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Pleading under the Illinois Civil Practice Act Legislation and Administration

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PLEADING UNDER THE ILLINOIS CIVIL PRACTICE ACT*

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SECTION 31[1] of the recent Illinois Civil Practice Act[2] abolishes the common law forms of action, and discards as inappropriate the corresponding forms of pleadings. It provides, so far as possible, for a uniform system of pleading in actions at law and suits in equity.

Unlike the Field Code of New York, it does not attempt to do the impossible, that is, to abolish the distinction between legal and equitable actions. So long as law and equity co-exist, with appropriate actions to enforce the two classes of claims, with different methods of trial, there are inherent differences which can not be wiped out by legislative fiat.[3]

Throughout the Illinois Act there is constant recognition of the persisting differences between the two classes of action.

A uniform system of pleading applicable to both legal and equitable actions necessarily changes to some extent the forms and rules of pleading that formerly obtained, for admittedly the two systems differed in a number of particulars.

Section 32 of the new Act substitutes the Code complaint for the former bill in chancery and the former declaration at law. This complaint,[4] whether the action is legal or equitable, is to contain simply a plain and concise statement of the plaintiff's cause of action, and a demand[5] for the relief to which he deems himself entitled. The equity pleader will have little difficulty in framing a complaint for equitable relief under the new

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[1] C.P.A. § 31 (Forms of action.) (1) Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, shall hereafter be deemed necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity. . . . .

[2] Ill. Cahill's Rev. Stat. (1933), c.110.

[3] See opinion of Selden, J., in Reubens v. Joel, 13 N.Y. 488 (1856).

[4] C.P.A. § 33 (Form of pleadings.) (1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply. . . . .

[5] C.P.A. § 34 (Prayer for relief.) Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. . . . .

rule. There never were any forms of action in equity, and hence their abolishment does not affect the pleading in equity cases. If we eliminate from the nine parts of the classic bill in equity all except the stating part and the prayer for relief, we have the essentials of a Code complaint. The formal address is not provided for and accordingly disappears. The same thing is true in regard to the introduction. If any allegations in reference to the parties are necessary, they will be incorporated in the statement of the cause of action as was done in declarations at law.

Charges of evidence have been eliminated because discovery is to be obtained by a different method. Charges to anticipate and avoid a defense are not longer necessary or proper[6] because a special replication is now available as in actions at law. The formal jurisdiction clause never served any useful[7] purpose, and has practically disappeared from the modern bill. It has no place in a Code complaint. If the substantial allegations do not disclose a case within the jurisdiction of equity, they are not helped by the pleader's bare assertion of the lack of an adequate remedy at law. The common conspiracy clause has long since disappeared in practice. The interrogatories have no place in a complaint for relief, because discovery is no longer obtained by the answer, except so far as an answer under oath to a verified complaint may be thought to give discovery by its explicit admissions required by Section 40.

The prayer for process has not been provided for, and will naturally disappear as it has in other Code states. Process will issue as at law for the persons named as defendants in the caption.

The stating part of the bill was not always plain and frequently far from concise.

Lack of clarity was the fault of the pleader and not due to defects in the rules of equity pleading. Prolixity so often cumbering the bill at an earlier period frequently irritated the common law pleader who characterized it as a thrice told tale. But equity cases frequently arise out of complicated transactions, and an adequate statement of them can not be compressed into the limits of a declaration in trover or a common count in assumpsit. In short, the bill in equity, when stripped of its non-essentials, becomes the somewhat simpler Code complaint.

Nor will the equity pleader find many new difficulties on the problem of parties, because in the main the sections on parties are little more than reënactments of the ordinary equity rules with which he is familiar.

[6] Canfield v. Tobias, 21 Cal. 349 (1863).

[7] Goodwin v. Smith, 89 Me. 506, 36 Atl. 997 (1897); Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 Atl. 108 (1914).

Neither the Act nor the Rules undertake to define necessary or indispensable parties. Such question must be determined by the old practice, whatever it was.

The provisions of Section 25, that, "Where a complete determination of the controversy can not be had without the presence of other parties, the court may direct them to be brought in," merely restates a doctrine with which equity pleaders have been familiar since the days of Lord Hardwicke.

The provisions of Section 23 on the joinder of plaintiffs that, "All persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons had brought separate actions any common question of law or fact would arise," is new in phraseology, but contains very little that is new in substance.

Where the right to relief was joint, joinder was always proper, and necessary[8] except where the refusal of one to join forced the others to make him a defendant. The case of complainants with several rights to relief growing out of the same transaction or series of transactions and involving common questions of law or fact which it was desirable to settle in one action rather than in several, finds abundant illustration in the familiar joinder of judgment creditors[9] in one suit to set aside a fraudulent conveyance and apply the property to the satisfaction of their respective demands, or in the joinder of separate creditors[10] to obtain a receivership of an insolvent corporation.

We have long been accustomed to the joinder of separate[11] property owners in a suit to abate a common nuisance, or prevent the pollution or diversion of water.

Such cases clearly fall within the terms of the statute—the claims to relief are several. Each could maintain a separate suit. The claims have a common origin, in the fraud of the debtor, the insolvency of the corporation, or the creation or continuance of the nuisance. There can be little doubt but that wherever joinder of persons with several rights was per-

[8] Stafford v. City of London, 1 P. Williams 428 (Ch. 1718); Lowe v. Morgan, 1 Bro. C.C. 368 (Ch. 1784).

[9] Brinkerhoff v. Brown, 6 John. Ch. (N.Y.) 139 (1822); Gates v. Boomer, 17 Wis. 455 (1863).

[10] Robinson v. Smith, 3 Paige (N.Y.) 222 (1832).

[11] Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731 (1890); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); Reid v. Gifford, Hopk. Ch. (N.Y.) 416 (1825); Murray v. Hay, 1 Barb. Ch. (N.Y.) 59 (1845).

missible under the old system, it is equally permissible under the Civil Practice Act. And conversely it seems probable that where a joinder was not permissible under the old system, it will not be permissible under the new, because the Act adopts the limitation of a common question which was evolved by the equity courts. The history of the New York Code and of the English rules shows that courts accustomed to the former equity rules and impressed with the practical considerations upon which they were based were not inclined to depart from them where the language of the statute did not clearly force an innovation. The joinder of persons claiming in the alternative seems to be new, and the decisions under similar provisions are too few to enable us to predict the proper application.

Section 24 on the joinder of defendants places them in three categories.

1. Any person may be made a defendant who is alleged to have or claim an interest in the controversy. This is familiar to the equity pleader. Such claimants were always proper parties, and sometimes necessary, depending on the nature of the claim and whether conceded or disputed, and what was sought to be accomplished by the suit. The questions involved here and the rules for their solution are beyond the scope of this paper.

2. Any person may be made a defendant who is necessary for a complete determination of any question involved in the suit. This is the old and familiar problem of necessary or indispensable parties. The Civil Practice Act has adopted the preëxisting rules.

3. Any person may be made a defendant against whom a claim is asserted, whether jointly, severally or in the alternative, arising out of the same transaction, etc.

The language here is strange, but as applied to equity cases, there seems to be little change. If persons were jointly[12] liable it was as necessary to join them in a suit in equity as it was at law.

Equity always permitted the joinder of persons severally liable in a proper case, and sometimes required it.

We are familiar with suits to enforce the separate liabilities of stockholders,[13] or of persons separately liable for contribution. Their liabilities arose out of the same transaction or series of transactions. In the tort field we have the familiar case of suits to enjoin persons separately and independently[14] polluting a stream. It may be difficult to say that the liabilities here arose out of the same transaction or series of transactions, but

[12] Darwent v. Walton, 2 Atk. 510 (Ch. 1742).

[13] Hatch v. Dana, 101 U.S. 205, 25 L.Ed. 885 (1879); Dunston v. Hoptonic Co., 83 Mich. 372, 47 N.W. 322 (1890).

[14] Lockwood Co. v. Lawrence, 77 Me. 297 (1885); State ex. rel. Federal Lead Co. v. Dearing, 244 Mo. 25, 148 S.W. 618 (1912).

courts of equity permitted joinder because it was practically desirable to determine once and for all the actual condition of the stream, and the responsibility for its polution, with all of the alleged tort-feasors before the court, instead of separately, since the inevitable attempt to shift responsibility would force a consideration of the conduct of each.

If cases where joinder has long been recognized as proper and desirable do not readily fit[15] into one of the categories of Section 24, it will doubtless be pointed out that Section 24 was not designed to restrict permissive joinder sanctioned by the former practice.

Does Section 24 permit a joinder of defendants in equity cases where a joinder would not have been possible under the former system? That question can not be answered at the present time. If, in any given cases, the court can see positive advantage in joinder as compared with the probable complications likely to arise, the language is loose enough to permit an extension of the rules of joinder. If the disadvantages outweigh the probable advantage the court will not be forced to go against its practical judgment.

Little difficulty may be expected in the defensive pleading. The demurrer has been abolished in name and the general demurrer has been abolished in fact. Section 45 provides that all defects in pleading heretofore attacked by demurrer shall be attacked by motion, which shall point out specifically the defects complained of. Pleas in abatement may be set up as formerly, or they may be incorporated in the answer.

All other defenses are to be made by answer, except that a defendant may make certain specified defenses by motion and affidavits under Section 48. Much learning on the subject of pleas becomes useless. The courts will no longer struggle with vexed questions as to when a plea requires a supporting answer, and when an answer overrules a plea.

There never was a general issue in equity pleading, and its abolishment works no change. The requirement that the answer admit or deny specifically each allegation of the complaint is not a novelty in equity pleading. But the pleader should remember that a failure to deny or to deny sufficiently now operates as a constructive admission[16] as at law. The requirement that affirmative defenses be specifically pleaded has always been the equity rule.

[15] It might be difficult to fit into this classification such a case as Mayor of York v. Pilkington, 1 Atk. 282 (Ch. 1737) (defendants severally and independently interfering with an alleged prescriptive right of the complainants), or Seattle Taxicab Co. v. De Jarlais, 135 Wash. 60, 236 Pac. 785 (1925), commented on in 20 Ill. Law Rev. 294 (1925) (suit to restrain defendants from independent similar acts of unfair competition).

[16] See C.P.A. § 40(2), that every allegation not explicitly denied shall be deemed admitted.

The cross-bill becomes the Code counterclaim, which need not be germane to the complaint, because Section 38 permits any cross-demand of whatsoever nature, whether legal or equitable, to be set up in any action.

The old controversy as to whether the cross-bill was germane to the bill will cease to cause trouble, though there can be little practical advantage in interposing a counterclaim which has no relation to, and can not affect, the claim set up in the complaint. The general replication disappears and a special reply takes its place as at law.

Thus the new equity pleading is undoubtedly simplified. The defendant loses one advantage—he can not obtain a dismissal of the complaint for want of equity if it states a sufficient case at law. If the objection can not be cured by amendment, the case will be transferred to the law side.

At law some of the changes are more startling to the common law pleader. A fairly competent pleader should find no difficulty in framing a good complaint at law.

The abolishment of forms of action frees him from any risk in the selection of the appropriate *form* of action, but it does not obviate the necessity of a correct analysis of his case. It is just as necessary today as formerly to determine the elements essential to any given liability, because these must be stated if he would enforce *that* liability. The Code does not authorize a recovery on an unpleaded[17] cause of action.

If he would recover damages for the breach of a contract, he must state in substance whatever it would have been necessary to state in a corresponding declaration in[18] special assumpsit.

If he would recover damages for a personal injury caused by the defendant's negligence, he must state in substance whatever it would have been necessary to state in a corresponding declaration in an action on the case.[19] This follows clearly from the provision in Section 31 abolishing forms of action: "This section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity."

A multitude of decisions from other Code states show that the expression, "averments of fact," is to be understood in a common-law sense;

[17] Owen v. Meade, 104 Cal. 179, 37 Pac. 923 (1894); Miller v. Hallock, 9 Col. 551, 13 Pac. 541 (1886); Tardieu v. Connecticut Co., 113 Conn. 94, 154 Atl. 173 (1931); U.S. Rubber Co. v. Grigsby, 113 Neb. 695, 204 N.W. 817 (1925); Walrath v. Hanover Fire Ins. Co., 216 N.Y. 220, 110 N.E. 426 (1915); Jackson v. Strong, 222 N.Y. 149, 118 N.E. 512 (1917).

[18] Hill v. Barrett, 14 B. Mon. (Ky.) 83 (1853); McCammon v. Kaiser, 218 N.Y. 46, 112 N.E. 572 (1916).

[19] Brinkmeier v. Mo. Pac. Ry., 224 U.S. 268, 32 Sup. Ct. 412, 56 L.Ed. 758 (1912).

that is, if an allegation was regarded as a statement of fact[20] for purposes of pleading under the older system, in general, it will be so regarded under the new system, although analysis may clearly show it to be the legal result of unstated facts, as when we allege that A and B are husband and wife, or that A executed and delivered a deed to B whereby etc.

The abolishment of forms of action may help out a bad analysis of the case, as where the pleader attempts to state the elements of one sort of liability, and actually states another. Such a mistake might have been fatal under the former system. Formerly if the pleader brought an action on the case his declaration must state a case of tort liability, and failing in that, it was not helped by a sufficient statement of a breach of contract.[21]

Under the new system, the sufficiency of the pleading is not affected by an ineffective attempt to state a particular cause of action, if its allegations amount to a sufficient statement of *some* cause of action. For example, an ineffective attempt to state a case of trespass to land with matters in aggravation of damages has been sustained as a complaint for conversion.[22] An ineffective attempt to state a cause of action for conversion of money has been sustained as a complaint for money had and received.[23] A complaint framed for specific performance has been sustained as an action at law for breach of contract.[24] Misconceived complaints may furnish difficult problems of construction, but that can not be avoided. We have always had such problems in equity pleading where a bill framed on an erroneous theory might be sustained on some other theory.

The requirement that the complaint in an action at law contain a demand for relief is ordinarily a matter of form,[25] because the nature of the judgment is fixed by the claim.

[20] Payne v. Treadwell, 16 Cal. 220 (1860); Clark v. C.M. & St.P. Ry., 28 Minn. 69, 9 N.W. 75 (1881); Kuhl v. Ins. Co., 112 Minn. 197, 127 N.W. 628 (1910); Savage v. Public Service Ry. Co., 95 N.J.L. 432, 113 Atl. 252 (1921); California Packing Co. v. Kelly Storage Co., 228 N.Y. 49, 126 N.E. 269 (1920); Grannis v. Hooker, 29 Wis. 65 (1871).

[21] Corbett v. Packington, 6 Barn. & Cress. 268 (K.B. 1827).

[22] McGonigle v. Atchison, 33 Kan. 726, 7 Pac. 550 (1885); Swift v. James, 50 Wis. 540, 7 N.W. 656 (1880); Bruheim v. Stratton, 145 Wis. 271, 129 N.W. 1092 (1911); *contra*, Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 Sup. Ct. 771, 39 L.Ed. 913 (1895).

[23] Greentree v. Rosenstock, 61 N.Y. 583 (1875).

[24] Barlow v. Scott, 24 N.Y. 40 (1861); Wachowski v. Lutz, 184 Wis. 584, 201 N.W. 234 (1924).

[25] In the case of an ambiguous complaint where the same allegations of fact would sustain either a legal or an equitable action, the demand for relief may serve to characterize the action, People ex. rel. v. District Court, 70 Col. 500, 202 Pac. 714 (1921); Cobb v. Smith, 23 Wis. 261 (1868). The last clause of C.P.A. § 34 that, "Except in case of default, the prayer for relief shall not be deemed to limit the relief obtainable . . . . ," seems to limit the pleader to the relief demanded in such cases. On this problem see Clapp v. McCabe, 155 N.Y. 525, 50 N. E. 274 (1898).

In the great majority of cases at law problems as to parties must be settled by the old rules.[26] If it was formerly necessary to join two or more persons as plaintiffs because the right of action was joint, the same necessity still exists. If it was formerly necessary to join two or more persons as defendants because the liability was joint the requirement has not been changed. If it was formerly permissible to sue two or more persons jointly or severally, the same alternatives continue. But Sections 23 and 24 do permit a joinder of plaintiffs and defendants in legal actions which was not possible before. This can be illustrated by a few cases. Several persons injured by the same accident[27] have been permitted to join as plaintiffs in an action for damages, because their claims arose out of the same transaction and involved common questions of fact. Persons severally defrauded[28] by the same prospectus have been permitted to join on the same theory.

Persons severally[29] liable on the same instrument have been joined as defendants, even where liable on separate[30] instruments, as in the case of separate insurers issuing policies covering the same property.

The joinder of defendants liable in the alternative has always existed in tort actions in fact, though not in form. We alleged that A and B did thus and so, and recovered against one if we proved him guilty. Permissive joinder in actions at law under Sections 23 and 24 is too broad a field for adequate[31] treatment here. The joinder of counts in the complaint is unrestricted except by such limitation as may be implied in the ections on venue and in the sections on joinder of parties.

Defensive pleading may make more trouble for the common law pleader.

A motion has been substituted for the demurrer, and is available to reach any objection to a pleading for which a demurrer could have been used.

[26] There are no provisions in the article on Parties (C.P.A. Art. V) attempting to define or specify what persons must join as plaintiffs or be joined as defendants. Accordingly, as declared by § 1 of the Act, the common law is to govern.

[27] Metropolitan Casualty Co. v. Ry., 94 N.J.L. 236, 109 Atl. 743 (1920); Spetler v. Jogel Realty Co., 224 App. Div. 612, 231 N.Y.S. 517 (1928).

[28] Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682 (1924); Drincqbier v. Wood, [1899] 1 Ch. 393. Such a joinder was permitted under the former equity practice. Roder v. Bristol Land Co., 94 Va. 766, 27 S.E. 590 (1897).

[29] In Illinois the Negotiable Instruments Act (§ 6) has long permitted the joinder of defendants severally liable on a negotiable instrument.

[30] Bossak v. Surety Co., 205 App. Div. 707, 200 N.Y.S. 148 (1923).

[31] Some light is thrown on the problem of the joinder of defendants on the basis of alternative liability by Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925) and Payne v. Bristol Time Recorder Co., [1921] 2 K.B. 1. See also Hinton, An American Experiment with the English Rules of Court, 20 Ill. L.Rev. 533 (1926).

Nice questions as to whether it should be general or special disappear, because the motion is required to point out the defect specifically, whether it is one of form or substance. The only vestige of the general demurrer is found in cases where the motion substitute is carried back to a prior pleading. Pleas in abatement my be used as formerly, but without danger, because a judgment of *respondeat ouster* is to be given in all[32] cases where they are not sustained.

Under Section 43 defenses in abatement may be joined in the answer with defenses in bar, though separate trials may be necessary.

Under Section 48 certain specified defenses may be made by motion and affidavits, though it may be inadvisable to do so because a trial on affidavits is frequently unsatisfactory.

Section 40 deprives the defendant of that most convenient plea, the general issue, and substitutes a specific denial of each allegation not admitted. It frequently requires some thought and analysis to frame a good specific denial, as can be seen from the older cases when specific and special traverses were more generally used.

Allegations usually contain some immaterial matters. A denial in the exact language of the allegation may result in an implied admission. A denial that on a certain day D assaulted P as a matter of logic simply denies the coincidence of the time and the act. By the ordinary rules of construction it is not taken as a denial of the act, but of the time[33] of its occurrence. The defensive pleader will have occasion to brush up some forgotten learning on the subject of the negative pregnant. The Code expressly condemns evasive denials which do not meet the substance of the allegation.

The requirement in Section 43 of a statement of the facts constituting any affirmative defense may give the pleader difficulty because it can not be consistently applied to any system of pleading which permits a pleading of conclusions.

This may be illustrated by the difference in pleading the same defense to an action of trespass and an action of trover. If an officer sued in trespass for taking the plaintiff's goods wished to make the defense of seizure under process, he must plead it specially[34] because he thereby admitted and justified the taking. If he was sued in trover for the same taking, he

[32] C.P.A. § 50(4) A judgment for the plaintiff on an issue as to the truth of any defense in abatement shall be that the defendant answer over.

[33] Hanson v. Lehman, 18 Neb. 564, 26 N.W. 249 (1886); Schaetzel v. Germantown Ins. Co. 22 Wis. 412 (1868); Brown v. Johnson, 2 Mod. 145 (K.B. 1678); Merril v. Josselyn, 10 Mod. 147 (Q.B. 1713).

[34] Olsen v. Upsahl, 69 Ill. 273 (1873).

was not permitted[35] to plead specially, because it would amount to an argumentative denial of the conversion. The allegation of taking was approximately a statement of fact, and hence could be confessed and avoided by the assertion of other facts. The allegation of conversion was a conclusion, and if confessed could not be avoided. And yet the real issue was the same in both cases.

Where a defendant in ejectment relied on adverse possession to defeat a regular chain of paper title in the plaintiff, he was actually invoking an affirmative defense because he was not disputing the facts on which the plaintiff based his claim, but avoiding their effect by additional facts. But the defendant would not have been permitted[36] to plead adverse possession specially because it amounted to a denial of the plaintiff's "title."

Section 43 gives a number of examples of affirmative defenses such as payment, release, fraud, statute of frauds, etc., which were generally recognized as such by cases holding that it was permissible to plead them specially if the defendant preferred that course instead of proving them under the general issue.

It is hard to see anything affirmative in some of the defenses mentioned in Section 43, such as non-delivery and want of consideration. If the complaint must allege delivery, non-delivery would seem to be a mere denial. Where the complaint alleges that P delivered, a denial that P delivered would seem to serve the purpose as well as an allegation that P failed to deliver.

A large field of uncertainty has been created by the last clause in Section 43, requiring a statement of any defense, whether affirmative or not, which if not expressly stated would be likely to take the adverse party by surprise. I might hazard a guess that it might be applied to cases where the complaint states a conclusion and a denial of the conclusion would not indicate the real issue. For example, a conclusion that A is the wife of B might be destroyed by proof that no marriage in fact ever took place, or that the marriage was bigamous. It might be thought that the plaintiff might be taken by surprise[37] by the latter contention if it were not stated.

[35] Hartford v. Jones, 3 Salk. 366 (K.B. 1699).

[36] Warren v. Jacksonville, 15 Ill. 236 (1853); Gallagher v. McNutt, 3 Serg. & R. (Pa.) 409 (1817); Ill. Cahill's Rev. Stat. (1933) c. 45, § 19.

Under the requirement of the ordinary code that new matter in defense be specially pleaded, a defendant may still prove adverse possession under a general denial, Phillips v. Hagart, 113 Cal. 552, 45 Pac. 843 (1896); Stocker v. Green, 94 Mo. 280, 7 S.W. 279 (1887); Oldig v. Fisk, 53 Neb. 156, 73 N.W. 661 (1897).

[37] A good illustration of the surprising discrepancy between the apparent issue made by a denial of a pleadable conclusion and the actual issue is furnished by the case of Johnson v. Oswald, 38 Minn. 550, 38 N.W. 630 (1888). The complaint alleged that *P* was the owner and

The Act is not clear[38] on the subject of equitable defenses, and the question will doubtless arise to perplex the pleader.

There are many cases where a legal claim may be defeated by resort to equity. A claim for damages for the breach of a written contract may be defeated by the reformation of the instrument.

From the standpoint of the whole law of the land it might be said that equity furnished a defense to the legal claim. In this sense we may speak of "equitable defenses."

From a procedural standpoint the defendant in the legal action had an equitable cause of action, the enforcement of which gave him a legal defense. Many of these defensive equitable causes of action have by a natural process of evolution developed into legal defenses, and may be relied on as such.

At an earlier period of the law, payment of the mortgage debt after default did not revest the title in the mortgagor. He had no defense to an action of ejectment by the mortgagee, but was forced to proceed by bill in equity to obtain a release which would give him a defense. Today payment of the mortgage debt, though after default, discharges the mortgage. Formerly an estoppel *in pais* was not available at law in any case. Today such estoppels are recognized as legal[39] defenses to many actions.

So far as equitable causes of action have become legal defenses they stand on the same basis as any other legal defenses.

Most of the Codes, following the New York Code, provide that a defendant might set up as many defenses as he had, whether legal or equitable. Such equities as had already become legal defenses were not affected

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possessed of certain chattels and that *D* took and converted them. The answer was a general denial. *P* relied on a sale and delivery of the chattels to him by *X*. It was held competent for *D* to "disprove" *P*'s title, by proof that *D* had been induced by fraudulent representations to sell the chattels to *X* and that *P* purchased from *X* with notice, and that *D* had rescinded, etc.

[38] C.P.A. § 43(2), provides for alternative statements, "or, when they appear in different counts or defenses (whether *legal* or *equitable*) he may state the counts or defenses which contain them in the alternative . . . ." (italics supplied).

Rule 11 of the Illinois Supreme Court lends some color to the idea of equitable defenses: "Where complaints, counterclaims or *defenses* combine matters at law and *in equity*, which could not have been united in one proceeding prior to January 1, 1934 . . . ." (italics supplied). These casual references to what might be thought to be "equitable defenses" are certainly not as explicit as the provisions of the New York Code, or of U.S. Judicial Code § 274b. The New York Code § 150, as amended in 1852, now N.Y. C.P.A. § 262 (1928) provides:

"A defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable."

U.S. Judicial Code § 274b, [38 Stat. 956 (1915), 28 U.S.C. § 398 (1928)], provides:

"That in all actions at law Equitable Defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court."

[39] Kirk v. Hamilton, 102 U.S. 68, 26 L.Ed. 79 (1880).

by this provision. In some cases affirmative[40] relief was necessary to make the equity effective. Here it was apparent that a cross-action was necessary. The defendant might use an equitable counterclaim for this purpose instead of an original suit.

In the case of many equities, affirmative relief did not seem necessary, and the statute was accordingly invoked to permit the pleading of the equity in the form of a mere defense.[41] Where this has been permitted, the inevitable tendency has been to treat it as any other defense triable by jury.[42] Thus the provisions for equitable defenses have resulted in the creation of new legal defenses, many of which are not well suited for jury trial.

In the absence of any explicit provision in the new Act on equitable defenses, it would seem that wherever it was necessary before January 1 to proceed by bill in equity, it should still be necessary to proceed by equitable cross-action.[43]

In the case of a complaint seeking a money judgment, a counterclaim for a money demand is defensive in the same sense that a set-off was defensive, in that it reduces or cancels the plaintiff's claim. The statute permits any kind of a cross-demand to be set up in any case, but there is no point[44] in doing so unless it is defensive.

The reply to a counterclaim serves the purpose of an answer, and is governed by the same rules. The reply to defenses set up by plea or answer serves the purpose of a common-law replication. But the abolishment of all general traverses renders useless some of the learning involved in the correct use of the "replication de injuria." It can not be used at all. All denials must be specific. But it is still necessary to determine whether a

[40] Lombard v. Cowham, 34 Wis. 486 (1874). The decision in this case requiring an equitable cross-action was doubtless affected by certain provisions of the Wisconsin Ejectment Act referred to in the later case of Chicago & Northwestern Ry. v. McKeigue, 126 Wis. 574, 105 N.W. 1030 (1906).

[41] Chicago & Northwestern Ry. v. McKeigue, 126 Wis. 574, 105 N.W. 1030 (1906).

[42] Kerstner v. Vorweg, 130 Mo. 196, 32 S.W. 298 (1895); Susquehanna S. S. Co. v. Andersen & Co., 239 N.Y. 285, 146 N.E. 381 (1925); Gill v. Pelkey, 54 Ohio St. 348, 43 N.E. 991 (1896).

[43] Rule 10 of the Illinois Supreme Court that

"All matters which, prior to January 1, 1934, were within the jurisdiction of a court of equity, whether directly or as an incident to other matters, ... shall be heard and decided in the manner theretofore practiced in courts of equity" is persuasive at least that these "equitable defenses" have not been converted into technical legal defenses triable by jury. They were certainly within the jurisdiction of courts of equity prior to January 1, 1934, and an equitable proceeding was necessary to make them available. If the rule means what its language seems to mean, they are to be tried in the manner heretofore practiced in courts of equity.

[44] The use of a counterclaim may enable a defendant to maintain a cross-action where otherwise it might be difficult or impossible to obtain jurisdiction of the person of a non-resident.