THE RIGHT TO A JURY TRIAL IN CIVIL CASES IN MISSOURI

The scope of this article will be limited to a discussion of the theory of the Missouri courts concerning the interpretation of two specific sections of the Missouri Code of Civil Procedure, and the consequent extension of the right to a jury trial beyond its common law confines. The first of these statutes is the so-called "jury trial" statute, which was embodied in the New York Code of 1848, and reproduced substantially in the Practice Acts of the majority of states adopting the reformed procedural rules.[1] The second section is a unique Missouri statute creating a "statutory" jury in a special instance.[2] In order to focus our intention the more accurately upon the particular problem, several general propositions will be postulated, and dismissed from further discussion.

It is conceded that, in the absence of express constitutional or statutory provisions to the contrary, a jury trial is a matter of right in all ordinary actions formerly brought at law where issues of fact arise upon the pleadings.[3] Conversely, unless extended by legislation, there is no right to a jury trial in actions formerly brought in equity,[4] the verdict of a jury in actions formerly cognizable in equity being entirely advisory and subject to the prerogative power of the Chancellor to accept or reject it in his discretion.[5] These matters are legal platitudes. The special situation to which we shall direct this inquiry results from the

[1] R. S. Mo. (1929) sec. 948: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived, or a reference ordered as hereinafter provided." See Clark, Code Pleading (1928), p. 56, note 51 for corresponding sections in N. Y. and other states.

[2] R. S. Mo. (1929) sec. 782: "Wherever a release, composition, settlement, or other discharge of the cause of action sued upon shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any fact showing or tending to show that said release, etc., was fraudulently or wrongfully procured from plaintiff, and the issue or issues of fact thus raised shall be submitted with all other issues to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient."

[3] In re Independence etc. Road (1911) 238 Mo. 323, 141 S. W. 1103; Minor v. Burton (1910) 228 Mo. 558, 128 S. W. 964; Schipp v. Snyder (1894) 121 Mo. 155, 25 S. W. 900; Smyth v. Boroff (1911) 156 Mo. A. 18, 135 S. W. 973. See 35 C. J. 153.

[4] State v. Shain (1923) 297 Mo. 369, 248 S. W. 591; Lee v. Investment Co. (Mo. 1922) 240 S. W. 129; Conway v. Robinson (Mo. 1915) 178 S. W. 154; Hagan v. The Cont. Nat'l Bk. (1904) 182 Mo. 319, 81 S. W. 171; Gay v. Ihm (1879) 69 Mo. 584; Weil v. Kume (1871) 49 Mo. 158.

[5] Northrip v. Burge (1914) 255 Mo. 667, 164 S. W. 584; Blood v. W. O. W. (1909) 140 Mo. A. 542, 120 S. W. 700; Southern Bk. v. Nichols (1911) 235 Mo. 401, 138 S. W. 881; Robinson v. Dryden (1893) 118 Mo. 534, 24 S. W. 448; Cox v. Cox (1887) 91 Mo. 78, 3 S. W. 585; Hess v. Miles (1879) 70 Mo. 205; Bouton v. Pippin (1905) 192 Mo. 474, 91 S. W. 149; Coons v. Coons (Mo. Ap. 1922) 236 S. W. 358.

merger in the Practice Code of what were formerly termed "actions at law" and "suits in equity" into the universal civil action of the Code,[6] and the consequential ability to interpose defenses and counterclaims formerly of equitable cognizance to an action formerly legal.[7] The failure of the Code to achieve a complete union of law and equity because of the constitutional provisions preserving the right to jury trial, necessitated the survival of vestigial terminology in order to differentiate between cases where jury trial was a matter of right, and cases where it was not a matter of right. Hence, in any discussion involving the right to a trial by jury, it is impossible to avoid the use of the terms "action at law," "suit in equity," "legal," and "equitable," although the substantial significance of those terms was destroyed by the code.[8]

The first problem to be considered is the status of the right to a trial by jury of factual issues presented by the interposition of a so-called "equitable defense" to an action formerly cognizable at law, and embraced within the "jury trial" statute as an action "for money only" etc.[9] Our purpose is to determine whether a jury trial is a matter of right in this situation in Missouri. If it is, and either party may demand a jury trial of issues arising in that manner, our next inquiry is to the source of the right. Is it embraced within the constitutional provision maintaining the right to a jury trial as it existed before the adoption of the state Constitution? Or is it the neoteric creature of the Legislature, springing from a statutory addition to the category of factual issues triable by jury historically? If the latter, the Missouri "jury trial" statute has operated so as to withdraw from the consideration of the Court certain matters which before the fusion of law and equity were exclusively equitable in their nature, and bestow upon the jury a function which it did not possess at common law.[9a]

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[6] See Clark, Code Pleading, p. 44. Also see: Ingersoll, The Confusion of Law and Equity, 21 Yale L. J. 58; Clark, The Union of Law and Equity, 25 Col. L. Rev. 1 (1925); Walsh, The Merger of Law and Equity under the Codes and Other Statutes 7 N. Y. Univ. L. Rev. 157 (1929); E. R. Taylor, The Fusion of Law and Equity, 11 Ill. L. Rev. 402 (1917). Also see stats. listed p. 46, note 24, Clark, Code Pleading (Supra).

[7] R. S. Mo. (1929) 777: "The defendant may set forth by answer, as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." See N. Y. Civil Prac. Act sec. 282. See Clark, Code Pleading, p. 442, note 27.

[8] For the resulting confusion in some juridisdictions, see: Walsh, Merger of Law and Equity Under the Codes and Other Statutes (supra); Clark, Code Pleading, p. 47-48, cases cited in notes 28 and 29; Cook, Equitable Defenses, 32 Yale L. J. 645 (1923); C. B. Clark, Union of Law and Equity, and Trial by Jury Under the Codes, 707 (1923); C. E. Clark, Union of Law and Equity, (supra) note 6.

[9] See note 1 (supra).

[9a] If this is established, it will raise the very serious and practical question of whether or not it is constitutional under either the state or federal

I. THE INTERPRETATION OF THE "JURY TRIAL" STATUTE BY THE MISSOURI COURTS

The Missouri Constitution contains the common provision that "The right of trial by jury, as heretofore enjoyed, shall remain inviolate. . . ."[10] This has been construed to mean that "it shall 'remain' as it was at common law; i. e., the *fundamentals,* though not all the details of trial by jury as they existed at the time when the constitution was adopted are preserved."[11] The general opinion that the "jury trial" statute is merely declaratory of this constitutional provision is erroneous. Actually it effects a radical change of the pre-Code practice. There is some indication that the codifiers of the New York Code intended a sweeping extension of jury trials.[12] Thus an action to reform a contract calling for the payment of money, and to recover on it as reformed, could logically be brought within the purview of the "jury trial" statute and be triable by jury. But the courts have refused to accept the words of the statute in their broadest sense, and have held that since equity formerly had jurisdiction of such an action, it remains triable by the court alone.[13] Similarly, the courts have applied the historical test to actions for accounting,[14] creditor's

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constitutions, to deprive the Court of jurisdiction over issues cognizable exclusively in Equity before the Code. Limitations of space prevent a detailed discussion of this problem. Apparently, the question has never been raised in the Missouri courts. For the view that such a procedure would be unconstitutional see: Clark, Code Pleading, p. 60, ffn. 67; Michaelson v. U. S. ex rel. Chi., St. L. M. & O. RR. Co. (1924) 266 U. S. 42, 64, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451, avoiding a decision of the point, *upon which lower federal cases had turned,* by holding the jury trial provisions of the Clayton Act arts. 21, 22 (28 USCA secs. 386, 387) to apply only to *criminal* contempts, terming it a "grave constitutional question." See below (C. C. A. Wis.) 291 F. 940, 946 (1923): "Congress cannot constitutionally deprive the parties in an equity court the right to a trial by the Chancellor." See also: Gallagher v. Basey (1872) 1 Mont. 457, affirmed, 20 Wall. 670, 680, 22 L. Ed. 452 (1874); Arnold v. Sinclair (1892) 12 Mont. 248, 277, 29 Pac. 1124; Brown v. Buck etc. (infra) note 52, and cases cited. For the contrary view see: Brown v. Greer (1914) 16 Ariz. 215, 141 Pac. 841; Ely v. Early (1886) 94 N. C. 1; Susquehanna S. S. Co. v. Andersen (infra) note 29; dictum in Berry v. RR (infra) discussed under heading II of this article, where it will be noted that the question was solely concerned with fraud, and the court avoided the present dilemma by deciding that fraud was cognizable in law before the adoption of the Code.

[10] Constitution of the state of Missouri (1875) Art. II, sec. 28.

[11] Clark, Code Pleading, p. 52.

[12] Clark, ibid., p. 58.

See First Rep. Comm'rs. on Prac. and Pl. (N. Y. 1848) sec. 208, note, also pp. 179-181.

[13] Bidwell v. Astor Mut. Ins. Co. (1857), 16 N. Y. 263, 267; Phillips v. Gorham (1858), 17 N. Y. 270; Imperial Shale Brick Co. v. Jewett (1901) 169 N. Y. 143, 62 N. E. 167; Caswell v. West (1875), 3 Thomp. and C. (N. Y.) 383; Back v. People's Nat'l Fire Ins. Co. (1922), 97 Conn. 336, 116 A. 603.

[14] Pendergast v. Greenfield (1891), 127 N. Y. 23, 27 N. E. 388; Weldon v. Brown (1904), 89 App. Div. 586, 85 N. Y. S. 599; Ely v. Coontz (1902), 167 Mo. 371, 67 S. W. 299; Johnson v. Bell (1895) 61 Mo. A. 37.

bills,[15] foreclosure proceedings,[16] interpleader,[17] suit to set aside a fraudulent release,[18] suit to revoke letters of administration,[19] and a suit for specific performance of a contract to convey realty,[20] in all of which cases the ultimate demand was for money or specific personal or real property, and clearly within the language of the statute from a literal point of view. Thus it is clear that where the entire action is one that was formerly cognizable in equity, the issues arising thereon are triable to the court under the Code, even though the action is apparently embraced within the conditions of the "jury trial" statute. A few courts have added confusion by stating that the language of the statute controls,[21] and by persisting in the use of the terms "legal" and "equitable" as a test in determining whether or not jury trial shall be afforded.[22] It is equally true that where the answer sets up an independent cause of action formerly of equitable cognizance, which constitutes a counterclaim and prays for or is entitled to affirmative "equitable" relief, the action is converted from one triable by jury to one triable by the court.[23] And likewise, where the defendant's answer admits the facts of the plaintiff's action formerly cognizable at law, and sets up facts of an "equitable" character, which, if proven, will completely extinguish the plaintiff's claim.[24] In this latter instance

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[15] Murtha v. Curley (1882), 90 N. Y. 372; Bell v. Merrifield (1888), 109 N. Y. 207, 16 N. E. 55, 4 Am. St. Rep. 436; Baily v. Hornthal (1898), 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; Johnson v. Bell (supra) n. 14.

[16] Long v. Long (1897), 141 Mo. 352, 44 S. W. 341; Parker v. McGinty (1925), 77 Colo. 458, 239 Pac. 10; Matter of Hamilton Park Co. (1896), 1 App. Div. 375, 37 N. Y. S. 310; Young v. Vail (1912), 29 N. M. 324, 22 Pac. 912, with note 34 A. L. R. 980, 1015.

[17] Union Mut. Life Ins. Co. v. Broderick (1925), 196 Cal. 497, 238 Pac. 1034; State Nat'l Bk. v. Andersen (Mo. Ap. 1917) 198 S. W. 511.

[18] Moss v. Burnham (1900), 50 App. Div. 301, 63 N. Y. S. 947.

[19] Stevens v. Larwill (1904), 110 Mo. A. 140, 84 S. W. 113.

[20] Hamilton v. Hamilton (1875), 59 Mo. 232. The court decided this point without advancing either authority or reasoning.

[21] City of Syracuse v. Hogan (1923), 234 N. Y. 457, 138 N. E. 406; See comments 32 Yale L. J. 707, 23 Col. L. R. 590, and 9 Cornell L. Q. 73. Gunsaullus v. Pettit (1888), 46 O. St. 27, 17 N. E. 231.

[22] Taylor v. Brown (1915), 92 O. St. 287, 110 N. E. 739; Katz v. Amer. Finance Co. (1925), 112 O. St. 24, 146 N. E. 811; Sierzek v. Smith (1921), 86 Okla. 79, 206 Pac. 611; McCoy v. McCoy (1911), 30 Okla. 379, 121 Pac. 176. Also see Mo. cases cited in notes 23 and 34 (*infra*).

[23] Buchnear v. Mear (1874), 26 O. St. 514; Gill v. Pelkey (1896), 54 O. St. 348, 43 N. E. 991, Throckmorton Cas. Code Pl. 682; Fish v. Benson (1886) 71 Cal. 428; Marling v. Burlington, C. R. & N. Ry. Co. (1885), 67 Ia. 331; Lewis v. Rhodes (1899) 150 Mo. 498, 52 S. W. 11; Pitts v. Pitts (1907) 201 Mo. 356, 100 S. W. 1047; Withers v. K. C. Suburban Belt Ry. Co. (1910) 226 Mo. 373, 126 S. W. 432; Pendleton v. Hubbard (1910), 231 Mo. 314, 132 S. W. 696; Conrey v. Pratt (1913), 248 Mo. 576, 154 S. W. 749; Hauser v. Murray (1913), 256 Mo. 58, 165 S. W. 376; Dahlberg v. Fisse (1931), 328 Mo. 213, 40 S. W. (2nd) 606; Also see cases cited in Clark, Code Pleading, p. 61, note 70. See discussion of Hauser v. Murray (*infra*).

[24] Lewis v. Rhodes (supra) note 23; Allen v. Logan (1888), 96 Mo. 591, 10 S. W. 149.

the courts demand that the defendant's answer be a virtual admission of the cause of action stated in the complaint, in order to prevent a trial by jury.[25]

Thus far we have been eliminating situations arising under the "jury trial" statute where the Code jurisdictions are apparently in harmony. We now consider the cardinal topic of so-called "equitable defenses" proper. It is claimed by the text-writers that the courts of Missouri, Minnesota, and New York, are entirely out of line with the rest of the Code states in the application of the "jury trial" statute to "equitable defenses" interposed to an action formerly cognizable at law and embraced within the statute.[26] Mr. Clark in his text on *Code Pleading*, summarizes this attitude as follows: "Therefore, in most code jurisdictions, 'action' (in the 'jury trial' statute) was considered in effect a general term used to define the nature of the case, and whenever an issue formerly equitable is injected into the case, it is held that such issue is to be tried to the court.[27a] This re-

[25] See: O'Day v. Conn (1895) 131 Mo. 321, 32 S. W. 1109; Schuster v. Schuster (1887), 93 Mo. 443, 6 S. W. 259.

[26] See: E. W. Hinton, Equitable Defenses Under Mod. Codes, (1920) 18 Mich. L. R. 717; C. B. Clark, Union of Law and Equity and Trial by Jury Under the Codes (1923) 32 Yale L. J. 707; C. E. Clark, The Union of Law and Equity, (1925) 25 Col. L. R. 1; W. W. Cook, Equitable Defenses (1923) 32 Yale L. J. 645; W. F. Walsh Merger of Law and Equity Under the Codes and Other Statutes (1929) 6 N. Y. Univ. L. Q. Rev. 157; R. W. Barrow, The Right to a Trial by Jury in Jurisdictions Where the Procedure at Common Law and Equity Is Blended by Their Practice Codes (1922), 7 St. L. L. R. 227; Clark, Code Pleading, p. 63 and note discussed in note 27 (*infra*).

[27] p. 61.

[27a] The distinction that is made in the cases appended to this statement is that the court in reaching a conclusion as to the right of a trial by jury conducts a limited historical investigation of the issue projected into the pleading. and extends or denies trial by jury according to the legal or equitable status of such an issue at common law, *regardless of whether the issue is presented as a mere defense, or a counterclaim praying affirmative relief.* A brief summary of the issues interposed in these cases follows: Swasey v. Adair (1891) 88 Cal. 179, 25 Pac. 1119 (In ejectment action defense asserting title in defendant, and counterclaiming for *damages* for conspiracy and deceit held triable by jury.) See comment 13 Cal. L. R. 345 (1925). Weir v. Welch (1922), 71 Colo. 66, 203 Pac. 1100 (Trial by jury denied where defense of resulting trust interposed to action for unlawful detainer.) Penniger Lateral Co. v. Clark (1912) 22 Idaho 397, 126 Pac. 524 (Jury trial denied where defense by way of cross-claim to quiet title to action on debt). Morris v. Merritt (1879) 52 Iowa 496, 3 N. W. 504 (Jury trial denied where defense of accounting interposed to action on contract). Queen Ins. Co. v. Marks (1924) 204 Ky. 662, 265 S. W. 30 (Jury trial denied where defense of fraud interposed to an action in award of arbitrators). Simmons v. Baker (1923) 109 Nebr. 853, 192 N. W. 511 (Jury trial denied where counterclaim for specific performance interposed to action on contract to convey realty). Arnett v. Smith (1902) 11 N. D. 55, 88 N. W. 1037 (Jury trial denied where counterclaim for specific performance interposed to an action on account stated). Gill v. Pelkey (*supra*) note 23 (Jury trial denied where counterclaim for reformation pleaded to action for recovery of land). Gantz v. Gease (1872) 82 O. St. 34, 91 N. E. 872 (Jury trial denied

sult . . . . is often confused by calling the pleading, in whatever form stated, an equitable counterclaim, or by speaking of the action as now one in equity.[27b] But the result, even though reached in this fashion, seems desirable. The very small minority (Missouri and Minnesota) holding *the other way*,[28] have been reinforced by a direct ruling of the New York Court of Appeals . . . ."[29] It cannot be doubted that what Mr. Clark had in mind when he said "the other way," was that the three jurisdictions named interpreted the "jury trial" statute as creating a *statutory* jury for the trial of "equitable" defenses interposed to actions brought under the statute. At least, after an extensive examination of the Missouri cases, the writer has reached that conclusion, and it is a logical inference that "the other way" from an interpretation of the statute as declaratory of the constitutional right, could only mean an interpretation which in Mr. Clark's own words "is a modification of the practice prior to the codes,"[30] or a legislative extension of the right to a jury trial.

The majority of the practicing lawyers would receive such a

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where defense of fraud in procurement pleaded to an action on a guarantor's bond). Kenny v. McKenzie (1909) 23 S. D. 111, 120 N. W. 781, 49 L. R. A. (N. S.) 775 (Jury trial denied where defense of estoppel pleaded to legal action to quiet title). Kimball v. McIntyre (1881) 3 Utah 77, 1 Pac. 167 (Jury trial denied where defense of equitable ownership pleaded to action of ejectment under a patent). Park v. Wilkinson (1900) 21 Utah 279, 60 Pac. 945 (Jury trial denied where counterclaim for reformation pleaded to an action to quiet title under statute). Peterson v. Phila. Mtg. and Trust Co. (1903) 33 Wash. 464, 74 Pac. 585 (Jury trial denied where defense of possession under agreement with plaintiff's grantor to hold until rent satisfied certain mortgage obligations interposed to an action to recover land). These are the leading cases which interpret the 'jury trial' statute as being merely declaratory of the constitutional right to a trial by jury.

[27b] See Hauser v. Murray (supra) note 23.

[28] (The italics are the author's.) The ambiguity of this expression will be resolved *infra*. In the appended footnote Mr. Clark states, "Apparently limited to Minnesota and Missouri, in addition to New York, though the Missouri cases indicate the result may be avoided by the expedient . . . of merely calling the allegations a counterclaim, even though in form a defense." The authority cited for the qualification in Missouri is Hauser v. Murray (supra) note 23. However, the overwhelming majority of the Missouri cases do not afford this loophole.

The Minnesota authority cited is King v. International Lumber Co. (1923) 156 Minn. 494, 195 N. W. 450 (The court extended jury trial to issues raised by a replicatory plea of fraud in obtaining a release pleaded as an answer to an action for rent under a written lease). The court said, "The complaint states a cause of action for the recovery of money only. Whether an action is triable by jury or not is to be determined solely by an examination of the complaint. Dun. Dig. and Supp. 5229." This is dubious authority for the proposition above, since as will be shown later, the defense of fraud was often cognizable at law before the Code. In Missouri this situation was encompassed by R. S. Mo. (1929) sec. 782 (supra) note 2.

[29] The N. Y. ruling appears in Susquehanna S. S. Co. v. A. O. Andersen & Co. (1925) 239 N. Y. 285, 146 N. E. 381, Throckmorton Cas. Code Pl. 674, Clark, Cas. Code Pl. 456, discussed *infra*.

[30] Clark, Code Pl., p. 58.

pronouncement with the highest degree of skepticism, and would maintain the counter-argument that the "equitable defenses" which the court delivers up to the jury are in reality not "equitable" at all, but were triable by the jury even before the Code, as where the defense interposed is fraud, and the evidential substratum is grounded "in factum".[31] Conceding that where the fraud is "in factum" the trial by jury is not "statutory" in the sense that the matter would have been tried by the court at common law, the case of *Conrey v. Pratt*[32] raises an insurmountable difficulty. In that case the action was brought to foreclose a deed of trust, and the defense of fraud was interposed with a prayer for cancellation. The court said, "The equitable defense set out in the answer, coupled with the prayer for affirmative relief, converted this into an equitable action, which the court might have tried without the aid of a jury." It is obvious that it was only the prayer for affirmative relief that prevented this case from being tried by a jury. The court, moreover, *called* the defense "equitable", which is sufficient answer to the argument that *all* defenses of fraud are of "legal" cognizance. The Missouri courts, with one recognized exception,[33] have held that an "equitable" defense to a "legal" demand does not convert the action "at law" into one "in equity" unless affirmative "equitable" relief is asked.[34] In the case of *Citizen's Trust v. Going*[35] an action was brought on a note, and the defense of estoppel was pleaded by the defendant. The court said,

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[31] See 35 C. J. p. 176, sec. 58. "While actual fraud is a question of fact, it does not follow that it must always be determined by a jury. Both courts of law and courts of equity have in proper cases jurisdiction of fraud, and where the facts constituting the fraud and the relief sought are cognizable in a court of law, the parties are entitled to a jury trial." Non-Royalty Shoe Co. v. Phoenix Assur. Co. Ltd. (1919) 277 Mo. 399, 210 S. W. 37; Routt v. Milner (1894) 57 Mo. A. 50; Kern v. Sup. Council A. L. of H. (1902), 167 Mo. 471, 67 S. W. 252; Schuerman v. Union Cent. Life Ins. Co. (1901), 165 Mo. 641, 65 S. W. 723; Earl v. Hart (1886) 89 Mo. 263, 1 S. W. 238; Kitchen v. RR Co. (1875), 59 Mo. 514.

For a discussion of equitable defenses at common law see: Ames, Specialty Contracts and Equitable Defenses (1895) 9 Harv. L. R. 49; Abbott, Fraud as a Defense in the Federal Courts (1915) 15 Col. L. R. 489. Also see: Whipple v. Crown (1919), 225 N. Y. 237; Corby, Ex'rx. v. Weddle (1874) 57 Mo. 452.

[32] See note 23 (supra).

[33] Hauser v. Murray, note 23 (*supra*). See discussion (*infra*).

[34] Citizen's Trust Co. v. Going (1921) 288 Mo. 505, 232 S. W. 996; Shaffer v. Detie (1905), 191 Mo. 377; Lincoln Trust Co. v. Nathan (1903) 175 Mo. 32; Conrey v. Pratt (supra) note 23; Koehler v. Rowland (1918) 275 Mo. 581, 205 S. W. 217, 9 A. L. R. 107, and cases cited; Toler v. Edwards (1913) 249 Mo. 168, 155 S. W. 26; Lee v. Conran (1908) 213 Mo. 404, 111 S. W. 1151; Minor v. Burton (supra) note 3. See: Wolf v. Ins. Co. (1925) 219 Mo. A. 307, 269 S. W. 701, 704; Bouton v. Pippin (supra) note 5; Babcock v. Rieger (1933) 332 Mo. 528, 58 S. W. (2nd) 722; Cullen v. Johnson (1930) 325 Mo. 253, 29 S. W. (2nd) 39.

[35] See note 34 (supra).

"It is contended that the circuit court erred in submitting this case to a jury. The action was at law. The defense thereto may to a certain extent be equitable in form, but the interposition of an equitable defense in the absence of a prayer for affirmative relief based thereon does not convert the action into one in equity. This ruling has been attested in numerous cases." Can it be doubted that the jury in this case was "statutory" insofar as it determined the issues arising on the plea of estoppel? Again, consider the equitable defense of laches. In the recent case of *Cullen v. Johnson*[36] an action was brought under a statute to determine the title to land, and the defendant asserted the title in himself, and further set up the plaintiff's laches as a bar to the alleged title. The court stated, "The mere setting up of an equitable defense does not convert an action at law into a suit in equity *unless affirmative equitable relief is prayed.*[37] Where plaintiff in his action to quiet title grounds his cause of action upon his legal title, and the defendant by his answer claims the legal title in fee, the answer, in further asserting the laches of the plaintiff as a defense but praying no affirmative equitable relief, tenders no equitable issue."[38] Indubitably, the jury exercised a "statutory" duty in this case. The reason why there has been some doubt as to the status of the jury in these cases in Missouri, and a reluctance upon the part of the text-writers to definitely state that the Missouri courts have interpreted the "jury trial" statute so as to create a "statutory" jury, is that the courts themselves appear to be ultimately confused by the problem, and apparently are willing to sacrifice the true spirit of the Code in order to avoid the issue. This is obvious from the language used in the above cases. It seems unfortunate that any judge in a code state could deliver such inartistic phrases as "does not convert an action at law into a suit in equity"[39] without at least a passing apology. A second reason is found in such exceptional cases as *Hauser v. Murray*[40] where in an action to ascertain and determine the title to land under a statute similar to that involved in *Cullen v. Johnson,* the defendant pleaded facts establishing a resulting trust, and also pleaded estoppel by acts "in pais," *and although no affirmative relief was asked,* the court denied a jury

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[36] See note 34 (supra).

[37] The italics are the author's.

[38] It is an indisputable fact that laches as a defense before the Code was exclusively equitable in its nature, and could not be interposed to an action at law, or to an action where the plaintiff stood upon his legal title. In this matter see: Hecker v. Bleish (1927) 319 Mo. 149, 172, 3 S. W. (2nd) 1008; Willis v. Robinson (1922) 291 Mo. 650, 675, 237 S. W. 1030; Brooks v. Roberts (1920) 281 Mo. 551, 558, 220 S. W. 11; Bell v. George (1918), 275 Mo. 17, 30, 204 S. W. 516; Kellogg v. Moore (1917) 271 Mo. 189, 193, 196 S. W. 15; Chilton v. Nickey (1914) 261 Mo. 232, 243, 169 S. W. 978; Hayes v. Schall (1910) 229 Mo. 114, 124, 129 S. W. 222.

[39] See Cullen v. Johnson (supra) note 34.

[40] See note 32 (supra).

trial, stating, "The defendants, while not in so many words asking affirmative relief, invoke equitable defenses to defeat a legal action, which *for all practical purposes*[41] is a request for an adjudication of the equities pleaded. Under this state of the pleadings a jury was rightfully refused." The case stands alone, cites no adequate authority, and altogether gives the impression that it is the skeleton in the closet. It is regrettable that it has not influenced the courts in adopting a more rational attitude on this subject. Perhaps it may yet effect a salutary "bouleversement" of the present method of analyzing these cases in the Missouri courts. Of course, by merely labelling a counterclaim what is actually only a defense in form, a beneficial result is reached, but the fundamental approach is still evasive. The only difference between the Missouri courts and the New York courts on this point is that Justice Cardozo in expressing the rule in *Susquehanna S. S. Co. v. Anderson*[42] refused to employ a circumlocutory subterfuge, and stated unequivocally what the Missouri courts achieved by a series of periphrastic decisions. It is unreasonable to sanctify such irrationalities by refusing to admit that the Missouri courts in interpreting the "jury trial" statute have created a "statutory" jury in certain instances. The writer of the prize thesis of Washington University for 1922 is indirectly in agreement.[43] In discussing the problem generally, he points out that the Missouri courts distinguish between equitable defenses and equitable counterclaims in applying the "jury trial" statute, and states; "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

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[41] The italics are the author's.

[42] See note 29 (supra). In this case an equitable defense of mistake was interposed to an action based upon a charter-party contract. Justice Cardozo, with characteristic directness states, "There remains for consideration the manner of trial. Our statute provides that in an action for money only 'an issue or fact must be tried by a jury unless a jury trial is waived or a reference is ordered.' Civ. Prac. Act sec. 422: Code Civ. Proc. sec. 968 . . . *There is no distinction in this respect between kinds of defenses, dependent upon their origin in equity or in law. The distinction is between all defenses on the one side and counterclaims on the other. . . . The rule is settled under the provisions that equitable defenses are triable the same way as defenses that are legal.*[42a] (Citations follow.) Possibly, though this is far from clear, a different construction might have been given to the statute originally. . . . We have held that even the label of a counterclaim will not change the mode of trial at the instance of a defendant if what is described as a counterclaim is also a defense . . . unless the situation is one in which affirmative equitable relief through a formal judgment of reformation is essential for complete protection . . ."

For criticism see: Clark, Trial of Actions Under the Code, (1926) 11 Cornell L. Q. 482; Ibid., 396; Rothschild, 26 Col L. R. 33 et seq.; cf. C. E. Clark, Union of Law and Equity (supra) note 8.

[42a] The italics are the author's.

[43] See R. W. Barrow, The Right to a Trial by Jury etc. (supra) note 26.

with the claim set forth in the plaintiff's petition, and therefore equally entitled to an *appropriate*[44] method of trial." It follows that jury trial of "equitable" defenses where no affirmative relief is asked is *inappropriate* from the historical point of view, and is not one of the fundamental elements of jury trial preserved by the state constitutional provision.

In view of the foregoing argument, it is conclusively proven that the Missouri courts have interpreted the "jury trial" statute so as to create a statutory jury for the trial of factual issues arising upon certain "equitable" defenses interposed to an action within the statute. We next consider jury trial under section 782 of the Missouri Code of Civil Procedure.

II. JURY TRIAL IN MISSOURI AS AFFECTED BY SEC. 782 OF THE CODE OF CIVIL PROCEDURE[44a]

The statute with which we are now concerned provides that where a defendant sets up a release or other charge in bar of the cause of action sued upon, the plaintiff may show in his reply that such charge or release was fraudulently or wrongfully procured from him, and the issues of fact arising thereon shall be tried by a jury together with other issues of fact in the case.[45] It is difficult to understand why this statute was enacted unless the problem of pleading fraud in Missouri is clearly understood. As we have seen, the Missouri courts from an early time adopted the view that in most cases, fraud as a defense was not peculiar to equitable jurisdiction,[46] and hence was triable by jury. The reasons for this attitude are not clear from the cases, and it is suggested that it was more the result of traditional usage than of any well-defined and logical policy. When the question of pleading fraud in the reply arose, even greater confusion resulted. Lawyers, aware of the indecisive status of the courts on the matter, pressed their arguments that such issues were triable by the jury, or that they were triable by the court, as the case may be. The courts responded with a series of decisions diametrically opposed in result, and exhaustive of all precedent and commentary on the subject.[47] It was at this time that the statute was passed.[48] This is the explanation accepted in the cases.

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[44] The italics are the author's.

[44a] R. S. Mo. (1929) sec. 782 (supra) note 2.

[45] RS Mo. (1929) sec. 782 (supra) note 2.

[46] See cases cited in note 31 (supra).

[47] Girard v. St. L. Car Wheel Co. (1894) 123 Mo. 358 (Holding that issues of fraud raised in this manner were triable by jury); Och v. RR. (1895) 130 Mo. 27 (Holding that until set aside in equity the release was a bar to an action at law); McFarland v. RR. (1894) 125 Mo. 253 (Avoiding a direct decision on the ground that the fraud was not shown in the pleading, but citing innumerable authorities); Homuth v. RR. (1895) 129 Mo. 629 (Also avoiding a direct decision on the same ground, but attempting an elaborate distinction between fraud cognizable at law and fraud cognizable in equity).

[48] R. S. Mo. (1899) sec. 654.

"The section evidently had its origin in the opposing views of the judges of this court prior to its enactment *(Girard v. Wheel Co.; McFarland v. RR; Och v. RR; Homuth v. RR)* These various cases and others which might be cited evinced varying views among the members of this court, as to what matters of fraud were cognizable before the law side of the trial court, and what matters should be heard in equity. Releases of different character were submitted by the trial courts to juries and thus the division of opinion. These varying views ran up to the date, or practically so, of this statute, and the statute was no doubt passed to meet the emergency."[49]

There is no doubt that the statute was intended, then, to include fraud formerly cognizable in equity as well as fraud formerly cognizable at law. It necessarily follows that when the jury tries issues of fact under the statute arising upon a plea of fraud formerly cognizable in equity alone, it is a "statutory" jury, and is performing a function which was formerly an exclusive power of the Chancellor. This would seem to settle the matter finally. But a further consideration developed. Was the statute mandatory, or could a plaintiff still prove that the particular kind of fraud which he interposed in his replication was of a nature formerly cognizable only in equity, and demand a trial by the court and a cancellation of the release or other charge set up in the answer? The case of *Roberts v. Lead Co.* decided that this procedure was still possible.[50] In that case the plaintiff sued for personal injuries, and a release was set up in bar. The plaintiff then replied with facts tending to show that the release was obtained by fraud and mistake and prayed for a cancellation of the release. The court in granting this relief commented as follows:

"It is immaterial that the plaintiff might have interposed the same facts as a bar to the defendant's use of the document as a defense to the plaintiff's claim, as it was held might be done in *Courtney v. Blackwell* 150 Mo. 245, 51 S. W. 668. That privilege would not exclude plaintiff's right to invoke the ancient jurisdiction of equity to eliminate by cancellation the paper as an impediment to the enjoyment of his rights, its invalidity not appearing on its face. . . . The enactment of a late statute touching the mode of pleading and practice where such a document is interposed as a defense does not abrogate the jurisdiction of equity to cancel such documents, there being no intent exhibited by the enact-

[49] Berry v. St. L. & S. F. RR. Co. and St. L., M. & S. E. RR. Co. (1909) 223 Mo. 358.

[50] (1900) 95 Mo. A. 581, 69 S. W. 630.

ment to accomplish such abrogation. The remedial jurisdiction of equity is not destroyed by the passage of a measure creating a statutory remedy at law in like circumstances, in the absence of an expression of legislative purpose to extinguish the ancient jurisdiction."

Aside from the already lamented clumsiness of expression which tends to preserve a distinction which no longer exists, this passage succinctly states the law as it is in Missouri today. Where a plaintiff wishes to show that a release set up in bar of his action was obtained by fraud or other wrongful means, he may avail himself of the statutory remedy, and have the issues thereon decided by a jury, or he may prove to the court that he is entitled to a cancellation of the document in question. As a matter of expediency, it is difficult to perceive what practical purpose a cancellation under these circumstances will effect. The plaintiff may recover without it via the statute, and once judgment is obtained, the release is valueless. The only conceivable reason would seem to be the avoidance of a jury trial of the issues involved. This analysis together with the dearth of cases in point suggests that *Roberts v. Lead Co.* was a test case to discover whether the court still had the power to set aside a release, that is, whether the statute withdrew from the court any power vested in the Chancellor before the adoption of the Code.

This matter arose directly in the case of *Berry v. RR. Co.*[51] where in an action for damage to crops the defendant pleaded a prior settlement, and the plaintiff replied that it was fraudulently obtained by the defendant's agents. The defendant then questioned the constitutionality of the statute in providing for trial by jury of the issues so raised. The court stated:

"In our judgment, the Constitution means that if theretofore (that is, prior to the adoption of the constitution) the defendant by law or practice was entitled to a jury, then such right must remain inviolate. Prior to that time some questions of fraud were triable by a jury in a court of law, and some by the Chancellor in a court of equity. The only inhibition on the Legislature fixed by the Constitution was to prevent . . . depriving a party of a right to a trial by jury where he had theretofore enjoyed that right. *No inhibition is found in the Constitution preventing the Legislature from extending the right of trial by jury.*[52] However, the case is

[51] Note 49 (supra).

[52] The italics are the author's. Cf. the case of Brown v. Buck, Circuit Judge of Kalamazoo County (1899) 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438. In this case the issue was the constitutionality of a Mich. stat. abolishing all equitable jurisdiction and extending jury trial to

not bottomed upon the statute, so that prior to this statute, and without considering the statute, this court has held that fraud in the procurement of a release was properly pleaded in a reply and properly triable before a jury. The statute does not undertake to abolish all equitable jurisdiction and has never been so considered by bench or bar. If it did, another question might be here."

The net result of the above opinions seems to remove this statute from any possibility of attack on constitutional grounds, and to silence forever the hectic disagreement in our courts as to the relative propriety of trial by court or jury of the issue of replicatory fraud pleaded to a release set up in the answer to a cause of action. Until the statute is removed the question will remain one of academic rather than practical significance.

ARTHUR J. BOHN '36.

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all cases. The court in declaring the statute invalid and unconstitutional, laid down the following proprositions:

a) "The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes and always must include it.

b) Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere.

c) The cognizance of equitable questions belongs to the judiciary as part of the judicial power, and under the Constitution must remain vested where it always has been vested before.

d) The functions of a judge in an equity case, in dealing with questions of fact, is as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common law cases, etc." Also see: Maier v. Wayne Circ. Judge (1897) 112 Mich. 491, 70 N. W. 1032; Callanan v. Judd (1868) 13 Wis. 343; Campbell v. McGowan (1909) 35 Utah 268, 100 Pac. 397, 23 L. R. A. (NS) 414, 19 Ann. Cas. 660; State v. Nieuwenhuis (1926) 49 S. D. 181, 207 N. W. 77. Clark, Code Pleading 60—"The view is that the constitutions establish courts of equity, and the power of the Chancellor to pass on the facts, with a verdict of the jury as only advisory, is an inherent characteristic of such courts."