, which by virtue of the statute of frauds cannot be done by parol. Objection to proof of the contract in this manner was therefore sustained and the defense of the statute made available without special pleading. Consistent with this holding is the statement in *Gist v. Eubanks*⁸ that although the petition did not allege a written contract it was not demurrable, since a defendant relying on the statute of frauds must raise the point by answer. No mention was made of a need of special pleading, and it may be assumed that a general denial would have met the requirement. In *Gardner v. Armstrong*⁹ the court held a similar petition good as against a motion for a directed verdict. However, by way of *dictum*, it was said that the benefit of the statute was waived if not pleaded defensively. These decisions, both of which, on the point decided, are consistent with *Hook v. Turner*, indicated to the Court of Appeals that

the rule in Missouri now is, contrary to earlier cases, that one who would avail himself of the statute of frauds must especially insist on it in pleading, or be deemed to have waived benefit of its provisions.¹⁰

Other decisions fortified the reversal, each successive decision citing those which came before and ignoring *Hook v. Turner*.¹¹ Nevertheless, in *Allen v. Richard*¹² the court returned to the reasoning of the *Hook* case and sustained the defendant's objection, under a general denial, to proof of a contract by parol evidence. This holding came only six months after the pronounce-

7. (1856) 22 Mo. 333. See also *Sherwood v. Saxton* (1876) 63 Mo. 78, for a similar holding.

8. (1860) 29 Mo. 248.

9. (1862) 31 Mo. 535.

10. *Donaldson v. Newman* (1880) 9 Mo. App. 235, 242.

11. *Huffman v. Ackley* (1863) 34 Mo. 277 (instruction on statute of frauds refused under a denial of purchase and sale); *Graff v. Foster* (1878) 67 Mo. 512 (instruction on the statute refused "first, because it was not pleaded * * * and second, because it had nothing to do with the case because the pleading admitted delivery"). In *Gordon v. Madden* (1884) 82 Mo. 193, the defendant pleaded payment to another with whom he alleged the contract had been made, but did not plead the statute. The court denied the instruction requested by defendant, "it being well settled in this state that the statute of frauds to be available at the trial must be pleaded." See also *Rabsuhl v. Lack* (1864) 35 Mo. 316, a favorite citation of this period. Although the headnotes are in point, they vary considerably from the holding of the case.

12. (1884) 83 Mo. 55.

ment of a "well settled" rule to the contrary.¹³ Explaining the decision the court said:

It is often laid down that the statute must be pleaded by the party claiming its benefits. When the plea admits the contract the statute must be pleaded. But when the contract is denied the burden is imposed on the plaintiff to establish it by legal evidence. The defendant may raise his defense at the time the proof is submitted by proper objections to its admission.¹⁴

Again, in *Springer v. Kleinsorge*, decided the same day, the court said:

* * * defendant, to avail himself of the statute of frauds must raise the issue by answer. But it is not necessary * * * [to] plead the statute *eo nomine* * * *. It is as fully raised by a general denial as any other answer could raise it.¹⁵

The present rule in Missouri follows these decisions and *Hook v. Turner* in holding the statute of frauds to be a rule of evidence preventing the introduction of parol testimony to prove a contract, and such treatment is in accord with a logical consideration of the functioning of the statute.¹⁶ The opposite hold-

13. *Gordon v. Madden* (1884) 82 Mo. 193. It is difficult to explain the apparently opposite holdings of the cases from 1862 to 1884 (see note 11, supra), inasmuch as no reason for the shift was given by the court at the time, and the later decisions returned to the logic of the *Hook* case. The attempt in *Springer v. Kleinsorge* (1884) 83 Mo. 152, 156, to reconcile the two lines of authority, while it justifies the actual holdings in certain of the cases, does not explain the forceful *dicta* in these same cases, or the directly opposite holding in the *Gordon* case in the preceding term of court.

It is possible that the Missouri court was following the lead of New York, where early decisions admitting the statute of frauds under a general denial were later repudiated. This theory is substantiated by the citation of New York cases in support of a pre-code decision, quoted with approval in the *Hook* case, and by the statement in *Donaldson v. Newman* (1880) 9 Mo. App. 235, that "the New York rule has been followed in later cases in Missouri."

14. *Allen v. Richard* (1884) 83 Mo. 55, 60.

15. (1884) 83 Mo. 152, 155.

16. Under this rule plaintiff's petition is not subject to demurrer for failure to allege affirmative compliance with the statute of frauds. *Phillips v. Hardenburg* (1904) 181 Mo. 463, 80 S. W. 891; *Martin v. Ray County Coal Co.* (1921) 288 Mo. 241, 232 S. W. 149. But if the petition affirmatively shows non-compliance it can be reached by a demurrer. *Chambers v. Lecompte* (1845) 9 Mo. 575 (before code); *Galway v. Shields* (1876) 1 Mo. App. 546. The requirement that defendant make known to court and opposing counsel his intention to rely on non-compliance may be met either by an objection to the introduction of parol testimony to prove the transaction, stating the reason, *Long v. Conrad* (Mo. 1931) 42 S. W. (2d) 357, or by a request for an instruction on the statute just before the case is submitted to the jury. *Widmer v. Moran Bolt & Nut Mfg. Co.* (1918) 203 Mo. App. 293, 218 S. W. 351; *George Gifford Co. v. Willman* (1914)

ing in the series of cases following *Gardner v. Armstrong* is interesting in that it may represent a feeling that the notice function of pleading would be better served by treating the statute as an affirmative defense; or it may show a policy of looking on the statute with disfavor and therefore requiring defendant to set it forth. In either event it is submitted that such classification, if desirable, must be made entirely apart from logic, and the departure clearly recognized lest it lead to confusion in the consideration of true defenses.

PAYMENT

The issue of payment must arise either in an action on an instrument for the payment of money or in an action for breach of a contract involving an exchange of goods for money. In either case the plaintiff's petition, to state a cause of action, must allege, (1) the instrument or contract, (2) performance of his part, (3) non-performance by defendant. A general denial of such a petition would be directed at the third allegation and logically should permit proof of payment at or before maturity, as a defense of class I A. A cause of action cannot arise before breach, and there can be no breach before maturity of the instrument or contract other than an anticipatory breach. Payment after maturity would extinguish a cause of action already in existence and so should require special pleading under class II. It is generally held, however, that any payment, whether before or after maturity, is an affirmative defense to be specially pleaded by defendant, and that the allegation of non-payment is a mere formal requirement of the petition which need not be proved.¹⁷

187 Mo. App. 29, 173 S. W. 53; *Smith v. Hainline* (Mo. 1923) 253 S. W. 1049. The latter practice permits plaintiff to present all his evidence including any possible matter taking the transaction outside the statute, without interference, reserving to defendant the right to invoke the statute upon failure of plaintiff to avoid its scope.

A "demurrer to the evidence" which does not state a reason why plaintiff should not recover does not fulfill the requirement of notice of the ground of defense and therefore does not invoke the statute. *Scharff v. Klein* (1887) 29 Mo. App. 549. For the same reason the statute may not be raised for the first time on appeal, *Wright v. Cobb* (Mo. 1921) 229 S. W. 171; *Mantz v. Maguire* (1892) 52 Mo. App. 136, or on motion for a new trial. *Smith v. Hainline* (Mo. 1923) 253 S. W. 1049; *Schmidt v. Rogier* (1906) 121 Mo. App. 306, 98 S. W. 791.

If defendant's answer admits the existence of the contract plaintiff need introduce no evidence to establish it. Under these circumstances there will be no parol testimony of the contract on which the statute of frauds can act, and defendant to avail himself of the statute must plead it specially and introduce evidence of non-compliance. *Smith v. Hainline* (Mo. 1923) 253 S. W. 1049; *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938; *Boyd v. Paul* (1894) 125 Mo. 9, 28 S. W. 171.

17. See Alden, *The Defense of Payment Under Code Procedure* (1909) 19 Yale Law J. 647.

Much of the reasoning behind this departure from the logical content of the answer can be traced to Justice Selden's celebrated opinion in *McKyring v. Bull*.¹⁸ It is said that payment is a single act, non-payment the result of inaction, so that it is easier for defendant to prove the single act of payment than for plaintiff to prove no payment on each day from the time of maturity of the claim until the bringing of suit. If this be so, it extends equally to all cases involving payment and places the burden of proof of this fact on defendant. In order that the pleadings may conform to the proof it is required that the defendant affirmatively allege payment in the answer.¹⁹ Logically then, if indeed there is any room for the application of logic to this matter, it would seem that an allegation of non-payment should not be required in the petition. Actually this is also required because it is one of the facts constituting the cause of action.²⁰

The Missouri court has adopted this lump concept of payment and the requirement that it be specially pleaded as an affirmative defense, probably influenced in part by the opinion of Judge Selden.²¹ The court, however, recognizes a class of cases "in which non-payment is a material fact necessary to constitute plaintiff's cause of action,"²² and in such cases holds that the issue of payment is raised by a general denial. At the outset it is clear that the phrase used is not definitive, non-payment being in all these cases a material fact necessary to the plaintiff's cause of action. The court is using the phrase as a label to indicate

18. (1857) 16 N. Y. 297. The opinion traces the history of the defense in England where, after a confused beginning, payment was finally permitted to be shown in all cases under a plea of the general issue. Much point is made of the confusion and lack of pre-trial notice leading to the Hilary Rules which when amended required payment to be specially pleaded. Selden, J., after stating that sanction must be found in the Field Code for making payment an affirmative defense to prevent repetition here of the tragic experience of England, practically creates such sanction by abstruse reasoning.

19. See generally, for the reasoning advanced to support the treatment of payment as an affirmative defense, Reppy, *The Anomaly of Payment as an Affirmative Defense* (1925) 10 Cornell L. Q. 269. See also *Lent v. N. Y. & M. Ry.* (1892) 130 N. Y. 504, 510, 29 N. E. 988.

20. Wisconsin recognizes the logical inconsistency of this requirement. See *Rossiter v. Schultz* (1885) 62 Wis. 655.

21. The rationalization of its position is found in *State ex rel. Spaulding v. Peterson* (1897) 142 Mo. 526, 532, 39 S. W. 453: "Payment is a fact not ordinarily required to be negated in the petition and in such case is new matter and to be made available as a defense must be pleaded. In such case proof of prior indebtedness is, prima facie, proof of liability. A general denial does not raise the issue of payment in such cases." It is to be doubted, however, that the court would follow its logic and sustain a petition not alleging non-payment against a demurrer.

22. *Ibid.*

those cases in which it has for other reasons held payment not to be an affirmative defense. These cases in Missouri are readily classified.

It has been held that in an action on a bond given by an agent to assure settlement of accounts with his principal, since plaintiff must prove that the agent has not settled the accounts in order to show a right of recovery on the bond, proof of settlement by the agent was admissible under a general denial to show that the alleged breach did not exist.²³ A similar result was reached in an action on a collector's bond.²⁴ In an action in conversion against a bank for failing to stop payment on a check as ordered, it was held that evidence of payment of the check before receipt of the order was admissible under a general denial because, if the check was rightly paid, there was no conversion.²⁵ In another case a partnership was dissolved, handing over its assets to a successor firm which assumed its debts. The successor gave the plaintiff, a creditor of the dissolved firm, trade acceptances to the amount of its claim. In an action by the plaintiff against members of both firms, it was alleged that the trade acceptances were not paid. The court permitted a member of the dissolved firm to prove under a general denial that the acceptances had been paid, apparently on the theory that after the giving of the acceptances members of the old firm became only secondarily liable, and hence that non-payment of the acceptances was a condition precedent to their liability.²⁶

It will be observed that in all these cases the "payment" permitted to be shown under a general denial was not a discharge of the obligation sued on, but was instead part of another transaction, the improper conduct of which was a condition precedent to the present liability of defendant.²⁷

The rule in Missouri may therefore be stated to be that payment of the obligation sued on, whether before, at, or after

23. *Wheeler & Wilson Mfg. Co. v. Ginsley* (1882) 75 Mo. 458.

24. *State ex rel. Spaulding v. Peterson* (1897) 142 Mo. 526, 39 S. W. 453.

25. *Albers v. The Commercial Bank* (1884) 85 Mo. 173.

26. *St. Louis Perfection Tire Co. v. McKinney* (1922) 212 Mo. App. 355, 245 S. W. 1100.

27. Two other cases frequently cited for the point that payment is admissible under a general denial, *Wilkerson v. Farnham* (1884) 82 Mo. 672, and *Hall v. Smith* (1910) 149 Mo. App. 379, 130 S. W. 449, actually involve proof by defendant of a contract materially different from that sued on. Such proof is always available under a general denial and if established defeats plaintiff's cause of action. The payment permitted to be shown, which was payment of the contract alleged by defendant, is, strictly speaking, irrelevant in an action upon a materially different contract, since it is not necessary to defeat recovery. This fact was recognized by the Court of Appeals in the *Hall* case.

maturity is an affirmative defense not available under a general denial. But under a general denial evidence may be introduced to negate the non-payment of an independent obligation which non-payment is a condition precedent to liability of defendant on the obligation supporting the plaintiff's action.

LACHES AND ESTOPPEL

Laches and estoppel both are class II defenses since they admit that a valid cause of action once vested in plaintiff but show that this cause of action subsequently was divested by certain conduct of plaintiff. In the case of laches this fact was not always recognized by the Missouri court.

Laches, or delay on the part of a plaintiff to assert a claim formerly denominated equitable, is an equitable limitation of action which cannot be a longer period than the statute of limitations²⁸ but which may be shortened by the court to any extent, depending on the facts of each case.²⁹ When it is apparent from the facts alleged in the petition that plaintiff has been guilty of laches defendant need not answer but may by a demurrer call upon the court to refuse relief.³⁰ There is *dictum* in *Bliss v. Pritchard*, which involved a demurrer, that "If plaintiff had been guilty of laches but it did not appear in the petition, the defendant, to avail himself of it, must plead it as a defense."³¹ This would naturally follow from the treatment of laches by the court as a discretionary statute of limitations and the application to it of a similar rule of pleading. However, in *Kelly v. Hurt* an opposite rule is set forth:

To let in the defense that the claim is stale and that the bill cannot therefore be supported it is not necessary that a foundation be laid by any averment in the answer of the defendant. If the case as it appears at the hearing is liable to the objection by reason of the laches of the complainant the court on that ground will be passive and refuse relief.³²

This holding was followed directly in *Murphy v. De France*,³³ and was cited as "the better doctrine" in *Stevenson v. Smith*.³⁴

28. *Hoester v. Sammelton* (1890) 101 Mo. 619, 14 S. W. 728; *Young v. Southwestern Bell Telephone Co.* (1927) 318 Mo. 1214, 3 S. W. (2d) 381; *Kober v. Kober* (1929) 324 Mo. 379, 23 S. W. (2d) 149.

29. *Pike v. Martindale* (1886) 91 Mo. 268, 1 S. W. 859.

30. *Bliss v. Pritchard* (1877) 67 Mo. 181.

31. (1877) 67 Mo. 181, 191.

32. (1881) 74 Mo. 561, 566.

33. (1891) 105 Mo. 53, 15 S. W. 949.

34. (1905) 189 Mo. 447, 88 S. W. 86.

Consistent with this view was the holding that laches might be raised for the first time on appeal.³⁵

The defense of estoppel, legal and equitable, should be treated at this time, because there has been a tendency on the part of the Missouri courts to treat laches as a form of estoppel available only in equity.³⁶ While separate rules of pleading were justified as long as separate tribunals were maintained for law and equity, since their amalgamation under the code the same rules of pleading should be used for these similar defenses. Otherwise, inasmuch as there is frequently a doubt at the time of filing pleadings whether a case is preponderantly in law or equity, there will be some question which rule of pleading should be followed.

The Missouri courts have always held that in actions at law estoppel, legal or equitable, must be specially pleaded;³⁷ but if at the trial the evidence was introduced on the ground that it proved estoppel and no objection was made, that objection was waived.³⁸ This same rule was adopted in equity as "the settled rule"³⁹ and reaffirmed in *Central National Bank v. Doran*,⁴⁰ where the court said:

Nor does it matter that this is an equity case instead of one triable at law, since in either case no defense will be considered but which is embraced in the issues "raised by the pleadings".⁴¹

No reference is made in these cases to the different practice in the treatment of laches, but the distinction probably would be drawn between proof of *acts* of petitioner which estop him from receiving relief and proof of *delay* in bringing the action, which is called laches.

The final change in practice involving these defenses was the requirement that laches, like estoppel, be specially pleaded. This

35. *Dexter v. MacDonald* (1906) 196 Mo. 373, 95 S. W. 359.

36. It is said that laches is to be distinguished from technical estoppel, but the distinction lies chiefly in the tribunal before which the defense is asserted and perhaps in the strictness with which the doctrine is applied rather than in a distinction as to the theory of the remedy. Laches may be asserted only in equity and, where applicable, may be said to estop plaintiff from seeking equitable relief. "True," or common-law, estoppel and estoppel in pais may be asserted either in law or in equity and may also be said to estop plaintiff from seeking relief. See 2 Pomeroy, *Equity Jurisprudence* (3d ed. 1905) 1448-1450, sec. 816, 817.

37. *Bray v. Marshall* (1882) 75 Mo. 327; *Noble v. Blount* (1883) 77 Mo. 235.

38. *Price v. Hallett* (1896) 138 Mo. 561, 38 S. W. 451; *Swinhart v. St. Louis & Suburban Ry.* (1907) 207 Mo. 423, 105 S. W. 1043.

39. *Hammerslough v. Cheatham* (1884) 84 Mo. 13.

40. (1891) 109 Mo. 40, 18 S. W. 836.

41. *Id.* at 51.

reversal, however, did not come in one step. It began with a *dictum*, citing no cases, in an action at law (where true laches does not apply) that:

In * * * [certain equitable jurisdictions] disclosure of laches by the evidence will authorize dismissal of plaintiff's bill, although there is no formal plea of laches. The better doctrine is to plead laches.⁴²

In numerous legal actions involving estoppel the court used the word "laches" to mean *any* delay rather than in its technical sense of "a delay which authorizes a court of equity to deny relief."⁴³ Together, these cases served as precedent for the statement in a decision holding laches to be no defense to an action at law that,

Furthermore, we do not find that laches, (using that word in its proper sense and accurate meaning) is pleaded in the answer of the defendant * * *. Laches, in order to be available as a defense to an equitable claim or cause of action, must be pleaded.⁴⁴

The stage thus was set for the application of this *dictum* to an action in equity wherein the defendant, although not pleading laches or estoppel, contended on appeal that the laches of plaintiff precluded recovery. The earlier Missouri cases,⁴⁵ which alone had the weight of precedent, were cited in support of this contention. The court said, however, that

The respondents did not plead estoppel, ratification, or laches, which they should have done since these are affirmative defenses. Respondents have referred to several cases as authority for the proposition that laches need not be pleaded, but they are not in line with the Hicker case, and later decisions there cited.⁴⁶

Thus the change in the rule was made certain. It may now be said that the defenses of laches and of estoppel must be specially pleaded to permit defendant to introduce evidence on

42. *Kellogg v. Moore* (1917) 271 Mo. 189, 194, 196 S. W. 15.

43. *Vanderline v. Smith* (1885) 18 Mo. App. 55; *Turner v. Edmonston* (1907) 210 Mo. 411, 109 S. W. 33, 124 Am. St. Rep. 739; *Coleman v. Northwestern Mut. Life Ins. Co.* (1917) 273 Mo. 620, 201 S. W. 544.

44. *Hecker v. Bleish* (1928) 319 Mo. 149, 172, 3 S. W. (2d) 1008, which cited the *Turner*, *Kellogg*, and *Coleman* cases for this point.

45. *Murphy v. DeFrance* (1891) 105 Mo. 53, 15 S. W. 949; *Stevenson v. Smith* (1905) 189 Mo. 447, 88 S. W. 86; *Dexter v. MacDonald* (1906) 196 Mo. 373, 95 S. W. 359.

46. *Ambruster v. Ambruster* (1930) 326 Mo. 51, 75, 31 S. W. (2d) 28, 77 A. L. R. 782.

the point.⁴⁷ But if either is apparent from the petition a demurrer will lie,⁴⁸ or if apparent from the evidence of *plaintiff* the court will enforce the defense although not specially pleaded.⁴⁹

STATUTES OF LIMITATION OF ACTIONS

1. *Property*

The defense that the statute of limitations has run against a cause of action is a typical class II defense, since it relies on facts occurring subsequently to the facts alleged in the petition (lapse of the statutory period) to defeat a once valid cause of action. Therefore it must be specially pleaded and is not available under a general denial.⁵⁰ There is, however, no inconsistency between the statute of limitations and the theory of the general denial and the two may be used concurrently.⁵¹

At this point reference must be made to legal conclusions and their effect on defensive pleading. Legal conclusions are the legal consequences of the facts alleged in the pleadings. At common law, by the very nature of the writ system, a great deal of the pleading consisted of legal conclusions which then had to be substantiated by evidence.⁵² It was the announced purpose of the code to abolish such pleading and substitute the pleading of facts; to a large extent this has been done.

In certain actions involving property it is held that the petition must show a property interest in the plaintiff sufficient to enable him to maintain the action. This interest is usually represented by the legal concept of "title" and the courts, to avoid

47. *Benswanger v. Liability Assur. Co., Ltd.* (1930) 224 Mo. App. 1025, 28 S. W. (2d) 448.

48. *Bliss v. Pritchard* (1877) 67 Mo. 181; *Stone v. Cook* (1903) 179 Mo. 534, 78 S. W. 801; *Grafeman Dairy Co. v. Northwestern Bank* (1926) 315 Mo. 849, 288 S. W. 359; *State ex rel. Consolidated School Dist. No. 2 v. Haid* (1931) 328 Mo. 729, 41 S. W. (2d) 806.

49. *Brown Construction Co. v. MacArthur Bros. Co.* (1911) 236 Mo. 41, 139 S. W. 104; *Grafeman Dairy Co. v. Northwestern Bank* (1921) 290 Mo. 311, 235 S. W. 435; *Grafeman Dairy Co. v. Northwestern Bank* (1926) 315 Mo. 849, 288 S. W. 359; *State ex rel. Consolidated School Dist. No. 2 v. Haid* (1931) 328 Mo. 729, 41 S. W. (2d) 806. Cf. *Benswanger v. Liability Assur. Co., Ltd.* (1930) 224 Mo. App. 1025, 28 S. W. (2d) 448; *Ambruster v. Ambruster* (1930) 326 Mo. 51, 31 S. W. (2d) 28, 77 A. L. R. 782. In the latter case it was said, at page 75, " * * * whether there are exceptions to the rule when plaintiff's bill on its face or his evidence shows laches is a question not raised by the facts in this record."

50. *Boyce v. Christy* (1870) 47 Mo. 70; *Linn County Bank v. Clifton* (1914) 263 Mo. 200, 172 S. W. 388. The same was true at common-law, probably due to a dislike on the part of the courts of statutory encroachment upon an otherwise valid right to redress. *Tramell v. Adams* (1829) 2 Mo. 155.

51. *Nelson v. Brodhack* (1869) 44 Mo. 597.

52. See *Pomeroy*, *op. cit.* supra note 1, at 540, 541.

inclusion in the petition of numerous facts, have held that the requisite is met by the general allegation in the petition that plaintiff has title.⁵³ Thus a material allegation of the petition is a legal conclusion, which is put in issue by a general denial. It is, therefore, held that under a general denial of title any facts are admissible which go to show that title is not in the plaintiff. Thus a great number of defenses of classes I and II are made available without special pleading.

In attempted justification of this windfall for defendants it is said that the defendant should not be required to be any more specific as to the manner in which he will controvert the title than the plaintiff is in his allegation.⁵⁴ It may be questioned whether, in view of the liberties taken by the court with the treatment of payment, such decorum is necessary. Though compliance is achieved with the theory that a general denial puts in issue all the material allegations of the petition, this is done only at the expense of non-adherence to an equally worthy scheme of defensive pleading.

Legal conclusions and kindred problems have been a source of great trouble for the Missouri court, particularly in relation to defenses of class I B. In seeking a solution for these problems the court has made a number of conflicting statements which have been only partially corrected, and, as will appear, these statements in turn have given rise to new difficulties. This whole matter will be considered further in connection with the defenses of fraud, duress, and illegality.⁵⁵

Since, after lapse of the statutory period of limitations, no successful real action can be brought by the "owner" against one who has held the land adversely for the period, the latter is secure in his title and is said to have gained title by adverse possession.⁵⁶ In an action between these parties, since plaintiff must allege title, a general denial permits proof of these facts. Thus, by the denial of a legal conclusion the statute of limitations, a class II defense, is invoked without special pleading in adverse possession cases.⁵⁷

53. *Young v. Glascock* (1883) 79 Mo. 574, 577.

54. *Sears, Proof of Fraud Under Denial* (1897) 31 *American Law Review* 865.

55. See page 414, *infra*.

56. *Atkinson, Some Procedural Aspects of the Statute of Limitations* (1927) 27 *Col. L. Rev.* 157, 173; *Atkinson, Pleading the Statute of Limitations* (1927) 36 *Yale L. J.* 914, 936; *Nelson v. Brodhack* (1869) 44 Mo. 597, 600.

57. *Nelson v. Brodhack* (1869) 44 Mo. 597; *Campbell v. Laclede Gaslight Co.* (1884) 84 Mo. 352; *King v. Theis* (1917) 272 Mo. 416, 199 S. W. 133. Special statutes barring actions against purchasers at a tax sale or

2. *Wrongful Death*

Under the wrongful death statutes it is held in a majority of jurisdictions that, since the statute creates a right and a remedy which did not exist at common law, plaintiff in his petition must allege facts which show compliance with the conditions of the statute in order to state a cause of action.⁵⁸ In the Missouri statutes there are two distinct limitations on the bringing of an action and the question arises whether these are conditions of the statute granting a right of recovery so that their fulfillment must be alleged by plaintiff. If so, non-fulfillment need not be specially pleaded by defendant but should be available under a general denial. The first provision, section 3262,⁵⁹ vests the right of recovery, "first * * * [in] the husband or wife of deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then * * * [in] the minor child or children of deceased * * *." Section 3266⁶⁰ says, "Every action instituted by virtue of the preceding sections of this article shall be commenced within one year after the cause of action shall accrue * * *." Although there have been amendments to these sections, they do not affect the portions quoted.

It is settled law in Missouri that the bringing of an action by the proper party within the time limit set for that party by section 3262 is a condition precedent to the right of recovery and must be shown by the petition. The point was fully considered in *Barker v. The Hannibal & St. Joseph R. R.*⁶¹ The court rejected the contention of plaintiff that the provision was in the nature of a limitation of time only, affecting only the remedy and limiting the enforcement of the right, and held that the provision is not merely a limitation or bar to the remedy

from the federal government have been similarly treated. *Burd v. Sellers* (1892) 113 Mo. 580, 21 S. W. 91; *Fairbanks v. Long* (1887) 91 Mo. 628, 4 S. W. 499. In the former case the court recognized a possible distinction between the general statute of limitations and special statutes, in that the former confesses absolute title by adverse possession while the latter bar legal action, but held that all statutes of limitations applying to real estate should be treated alike in the interest of uniformity.

In an action to quiet title, when the petition alleges plaintiff's title and the fact that defendant claims some interest which plaintiff wants determined, a general denial apparently is unavailable as a defensive plea, since by so answering defendant denies not only the title of plaintiff but also that "he himself has any claim, title or interest in the land hostile to plaintiff." *Rohlf v. Hayes* (1921) 287 Mo. 340, 229 S. W. 747.

58. Atkinson, *Pleading the Statute of Limitations* (1927) 36 Yale L. J. 914, 926.

59. R. S. Mo. 1929.

60. R. S. Mo. 1929.

61. (1886) 91 Mo. 86.

but a bar to the right itself, the fulfillment of which must therefore be alleged as a condition precedent to recovery.⁶²

Although there apparently is no case directly in point, it would follow from the above that, since an allegation of compliance with section 3262 is a material part of plaintiff's petition, this compliance is put in issue by a general denial.

A *dictum* in the *Barker* case to the effect that section 3266 is a bar to the remedy rather than a condition precedent to the right of recovery was followed in *Cytron v. St. Louis Transit Co.*⁶³ There it was said that the legislative intent to create a bare statute of limitations is indicated by the title of the section, "Limitation of Action," and that this intent should not be permitted to perish through construction of the section as a condition. Similar holdings are found in two Court of Appeals cases.⁶⁴ From these rulings it must follow that compliance with section 3266 is not a material allegation of plaintiff's petition and so is not put in issue by a general denial but must be pleaded specially like other general statutes of limitations.

WANT AND FAILURE OF CONSIDERATION

In a contract action the petition must allege the mutual considerations, performance or a tender thereof by the plaintiff, and non-performance by defendant. This being true, it follows that a general denial reaches both the mutuality (want of consideration) and the performance by plaintiff (failure of consideration). Failure of consideration, thus understood as a failure of performance, would include any breach, however large or small, on the part of the promissor.⁶⁵

Strictly speaking, both want and failure of consideration are class I A defenses since plaintiff cannot establish a *prima facie* case without negating both. Evidence introduced by the defendant goes directly to controvert a material allegation of the petition and therefore is not matter to be pleaded specially.

The question of availability of want or failure of consideration as a defense under the general denial is complicated in Missouri by two statutes. By the first,

62. *Barker v. The Hannibal & St. Joseph R. R.* (1886) 91 Mo. 86, 92. According to the court, this interpretation was made necessary by the inclusion of the limitation within the very section which granted the right, and by the confusion of litigation which might otherwise result.

63. (1907) 205 Mo. 692, 104 S. W. 109.

64. *Bright v. Thacher* (1919) 202 Mo. App. 301, 215 S. W. 788; *Mayberry v. Iron Mountain Co.* (1922) 211 Mo. App. 610, 249 S. W. 161.

65. See 3 Williston, *Contracts* (Rev. ed. 1936) 2291, sec. 814. See also *O'Day v. Annex Realty Co.* (Mo. 1921) 236 S. W. 22.

All instruments of writing made and signed by any person or his agent, whereby he shall promise to pay to any other, or to his order, or unto bearer, any sum of money or property therein mentioned, shall import a consideration, and be due and payable as therein specified.⁶⁶

This provision, read in conjunction with the second statute which says, "Whenever a * * * written contract * * * shall be the foundation of an action * * *, the proper party may prove the want or failure of the consideration in whole or in part * * *,"⁶⁷ gives the result that in all cases to which the statutes apply it is not necessary for plaintiff to plead consideration or to make proof of it in the first instance.⁶⁸ Since this is so, the defenses of want or failure of consideration in such cases are affirmative and must be pleaded specially and proved by the defendant.⁶⁹ It will be noted, however, that contrary to statements in certain earlier court of appeals cases⁷⁰ the mere signature of defendant to a written contract does not bring the case within the statutes; it is also necessary that the contract be for the payment of money or property.⁷¹

The statutes do not apply to an oral contract or to a written contract other than for payment of money or property.⁷² Under these circumstances the requisites of plaintiff's cause of action are those stated at the beginning of this section, and a denial should permit evidence of either want or failure of consideration.

66. R. S. Mo. (1929) sec. 2958.

67. R. S. Mo. (1929) sec. 954.

68. *Montgomery v. Auchley* (1887) 92 Mo. 126, 4 S. W. 425.

69. *Montgomery v. Auchley* (1887) 92 Mo. 126, 4 S. W. 425; *Smith v. Ohio Millers Ins. Co.* (1932) 330 Mo. 236, 49 S. W. (2d) 42.

70. *Montgomery v. Montgomery* (1910) 142 Mo. App. 481, 127 S. W. 118; *Fleming v. Mulloy* (1910) 143 Mo. App. 309, 127 S. W. 105; *Wallace v. Workman* (1914) 187 Mo. App. 113, 173 S. W. 35.

71. Thus, in *Mueninghaus v. James* (1929) 324 Mo. 767, 24 S. W. (2d) 1017, it was held that a petition alleging a written and signed contract to do an act in exchange for another act was subject to demurrer for failure to state a consideration. If, although his case comes within the statute, plaintiff assumes the burden of proof of consideration and requests an instruction which places the burden on himself, a verdict for defendant will be proper if plaintiff cannot sustain the burden. *Gibson v. Texas Prudential Ins. Co.* (1935) 229 Mo. App. 867, 86 S. W. (2d) 400. It was formerly held that if, under conditions to which the statute would apply, the plaintiff alleges a consideration it must be a valid one, or the petition is subject to demurrer, *Glasscock v. Glasscock* (1877) 66 Mo. 627, but the allegation is now treated as surplusage. *Smith v. Ohio Millers Ins. Co.* (1932) 330 Mo. 236, 49 S. W. (2d) 42. Under a plea of total failure of consideration partial failure is available if instructions presenting the latter issue are requested. *National Tube Wks. Co. v. Ring Refrigerating & Ice Mach. Co.* (1906) 201 Mo. 30, 98 S. W. 620.

72. *Mueninghaus v. James* (1930) 324 Mo. 767, 24 S. W. (2d) 1017.

The Missouri decisions on this point are not numerous and their meaning is somewhat obscure, due in part to a confused use of the terms want and failure of consideration, and in part to a failure to distinguish between cases within and without the statutes. Judging from *dicta*, it would seem that both want and failure of consideration under these circumstances are available under a general denial.⁷³ Apparently the matter has never been before the supreme court and has been considered only twice in the courts of appeals.

In the first of these cases, an action on what was apparently an oral contract not to sue, the court said: "As neither a total nor a partial failure of consideration was pleaded, the questions raised relative to consideration are not properly in the case."⁷⁴ Cited in support of this decision is a court of appeals case involving a written contract. And in the second, clearly an action on an oral contract, the court said:

The point that there was no consideration for the alleged contract sued on cannot be relied on for more than one reason. 1) Lack of consideration was not pleaded. 2) Even if the contention in regard to consideration be considered an entire *want* of consideration at the outset or a mere *failure* of consideration the point must fail since adequate consideration was shown. Again, the case was tried without suggestion of any kind that there was any want or failure of consideration for the alleged contract. Consequently, we would not feel justified in reversing the case on such ground.⁷⁵

The decision is correct in view of the second reason given, but the first reason, although *dictum*, is disturbing.

It is submitted that no worthwhile conclusions can be drawn from these cases. Probably the number of contracts outside the statutes brought before the courts is so small that the lack of a settled policy on the point is not of great importance. Aside from matters of policy—for example, a desire to simplify pleading by treating all contracts, written or oral, alike—both want and failure of consideration should be admissible under a denial of the contract, except in cases to which the statutes apply.

FRAUD, DURESS, AND ILLEGALITY

When fraud or duress is practiced on the promissor under a contract, it must go either to the consideration or to the sur-

73. *Moore v. Ringo* (1884) 82 Mo. 468; *Rico v. Peters* (Mo. App. 1916) 185 S. W. 752.

74. *Hyde v. Henman* (Mo. App. 1923) 256 S. W. 1088.

75. *Peppas v. Ehrlich & Sons Mfg. Co.* (1934) 228 Mo. App. 556, 562, 71 S. W. (2d) 821.

rounding circumstances. In either case the effect is solely on the mind of the promissor as an added—or the deciding—factor in his making the promise. The promise, consideration, and surrounding circumstances are all there although perhaps in a different form than was understood by the promissor, and a petition stating these facts and omitting only the intangible fraud will state a valid cause of action. If proof is limited to these facts, recovery will necessarily follow. The same is true when an unalleged portion of the consideration is illegal. The burden rests on the defendant to prove additional facts which will change the complexion of the transaction and prevent recovery. May he do so under a general denial?

Fraud, duress, and illegality belong to class I B or to class II depending upon the view which is taken of their effect upon the contract. If they make the contract utterly void, so that no action could ever be maintained on it, they clearly belong to class I B. If, however, it be held that such defect only renders the contract subject to avoidance by an act of defendant, the question arises what act is sufficient. It may be said that the defendant's non-performance constituted an election to avoid, in which case again plaintiff never had a cause of action, there having been no breach prior to avoidance. But if filing a defense to an action on the contract be considered the election, the breach having occurred prior to that time, it would follow that the plaintiff once had a cause of action, which was subsequently terminated by the election to plead the defense. This last line of reasoning would make fraud, duress, and illegality class II defenses.⁷⁶ Logically then, these defenses could be put into either category.

76. Missouri courts have concerned themselves with the distinction between void and voidable only in those cases in which the party claiming to have had fraud or duress practiced on him seeks an affirmative recovery. In such cases it is said that fraud or duress renders a contract voidable, so that the party may elect to accept the contract and sue for damages or elect to rescind. If the contract extinguished a prior right of action and the party wishes to rescind, the usual acts connected with avoidance must be performed before an action may be brought on the prior right. *Och v. M. K. & T. Ry.* (1895) 130 Mo. 27, 31 S. W. 962; *Bushnell v. Loomis* (1911) 234 Mo. 371, 137 S. W. 257. But where fraud or duress is claimed solely as a defense to a contract action, the Missouri courts apparently treat the contract as being void. See cases cited *infra* note 96. In the first of these cases, however, the defrauded party brought a concurrent action for rescission of the contract, offering to return all benefits received; in the second case, evidence of fraud was insufficient and the contract was enforced. Thus in neither instance did the defrauded party gain by treating the contract as void rather than voidable. Perhaps, in a case in which defendant had received a benefit under the contract which he would retain if the contract were treated as being non-existent, the distinction between

In *Greenway v. James*,⁷⁷ which recognized only the broad outlines of classes I and II, the court classified these defenses as showing that a cause of action never existed, and allowed proof of them under a general denial. Under this view, the plaintiff's allegation of a valid "contract"—a legal conclusion—is treated as a material allegation of the complaint. The general denial then would open up all defenses, including fraud, duress, and illegality, which go to show that a valid "contract" never existed.

However, later cases, following *Northrup v. The Mississippi Valley Insurance Co.*,⁷⁸ have further divided class I, and have required the I B defenses to be specially pleaded. This is the almost invariable holding in other jurisdictions. It is submitted that the practical explanation lies in the judicial dislike of defenses which impute bad morals, and that its logical justification is found in the attempt of code draftsmen to avoid legal conclusions and require pleading of facts. Considered in this light the contract and its component parts, consideration, legal subject matter, and meeting of minds, are but legal conclusions to be avoided. The petition alleges only facts from which legal conclusions are drawn by court and jury. Then a denial puts in issue only the facts of plaintiff's *prima facie* case, and the additional facts of fraud, duress, or illegality are new matter which must be specially pleaded.

The two earliest Missouri cases in point under the code, *Sugg v. Blow*⁷⁹ and *Sybert v. Jones*,⁸⁰ held respectively that fraudulent representations of the promissor and illegality of consideration could not be shown under a general denial. No reason was given. However, the next case in point held that under a general denial to a petition alleging trespass for taking of goods, evidence was admissible to show that plaintiff obtained his title by virtue of a transaction in fraud of creditors. This was *Greenway v. James*,⁸¹ source of the rule that anything which tended to prove that plaintiff's cause of action never existed is admissible under a general denial. Thus was begun a line of decisions which is valid today, although restricted in the main to actions in which the allegation of the legal conclusion of title is material to plaintiff's petition. The rule has been extended to actions in replevin,⁸² eject-

void and voidable would be invoked even where no affirmative recovery is sought by defendant.

77. See also the discussion of this case supra page 400 and infra this section.

78. (1871) 47 Mo. 435.

79. (1852) 17 Mo. 359; (1853) 19 Mo. 86.

80. (1853) 19 Mo. 86.

81. (1864) 34 Mo. 326.

82. *Young v. Glascock* (1883) 79 Mo. 574.

ment,⁸³ and to the defense to an interpleader in an attachment suit.⁸⁴

But the theory of the *Greenway* case also extended to other fields. Thus, under a plea of *non est factum* to an action on a note, defendant was permitted to show that his signature was obtained through fraud.⁸⁵ And the logical extreme of the theory was reached in *Sprague v. Rooney*,⁸⁶ where in an action for specific performance of a contract for sale of real estate defendant offered to show under a general denial that the contract was drawn as a substitute for a lease, to avoid a statute forbidding leasing of property for immoral purposes. The court held the evidence admissible, "not to vary or control the contract, but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had an existence; that it was void *ab initio*."⁸⁷ The effect of the general denial "was to deny that there was any *legal* contract in existence, and therefore, that plaintiff had a standing in court."⁸⁸

Meanwhile there was developing coincidentally a line of cases following *Sugg v. Blow*. Thus evidence of champerty in an action on a contract for legal services was held inadmissible because not specially pleaded,⁸⁹ the court saying, in *Musser v. Adler*:

It is not enough that evidence may appear tending to establish facts which if pleaded would defeat a recovery. The general denial puts in issue the facts pleaded in the petition, not the liability. The facts from which the law draws the conclusion of non-liability must be stated in the answer when not pleaded in the petition.⁹⁰

And at the term of court following *Sprague v. Rooney*, a decision, written by the same judge, reaffirmed the cases following the *Sugg* case by holding that, in a contract action for rental of ground, evidence that the rental was for Sunday athletic games and so violated a statute was inadmissible under a general denial.⁹¹ The decision applied the reasoning of the *Musser* case,

83. *Smith v. Harris* (1869) 43 Mo. 557.

84. *Springer v. Kleinsorge* (1884) 83 Mo. 152; *Patton v. Fox* (1902) 169 Mo. 97, 69 S. W. 287.

85. *Corby v. Weddle* (1874) 57 Mo. 452. The case was overruled on a point of negotiable instruments law, but on the question of the availability of fraud under a general denial the case was followed by *South Side Buick Auto Co. v. Bejach* (Mo. App. 1932) 44 S. W. (2d) 870.

86. (1891) 104 Mo. 349.

87. *Id.* at 360.

88. *Ibid.*

89. *Moore v. Ringo* (1884) 82 Mo. 468; *Musser v. Adler* (1885) 86 Mo. 445.

90. (1885) 86 Mo. 445, 449.

91. *The St. Louis Agr'l & Mech. Ass'n v. Delano* (1891) 108 Mo. 217, 18 S. W. 1101.

noting particularly that "nothing on the face of the petition * * * indicates other than a valid contract between the parties * * *."⁹²

No reference is made to the *Sprague* case, yet the holdings are directly opposite. It is possible, judging from the relative space devoted to the two points, that in the earlier case the judge was more concerned with laying down the correct rule on the availability of illegality for the purpose of avoiding a contract than with the manner in which the case reached the court.

In *McDearmott v. Sedgwick*,⁹³ the conflict was recognized and the true rule stated to be that of *Musser v. Adler*. The *Sprague* case was expressly overruled, the court in effect holding that a general denial does not raise the question of legality of the contract sued on, since that is a matter of legal conclusion, which under the code is not pleaded. A petition alleges only facts, and only these facts, which as pleaded show a valid contract, are put in issue.

The present rule, as stated in the *McDearmott* case, is:

* * * [if] the contract is offered in evidence in support of the petition and its illegality appears upon its face relief should be denied, whatever the condition of the pleadings. The same is true where the plaintiff can only make out his case through the medium of an illegal transaction to which he himself is a party * * *. But when the illegality does not appear from the contract itself or from the evidence necessary to prove it, but depends on extraneous facts, the defense is new matter and must be pleaded in order to be available.⁹⁴

It will be noted that the rule was developed in cases involving illegality rather than fraud. This fact caused the appellate courts for a time to admit fraud under a general denial, following the rule laid down by the supreme court in property title cases.⁹⁵ Recent supreme court cases⁹⁶ applied the settled rule of pleading illegality to cases involving fraud, the first case achieving this

92. *Ibid.*

93. (1897) 140 Mo. 172, 39 S. W. 776.

94. *Id.* at 182. See also *School District v. Sheidley* (1897) 138 Mo. 672, 40 S. W. 656; *Kellerher & Little v. Henderson* (1907) 203 Mo. 498, 101 S. W. 1083; *Bell v. Peper Tobacco Warehouse Co.* (1907) 205 Mo. 475, 103 S. W. 1014; *Shohoney v. Q. O. & K. C. R. R.* (1910) 231 Mo. 131, 122 S. W. 1025; *State ex rel. Shawhan v. Ellison* (1917) 273 Mo. 218, 200 S. W. 1042; *Carter v. Metropolitan Life Ins. Co.* (1918) 275 Mo. 84, 204 S. W. 399.

95. See, for a discussion of these cases, *Pattison, Code Pleading* (2d ed. 1912) 569-575.

96. *Carter v. Metropolitan Life Ins. Co.* (1918) 275 Mo. 84, 204 S. W. 399; *Thompson & Co. v. Conran-Gideon Special Road Dist.* (1929) 323 Mo. 953, 19 S. W. (2d) 1049.

result by stating that a contract "conceived in fraud" is illegal, having no legal existence, and thereafter citing cases on illegality to support the decision. Duress likewise must be specially pleaded to be available.⁹⁷ It is logical that whatever the rule it should be the same in each case.

Fraud or illegality is still admissible under a general denial in actions involving title to property, but this is due to the peculiar concept of title used in such actions rather than to the statements made therein as to the scope of the general denial. The doctrine that under a plea of *non est factum* to an action on a note the defense of fraud is admissible apparently still survives, at least in the courts of appeals.

CONCLUSION

It is evident that the definition of the component parts of the answer embodied in the Missouri Code is of small help in determining which defenses must be pleaded specially and which will be available without pleading. Instead, the rule applicable to each particular defense has been altered, reversed, and in the case of the statute of frauds even brought back to its original form by the court, which all the while has been conscientiously attempting to apply the theory of the practice act and of the denial. Nor is the determination aided greatly by the explanation of the code provision given by the court—that under a general denial any evidence may be introduced which goes to controvert "such questions of fact as are necessary to sustain the plaintiff's case."⁹⁸

A somewhat reluctant recognition has finally been accorded the divisions A and B of class I, but that this was done to achieve a desired result rather than out of a real understanding of the division is indicated by the confused decisions on the point and by the frequent resurgence of the blanket classification of *Greenway v. James*, even in recent cases. A logical analysis of the scope of the denial as defined in the practice act or by the court is of value only as a point of reference from which the displacement of various defenses becomes more apparent.

Since an adequate definition of scope cannot be formulated, it is suggested that the proper approach lies in a code provision listing certain defenses to be affirmatively pleaded. These defenses might be determined by an analysis of the denial, as attempted at the beginning of this paper, which would admittedly

97. *Timson v. Manufacturers' Coal & Coke Co.* (1909) 220 Mo. 580, 119 S. W. 565.

98. *Northrup v. Mississippi Valley Ins. Co.* (1871) 47 Mo. 435, 444.

bring about an arbitrary classification, no doubt with certain injustices, or might be obtained from the decisions of the supreme court. Such a provision is found in many of the newer codes.

Whether such a list should attempt to be all-inclusive, (with of course a catch-all provision to take care of possible omissions) or should concern itself chiefly with those defenses which have caused the courts difficulties in the past is debatable. So far as is known, no attempt has been made to assemble a complete catalogue of affirmative defenses and it seems highly probable that in any such attempt one or more defenses would be overlooked. While these would of course be handled by the catch-all provision, their omission would make the list unavailable as the ultimate source of all defenses to be pleaded specially, which would appear to be the chief justification for attempting to make it all-inclusive. It might seem that the more complete list would be an aid in drafting the answer, but this aid would be more apparent than real. Aside from those defenses of class I which have been handled differently in different jurisdictions, a number of which have been discussed in this paper and all of which could readily be listed, affirmative defenses are those of class II and are readily recognized as defenses admitting the one-time existence of an obligation, but setting forth facts which prevent enforcement of this obligation. It would seem easier for the pleader to apply this simple test to the point in question than for him to see if his facts come within one of the lump concepts listed in the act, always bearing in mind that the list might not be all-inclusive, so that in the end the test would be required anyway.

The inclusion in the code of a clause requiring special pleading of a defense which tended to surprise the opponent would absolutely prevent the list from being all-inclusive. Such a clause attempts to express briefly the intention that in addition to the usual affirmative defenses listed, any other defense must be pleaded specially which from the particular facts of the individual case would seem to be unexpected and would therefore give the unfair advantage of surprise to the party using it. Because of its very nature the clause cannot be made more definite, and so an entirely new field of uncertainty in pleading is opened, with the defendant not wanting to reveal unnecessarily an element of his case, and yet fearing that his failure to do so will result in the exclusion of his evidence. It is said that in practice this dilemma is resolved by special pleading in all doubtful

cases;⁹⁹ however, it would seem that, as a body of case law developed interpreting this provision, dealing perhaps with the exceptional case in which the matter was not pleaded or with the opposite extreme of pleading "evidence" rather than "facts," loopholes in the provision against surprise would be uncovered, once more bringing an element of uncertainty to the field of the affirmative defense. The advantage to be gained by a provision on surprise defenses is a furtherance of the notice function of pleading, but it is perhaps to be questioned whether the provision does not mark a return toward greater bulk and intricacy of pleadings with a resultant tendency toward trying the case in the pleadings, and whether the true case of surprise cannot be more effectively handled with simpler pleadings, allowing the questioned defense to be raised for the first time at the trial, but with a postponement to permit the marshalling of evidence on the opposite side in the event of actual hardship. Furthermore, is it not possible that the cure for surprise lies not in more complex pleadings, performing the classical notice function, but rather in the newer, less formal pre-trial procedure?

A final point raised by a consideration of defensive pleading is the possibility of the entire abolition of the general denial, using instead a specific denial of the individual allegations of the complaint. An adequate treatment of this question would involve weighing the advantages of a clearer statement of defendant's position, with a resultant simplification of court procedure, against the practical point that often the simplest way of defendant's assuring the presence of certain witnesses is to make them also indispensable to the plaintiff's case; further bearing in mind that no penalty has yet been devised sufficient to prevent wholesale denial under the specific form. Whatever decision should be reached on this point would not affect the conclusions of this paper, since whether a point is put in issue by a general or a specific denial exactly the same procedure will be followed thereafter.

It is, then, the conclusion of the writer that in any future revision of the Civil Practice Act, the section on the answer should contain the following provisions: (a) a definition of "new matter" as admitting the existence of a cause of action but claiming that it was extinguished by subsequent events; (b) a list of those defenses of class I A or I B which, for reasons of policy, it is desired that the defendant plead specially.

J. J. THYSON.

99. See Sunderland, Observations on the Illinois Civil Practice Act (1934) 28 Ill. L. Rev. 861.