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Equitable Defenses to Actions at Law in the Federal Courts

AN EXAMINATION of the decisions of the state courts where statutes exist which confer legal and equitable jurisdiction upon the trial courts, and also provide that a defendant may interpose equitable defenses to actions at law, shows no little confusion and a variety of views. When there were separate courts of law and equity with wholly different methods of pleading, trial, and review, there was no such thing as an equitable defense to an action at law. These defenses, so called, were first introduced in New York in 1852 by an amendment to the New York Code of Civil Procedure.¹ Similar provisions were thereafter inserted in the codes of civil procedure of most, if not all, the states that took the New York Code as a model for reforming pleading in civil actions, both legal and equitable in nature.² Though there is no general agreement to be found in the decisions of the state courts, it has been ably pointed out that the decisions, probably not consistently in any single jurisdiction, express three views as to what is meant by a code provision authorizing equitable defenses to actions at law.³ According to one view the provision means that a defendant may plead defensively, and have the facts go to the jury, any matter that he might have successfully embodied in a bill in equity as plaintiff to enjoin the action at law which the plaintiff had commenced against him. According to another view the defendant is not permitted to plead defensively *any* matter that he may successfully make the subject of a bill in equity to restrain the action at law begun against him, but only *some* matters. No satisfactory rule is announced whereby one can ascertain what may or may not be pleaded defensively. Arbitrary differences are made, based for the most part upon the prevailing notions of what type of questions of fact can properly be determined by a jury. According to the third view equitable matter may not be pleaded defensively in any case where the plaintiff's action is at law, but the defendant may bring a cross action against the plaintiff to restrain the further prosecution of the action at

¹ N. Y. Laws 1852, c. 392, § 150.

² POMEROY, CODE REMEDIES (5th ed. 1929) §§ 26 to 35 incl. CLARK, CODE PLEADING (1928) § 96.

³ Hinton, *Equitable Defenses Under Modern Codes* (1920) 18 MICHIGAN L. REV. 717.

law, provided he pleads facts which, had they been alleged in a bill in equity under the old system, and successfully proved, would have resulted in a decree that would prevent the prosecution of the action at law. The first and third views may be applied easily and consistently. The second view, as has been stated, has resulted in conflicting opinions and great uncertainty.

Prior to an act of Congress of May 3, 1915, this troublesome question was of little importance to the federal courts. Equitable defenses were not permitted. If one was sued in a federal court and had no defense at law but facts existed that entitled him to relief in equity his remedy was to file a bill in equity as plaintiff to restrain the action at law.⁴ This condition was not a satisfactory one. Practical considerations demanded that a defendant who had no legal defense, when sued at law, be able to do something easily and conveniently, to prevail over his opponent if he was entitled to relief in equity. It was unnecessarily burdensome, and expensive, to require a defendant to become a plaintiff on the equity side of the court. This situation had for several years prior to legislation by Congress in 1915 occupied the attention of the American Bar Association. Due largely to the energy of the committees of that association Congress in 1915 passed an act changing the situation.⁵ This act, which became section 274b of the Judicial Code, reads as follows:⁶

"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. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

What does it mean? How shall it be interpreted? How much change is introduced? These were questions that confronted the federal courts, particularly the trial courts, when this procedural device was brought before them. Which one of the three views that had been held by the state courts under somewhat similar provisions shall be fol-

⁴ *Burnes v. Scott* (1886) 117 U. S. 582, 6 Sup. Ct. 865.

⁵ See Adams, *Federal Practice as to Equitable Defenses in Actions at Law* (1924) 10 AMERICAN BAR ASSN. J. 467.

⁶ 38 STAT., c. 90, p. 956 (1915), 28 U. S. C. § 398 (1926).

lowed? Contrary predictions were made by learned students of the subject.⁷

What is meant by an equitable defense to an action at law? Is this phrase not a contradiction? If by equitable defense one means that a defendant, after legislation permitting equitable defenses, may as a matter of right plead facts entitling him to succeed if the jury, or the judge sitting as a trier of the facts in an action at law, believe those facts then the defense is not an equitable defense. It is a legal defense. It may be that originally such facts only had weight in a court of equity but once they are recognized as provable to the triers, or trier, of the facts in an action at law, they have no different aspects than legal defenses recognized from the very beginning of the particular legal action. The term equitable defense has been properly characterized as a misnomer.⁸ If, on the other hand, the phrase means that a defendant, by cross-action to the action at law, may plead facts which, if found to

⁷ Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645; Hinton, *Equitable Defenses Under Modern Codes* (1920) 18 MICHIGAN L. REV. 717.

Professor Hinton said: "The material does not yet exist for determining the effect of this innovation. There are dicta to the effect that this statute abolishes all technical distinctions between proceedings at law and in equity, but the few decisions under it indicate that it has provided for a cross-action in equity, without the formality of filing a bill, rather than created new defenses." Hinton, *Equitable Defenses Under Modern Codes* (1920) 18 MICHIGAN L. REV. 717, 735.

Professor Cook in his article said: "There are indications that under the federal statute of 1915 many of the federal judges are still in the grip of the idea that there can not be 'equitable defenses' to 'legal actions' and that the statute merely provides for equitable cross-actions. It is to be hoped that when the matter comes squarely before the Supreme Court for decision, this view will not be taken, and that the more enlightened view of some of the judges of the lower federal courts will be adopted. There is nothing in the structure of the federal system or in the constitutional provisions for jury trial as at common law which prevents allowing fraud, mistake, etc., to be pleaded as equitable defenses and not as counter-claims, provided the defense is treated as 'equitable' in the sense that it remains triable by the court." Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645, 655.

Just what Professor Cook means is not entirely clear. If he means that the pleading should be sustained though it omits to ask for affirmative relief such a view has much to support it. On the other hand if he means that the facts pleaded by defendant are to be decided by the judge without a determination whether the judge is sitting as a chancellor or in the place of the common law jury this solution seems without any basis in our legal system, which is based upon that English system that contains law and equity, with their different methods of trial and appellate review, and no third division of law applicable to civil actions where the trial is "by the court."

⁸ CLARK, CODE PLEADING (1928) 428. The author well says: "The matter while formerly of 'equitable' cognizance was not a defense, and now while it may be considered a defense, it is not equitable. It is a matter which formerly was the subject only of an affirmative bill in equity. True it might also be intended as a defensive weapon to prevent a threatened or pending action at law, and often the additional relief of an injunction against such action was asked for. It was not, however, pleaded as a defense."

be true by the court sitting in equity, will entitle him to a decree that will make recovery at law by the plaintiff impossible, then the phrase is not a contradiction of terms.⁹

Unexpectedly, perhaps, the first important question arising under the new law concerned not matter interposed by a defendant to defeat plaintiff's suit but matter urged by a plaintiff to defeat a legal defense of a defendant. The problem was whether plaintiff might plead and prove in his action at law that a sealed release of the cause of action stated should be avoided because of fraudulent misrepresentations inducing assent to its execution. The rule adhered to by the decisions in the federal courts prior to the enactment of section 274b was that fraud inducing assent to the execution of a sealed instrument could not be shown — that only fraud in the execution might be shown, for example, fraud practiced upon the maker causing him to seal an instrument he did not intend to execute.¹⁰ In *Union Pacific Railway Co. v. Syas*,¹¹ decided by the Circuit Court of Appeals, Eighth Circuit, November, 1917, the court was of the opinion that section 274b authorized the plaintiff to plead fraud in a replication. The act reads that "In all actions at law equitable defenses may be interposed by answer, plea, or replication, etc." And "In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication." The opinion of the court was devoted chiefly to the manner in which the case had been tried by the district court and not to whether plaintiff might plead the fraud in a replication. Defendants had strenuously insisted at the trial that the question whether consent to the obligation had been obtained by fraud should be passed upon first by the court sitting as a chancellor.

⁹ Professor Cook, seemingly, is of the opinion that this is a proper phrase and that though the facts are decided by the court sitting in equity they truly constitute an equitable defense. In the article above referred to he says (discussing what happened prior to these statutes providing for equitable defenses where A sues B, at law, upon a sealed instrument and B had been induced by fraudulent representations to execute it): "In short, then, the equitable proceeding for cancellation is affirmative merely in form. In substance it is, if we take a realistic view of things, truly an 'equitable defense' to the common-law action on the instrument. For purely historical reasons, the *procedural law* required that the 'defense' be made effective by an affirmative proceeding in a separate court, rather than by pleading it in the court where the action on the instrument was pending. To the present writer nothing seems clearer than that it was the obvious intention of the framers of the codes and the 'equitable defense' statutes to abolish this absurd and antiquated procedure, and to permit the invalidity of the instrument, in the case supposed, to be set up as a defense in form as well as in substance." Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645, 650.

¹⁰ Ames, *Specialty Contracts and Equitable Defences* (1895) 9 HARVARD L. REV. 49, 51; Abbott, *Fraud as a Defence at Law in the Federal Courts* (1915) 15 COLUMBIA L. REV. 489.

¹¹ (C. C. A. 8th, 1917) 246 Fed. 561.

The trial judge denied the request. The parties then introduced their evidence relating to liability, the release, and the fraud. Thereafter all the facts were sent to the jury, the judge charging the jury that their verdict upon the issue of fraud was to be advisory only. Speaking of the issue of liability he said that if the release should be held valid "that is the end of this case . . . he cannot recover," but if the court should determine that there was fraud the release would be set aside "and you can consider, whether or not, and how much, he is entitled to recover in the way of damages, etc." The jury found, first, that the release was procured by fraud and, second, that plaintiff was entitled to a verdict of \$7,500 damages.

The Court of Appeals condemned this method of trying the case and reversed and remanded the case for a new trial. It was held by the Circuit Court of Appeals that the question of fraud should be tried first by the court sitting in equity and if the finding should be that there was fraud the facts relating to liability should go to the jury. The court was of the opinion that in a personal injury suit the sympathy of the jury would probably be with the plaintiff and that an advisory verdict required from the jury that had heard the evidence of liability and injury is not a proper one "as the desire of the jury to render a verdict in the law action in favor of plaintiff or defendant may so cloud their judgment as to render their advice unsafe to follow." Judge Carland writing the opinion made this observation as to the new procedure:

"We are clearly of the opinion that, when equitable relief is asked in an action at law under the statute above quoted, the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what must otherwise frequently ensue — confusion and embarrassment in the progress of the action."¹²

The question of showing that a sealed release was obtained by fraud was also considered by the Circuit Court of Appeals, Second Circuit, in

¹² 246 Fed. at 566. The court was also of the opinion that the charge of the trial judge relating to the payment that had been made to plaintiff by defendant of \$750 for the release was prejudicial to defendant. He said: "This instruction for all practical purposes permitted the jury to find a verdict against the defendant in the case for damages, in order that money might be obtained to pay to the defendant the \$750 required to be paid to it before the release could be avoided. It would seem that a duty was imposed upon the jury by the court that was impossible in the nature of things for it to perform, and at the same time follow the court's charge in other respects. But, whatever may be said, this was not the trial in a court of equity of the equitable issues to which the defendant was entitled and which it demanded." 246 Fed at 567.

January, 1918, in *Keatley v. United States Trust Company et al.*¹³ The action was at law. One defense was a release under seal. The trial court directed a verdict for defendant, declining to consider the evidence of fraud. The judgment below was affirmed. The majority of the court were of the opinion that section 274b did not authorize plaintiff to file a reply setting up fraud but that plaintiff should have filed a bill on the equity side of the court to cancel the release. It was said the replication mentioned in the section was a pleading to meet an answer setting up an equitable defense. Learned Hand, District Judge, dissented. He was of the opinion that the new section authorized plaintiff to plead fraud in a replication to the legal defense of release. He said:

"So far as we may look to the purpose of the section I cannot think there is any doubt. Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants', and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a Mitford or a Langdell would have used; but the purpose seems to me perfectly plain, and we ought, I think, to try to effect it if we can."¹⁴

The result of the majority opinion seems sound because no replication pleading the fraud was filed. In several decisions thereafter the District Courts and Circuit Courts of Appeal have held that a plaintiff, by way of replication, may plead fraud in inducing consent to overcome a release under seal.¹⁵ They differ, however, as to the very important question, whether the issue of fraud is for the court, sitting in equity, or for the jury sitting as common law triers of the facts. Two decisions of the Circuit Court of Appeals, First Circuit, hold the issue is for the jury, to be passed upon in the same manner as the other facts in the legal action.¹⁶ The true rule seems to be that where it is alleged

¹³ (C. C. A. 2d, 1918) 249 Fed. 296.

¹⁴ 249 Fed. at 299. No replication was filed by plaintiff. Judge Hand was of the opinion that the case should be reversed and remanded for a new trial as defendant had not objected to the absence of a reply, and that after a judgment at law plaintiff could not succeed in a bill in equity to set aside the release.

¹⁵ *Manchester Street Railway v. Barrett* (C. C. A. 1st, 1920) 265 Fed. 557; *Plews v. Burrage* (C. C. A. 1st, 1921) 274 Fed. 881; *Pringle v. Storrow* (D. Mass. 1925) 9 F. (2d) 464; *Whitney Co. v. Johnson* (C. C. A. 9th, 1926) 14 F. (2d) 24.

¹⁶ *Manchester Street Railway v. Barrett* (C. C. A. 1st, 1920) 265 Fed. 557; *Plews v. Burrage* (C. C. A. 1st, 1921) 274 Fed. 881. In the latter case the trial court sustained a demurrer to the replication which pleaded the release under seal was procured by fraudulent misrepresentation. The Circuit Court of Appeals held the ruling erroneous. The *dicta* was that it is "a question of judicial discretion" under section 274b whether the issue of fraud should be submitted to the jury or the court. The opinion is not entirely clear whether the issue, if submitted to the jury, is submitted for an advisory verdict. Judge Anderson said: "We are not able to accord with the view that the issue calling for equitable relief must first be tried by the court alone, sitting as a court of equity. Compare *Union Pacific R. R. v. Syas*, 246 Fed. 561, 158 C. C. A. 531. While the verdict of a jury may in the equitable

there was fraud which induced the party to consent to the execution of a release under seal, which he knew he was executing, the decision is for the court sitting as a chancellor, and that this issue should be decided before going into the merits of the action at law. This rule is an acceptance of the view described in the third group of cases in the state courts, *viz.* that a statute authorizing an equitable defense does nothing more than permit the litigant to file a cross-action in equity, to be disposed of in the same manner as if he had, as plaintiff, filed a bill in equity.

The leading case construing section 274b is *Liberty Oil Co. v. Condon National Bank*,¹⁷ decided by the Supreme Court of the United States in 1922. This was an action for money had and received, brought in the District Court of Kansas by plaintiff oil company against defendant bank. The plaintiff alleged that it made a contract with the Atlas Petroleum Company, and others, to purchase oil land for \$1,150,000, and that according to the terms of the contract it deposited \$100,000 in the defendant bank; that it was agreed in the event plaintiff failed to perform the contract the sum was to be paid to the sellers as liquidated damages, and if the sellers failed to perform the contract the sum was to be paid to the buyer as liquidated damages. The

issue be advisory only, yet when such issue is, as in this case, simple and one eminently fit for submission to a jury, we think the practice adopted in the Barrett and Knickerbocker Trust Cases, *supra*, is the preferable practice, and the one most consonant with the spirit and purpose of the statute. The statute is remedial, and should be liberally construed in favor of a single, direct, and speedy trial of all issues involved in the litigation." 274 Fed. at 884.

In *Manchester Street Railway v. Barrett*, *supra*, the issue of fraud seems to have been submitted for the jury's determination, not merely for advice to the chancellor. Though the opinion states the release was not under seal (265 Fed. at 559), Judge Lowell, District Judge, in *Pringle v. Storrow* (D. Mass. 1925) 9 F. (2d) 464, states that "I have ascertained by referring to the original papers that the release in that case [*Manchester Street Railway v. Barrett*, *supra*] was under seal." In *Pringle v. Storrow*, *supra*, Judge Lowell, in a very thorough discussion of the subject, held that plaintiff might attack the release under seal for misrepresentation inducing the execution but that the issue of fact was for the court sitting as a chancellor. He rested his decision upon *Hartshorn v. Day* (1856) 60 U. S. (19 How.) 211, and *George v. Tate* (1880) 102 U. S. 564, where the Supreme Court of the United States held fraud of this type, as distinguished from fraud in the execution, "as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal" as Judge Lowell stated, may not be shown in an action at law. Judge Lowell was of the opinion that section 274b did not make a change in substance but in procedure only, and that though it was no longer necessary for plaintiff, who claimed that his assent to a release had been procured by fraudulent misrepresentation, to seek the aid of the court as plaintiff in a bill in equity, he might have the question decided in connection with the action at law, the decision as to the fraud being for the court sitting as a chancellor. See (1922) 35 HARVARD L. REV. 345; (1922) 20 MICHIGAN L. REV. 680 (reviewing *Plews v. Burrage*, *supra*.)

¹⁷ (1922) 260 U. S. 235, 43 Sup. Ct. 118.

petition alleged that the sellers broke the contract, that the title to the land was not good and plaintiff was entitled to a judgment for the amount so deposited.

The bank in its answer admitted that it had received the money and alleged that both the sellers and the buyer claimed the fund, each asserting that the other had breached the contract, the one claiming the title to the land was good, the other claiming it was bad. The defendant bank asked that the sellers be made parties and that they be required to set up their claims to the fund, that the court determine the ownership of the fund, and that the bank, upon compliance with the order made by the court, be discharged of all liability. The sellers were made parties. They filed an answer praying for specific performance, for the payment to them of the \$100,000 and for judgment against plaintiff for \$1,050,000. A jury was waived in writing. The District Court found the title to the land was good and gave judgment for the sellers for \$100,000, plus interest. Upon appeal the Circuit Court of Appeals held the action was at law and that as the finding was general it was not within the power of the court to determine whether the evidence sustained the finding. The judgment below was affirmed.

Upon certiorari the Supreme Court reversed the judgment of the Circuit Court of Appeals, holding the action was not an action at law, that the evidence should be examined to determine whether the judgment of the District Court was supported.

In an opinion written by Chief Justice Taft it was held that the action was in equity and plaintiff was entitled to a review of the evidence. The court held though the petition stated an action at law for money had and received the bank's answer disclaiming any interest in the fund, and praying that the claimants be made parties, "became an equitable defense," . . . "in the nature of a bill for interpleader."

It was held that section 274b of the Judicial Code authorized the defendant bank to file the bill of interpleader, and that section 274a, when read in connection with section 274b, and Equity Rule No. 22, required that the case be transferred from the law side to the equity side of the court. Though this was not done, the court was of the opinion the failure to do so did not and could not affect the character of the action and that it remained an action in equity, and that the Circuit Court of Appeals should have examined the evidence to determine whether the judgment of the District Court should stand.

The opinion characterizes section 274b as an "important step" toward "a consolidation of the federal courts of law and equity." It was pointed out that a complete consolidation or amalgamation was prevented by virtue of the Seventh Amendment guaranteeing a jury trial

in suits at common law involving more than twenty dollars, and that section 274b in effect only authorized the pleading of equitable matters which "should be first disposed of as in a court of equity, and then if an issue of law remains, it is triable to a jury." It was pointed out that if this procedure is observed the right of trial by jury "is preserved exactly as it was at common law" the practice at common law being, as stated by the Chief Justice, that a defendant might go into a court of equity as a plaintiff to enjoin the suit at law. If he succeeded upon his bill in equity he secured a perpetual injunction and no jury trial was had; if he failed the action was tried by the judge and jury. The opinion states that Congress in enacting section 274b "was looking to such a union of law and equity actions."

The conclusion to be drawn from this important decision is that Congress by the enactment of section 274b did not intend to create new defenses to actions at law. It was suggested in *Union Pacific Ry. Co. v. Syas*¹⁸ that under the Constitution of the United States Congress possesses no power to change the equitable issues to legal issues. The soundness of this suggestion, so broadly stated, seems doubtful,¹⁹ and it was unnecessary to a determination of the true intent of Congress. Seemingly, however, Congress may not provide that all civil actions shall be triable by jury as actions at law and thereby wholly destroy equity. Some questions of fact are not well suited for solution by a jury and Congress, though it concluded it had power under the Constitution, might well decline to pass an act providing that a defendant may plead as a defense any facts that would entitle him to relief in equity against plaintiff's suit at law, and, that whether the facts alleged are true shall be determined by the jury under an appropriate charge by the judge as all legal defenses are determined. Such a plan in a very short time would make equity almost wholly impotent, and one may well question whether this would result in general improvement of our legal system. A greater burden upon the jury in civil cases seems

¹⁸ Carland, Circuit Judge, 246 Fed. at 565-6. "Congress legislated with full knowledge of the grant of jurisdiction contained in section 2 of article 3 of the Constitution, to the effect that 'the judicial power shall extend to all cases, in law and equity.' The Supreme Court has decided that the words 'cases in equity' mean those cases which in the jurisprudence of England were so called as contradistinguished from cases at common law at the time of the framing of the Constitution. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *United States v. Howland*, 4 Wheat. 108, 4 L. Ed. 526; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198. Therefore it will not be presumed that Congress intended to make any serious change in the constitutional classification, even if it could do so."

¹⁹ *In re Garnett* (1891) 141 U. S. 1, 11 Sup. Ct. 840; *Michaelson v. United States* (1924) 266 U. S. 42, 45 Sup. Ct. 18; *United States v. American Brewing Co.* (E. D. Pa. 1924) 1 F. (2d) 1001.

undesirable to contemplate in any substantial reform of legal institutions.

The broad principle of *Liberty Oil Co. v. Condon National Bank*, *i. e.* that section 274b did not authorize new defenses to be submitted to the jury, seems to have been accurately applied by the inferior federal courts in subsequent cases.²⁰ *Liberty Oil Co. v. Condon National Bank* also sanctioned the practice of bringing in additional parties needed for a complete disposition of the equitable cross action. Though in one case decided prior thereto it was held that under section 274b new parties could not be brought in, that the statute only contemplated an equitable cross action between the original parties to the action at law,²¹ a later case held the contrary.²²

The problem of mutual mistake in a written contract has arisen. It has correctly been held that defendant may plead mutual mistake when sued at law for breach of contract, and that when so pleaded, the questions whether there was a mutual mistake, and what the parties actually agreed upon but failed to express by their writing, are to be determined by the court sitting as an equity court.²³

Several cases also have arisen where the defendant has successfully pleaded equitable estoppel. In those cases also the facts pleaded constituting the estoppel have been passed upon by the court sitting as a

²⁰ *F. C. Ayers Mercantile Co. v. Union Pacific R. Co.* (C. C. A. 8th, 1926) 16 F. (2d) 395, and cases cited in the opinion.

²¹ *Sherman National Bank of New York v. Shubert Theatrical Co.* (C. C. A. 1st, 1917) 247 Fed. 256 (*dicta*); *Breitung v. Packard* (D. Mass. 1919) 260 Fed. 895.

²² *Duell v. Greiner* (S. D. Fla. 1926) 15 F. (2d) 726. In *Liberty Oil Co. v. Condon National Bank*, *supra* n. 17, new parties were brought in. The opinion of the Supreme Court, mainly devoted to the question whether the action should be tried as at law or in equity, gave no especial attention to the question. The bringing in of the new parties may be considered as having been approved.

²³ *Upton Nut Co. v. American Shipbuilding Co.* (N. D. Ohio, 1918) 251 Fed. 707; *Lyons v. Empire Fuel Co.* (C. C. A. 6th, 1920) 262 Fed. 465.

No doubt this view will meet the approval of the Supreme Court of the United States. That court passing upon a case that came to it from the Philippine Islands held the Philippine Code providing for equitable defenses meant that when mutual mistake was set up as a defense, the question should be passed upon by the court sitting in equity. See *Philippine Sugar Co. v. Philippine Islands* (1918) 247 U. S. 385, 38 Sup. Ct. 513. Mr. Justice Brandeis in writing the opinion said: "The complaint set forth a cause of action at law on the contract. The answer was, in effect, a bill in equity for reformation and incidentally to enjoin the action at law. Compare *Bradbury v. Higginson*, 167 California 553. The proceeding became thus an equitable one." 247 U. S. at 388, 38 Sup. Ct. at 514.

Compare *Susquehanna S. S. Co. v. Andersen & Co.* (1925) 239 N. Y. 285, 146 N. E. 381. In that case the New York Court of Appeals, by a divided court of four to three, held that the question whether there was a mutual mistake should go to the jury. As to how it should go to the jury, Cardozo, J., writing the opinion said: "Very likely there is danger of confusion and injustice at times in this blending of the issues. Juries may find it difficult to apply the presumption that preliminary

chancellor.²⁴ There are also precedents in the decisions of the federal courts where principles of estoppel have been taken over by the courts at law and made the basis of legal defenses.²⁵ When estoppel will be taken over and made a legal defense we cannot predict, but in determining whether it is to be taken over the courts have been, and no doubt largely will be influenced by a determination of whether the questions of fact are of the type the jury is accustomed to decide.

In one case a defendant when sued at law for breach of contract was permitted to plead that the agreement was procured by fraud that upon equitable grounds entitled him to a rescission.²⁶

The interesting question whether in an action at law to recover possession of land a deed from defendant to the plaintiff may be shown to have been given to secure a debt and hence in reality is a mortgage seems not to have been decided. This question has arisen in the state courts where equitable defenses exist. In some jurisdictions the rule is that the question is for the jury, while in others the view is taken that the question is for the court sitting as in equity, as if defendant had filed a bill in equity to have the instrument reformed.²⁷ It seems almost

treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake. Against these and like dangers there are two methods of relief. One is suggested by the provision of the statute that 'the court, in its discretion, may order one or more issues to be separately tried prior to any trial of the other issues in the case.' (Civ. Prac. Act, § 443, subd. 3). The other is to be found in a strict enforcement of the rule that reformation must be refused unless the case in support of it is 'of the clearest and most satisfactory character.' (*Philippine Sugar Est. Dev. Co. v. Phil. Islands*, 247 U. S. 385, 391; *Christopher & Tenth St. R. Co. v. 23d St. R. Co.*, 149 N. Y. 51, 58). This rule is as applicable to equitable defenses as it is to independent suits. (*Hoppough v. Struble*, 60 N. Y. 430, 435). Judgments for reformation have been reversed even in this court for failure to obey it. We have withheld approval from such judgments when the evidence of mistake, though not lacking altogether, was too contradictory or uncertain to measure up to the prescribed standard. (*Allison Bros. Co. v. Allison*, 144 N. Y. 21, 31, 33; *Nevius v. Dunlap*, 33 N. Y. 676, 680). The judge must still be satisfied that this standard has been reached." 239 N. Y. at 296, 146 N. E. at 385.

One may well suggest that it is very doubtful indeed whether the jury as stated by the learned judge of the New York Court of Appeals will actually apply the preponderance of the evidence test to part of the facts before them and the requirement of proof "of the clearest and most satisfactory character" to other facts.

²⁴ *Williams v. Mason* (S. D. Fla. 1923) 289 Fed. 812; *Ford v. Huff* (C. C. A. 5th, 1924) 296 Fed. 652; *Simmons v. Utah Copper Co.* (C. C. A. 8th, 1926) 15 F. (2d) 780.

²⁵ *Dickerson v. Colgrove* (1879) 100 U. S. 578; *Kirk v. Hamilton* (1880) 102 U. S. 68. For other cases see CLARK, CODE PLEADING (1928) 428.

²⁶ *Horbach v. Coyle* (C. C. A. 8th, 1924) 2 F. (2d) 702.

²⁷ *Reilly v. Cullen* (1900) 159 Mo. 322, 60 S. W. 126, holding the issue is for the court sitting as in equity, and *Locke v. Moulton* (1895) 108 Cal. 49, 41 Pac. 28; *Dobbs v. Kellogg* (1881) 53 Wis. 448, 10 N. W. 623, for the view the question is for the jury.

certain that the federal courts will hold — and it is thought they should hold — that the court sitting as a chancellor should decide the question.

The language of section 274b does not expressly prevent one entitled to affirmative relief in equity from becoming a plaintiff by bill on the equity side of the court either before or after an action at law has been commenced against him. The section reads that "equitable defenses may be interposed by answer, plea, or replication, without the necessity of filing a bill on the equity side of the court." Suppose an action at law has been commenced against a defendant and he omits to file a cross action for equitable relief. May he seek the aid of a court of equity as plaintiff after the judgment has gone against him in the action at law? It seems quite probable that he may not, and there are excellent reasons why he may not do so. This opinion finds support in *Lyons v. Empire Fuel Co.*²⁸ A suit for breach of contract had resulted in a judgment for the plaintiff therein. The trial court being of opinion that the contract was ambiguous submitted it to the jury. Defendant in that suit became plaintiff in a suit in equity to restrain the execution of the judgment, claiming the contract, due to a mutual mistake in writing, did not truly express the agreement of the parties. It was held plaintiff should not succeed in the equity suit. The court held, that the plaintiff's claim of mutual mistake, under the ruling of the trial court that the contract was ambiguous, had been decided in the action at law, but it was said that under section 274b plaintiff in the equity suit

²⁸ (C. C. A. 6th, 1920) 262 Fed. 465. Knappen, Circuit Judge, expressed the following opinion: "The Fuel Company thus had explicit notice, through the petition, of Lyons' construction of the contract, and was thereby given the right and opportunity, under section 274b of the Judicial Code (Act March 3, 1915, 38 Stat. 956 [Comp. St. § 1251b]), to interpose and have heard the defense that the writing did not express the actual agreement, and to ask affirmative relief by way of its reformation. That (as the company contends) the case for equitable reformation would necessarily be tried as a case in equity (*Union Pacific R. R. Co. v. Syas* [C. C. A. 8] 246 Fed. 561, 566, 158 C. C. A. 531; *Keatley v. Trust Co.* [C. C. A. 2] 249 Fed. 296, 161 C. C. A. 304; *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385, 388, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177, arising under the Philippine Code of Civil Procedure) is not, in the view we take of the case, important here; and we think it equally unimportant that, as held in *Railroad Co. v. Syas*, supra, the case for equitable relief should be disposed of before proceeding in the action at law. In any event, the action at law would be stayed pending the hearing on prayer to reform. *Prudential Co. v. Miller* (C. C. A. 6) 257 Fed. 418, 421, — C. C. A. —. The point is that by the action at law opportunity was given the Fuel Company to try out then and there the case for reformation, and, to all intents and purposes, in the same case, although perhaps without a common law jury, as to the plea for reformation. The Fuel Company did not take the benefit of this statute, but contented itself with a plea denying every allegation in the petition except its West Virginia incorporation. Had it pleaded mutual mistake, and asked reformation, it clearly could not again raise the question. *Werlein v. New Orleans*, 177 U. S. 390, 399, 20 Sup. Ct. 682, 44 L. Ed. 817. And there is respectable authority that the result would be the same if the existing right was not availed of." 262 Fed. at 466.

might have filed a cross action setting up the alleged mutual mistake and not having done so, was not entitled after judgment to the aid of a court of equity. A litigant, as plaintiff seeking aid of a court of equity which he conveniently might have sought by a cross action is in a very unfavorable position and normally equitable relief should be denied him because of his laches. Before the enactment of section 274b equitable relief might be granted though it had not been sought by him until after the judgment at law.²⁹

Chief Justice Taft in *Liberty Oil Co. v. Condon National Bank*³⁰ stated that the reform of 1915, *i. e.* the enactment of sections 274a and 274b, did not result in creating one form of action but that these sections "manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible." Consistently with this view it has been held that where defendant files a cross action in equity and the evidence on that issue is first heard by the court sitting in equity and relief denied, the defendant may not at that point appeal from the decree.³¹ It was held that neither section 274b, nor the other sections relating to appeals, authorized an appeal at this stage in the action. While section 274b provides: "Review of the judgment or decree entered in such case shall be regulated by rule of court" this provision was held not a grant of jurisdiction but "a grant of power to regulate action under a jurisdiction already conferred." It was also said that no rules had been made on the subject.

No doubt considerable delay and expense may be avoided by not permitting an appeal until both the equitable and legal issues have been

²⁹ *Whitcomb v. Shultz* (C. C. A. 6th, 1915) 223 Fed. 268. Rogers, Circuit Judge, writing the opinion said: "And Chief Justice Marshall, 100 years ago, in *Marine Insurance Co. of Alexandria v. Hodgson*, 7 Cranch, 332, 336, 3 L. Ed. 362, said: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.'" 223 Fed. at 273.

See *Chicago & N. W. R. Co. v. McKeigue* (1906) 126 Wis. 574, 105 N. W. 1030, holding that after the action at law has been commenced the defendant may not become plaintiff in an action in equity to restrain the action at law if he may raise the question by way of equitable defense. The court was of the opinion that defendant in the law suit might have pleaded these facts defensively and, presumably, whether they were true was for determination by the jury. This decision should have little weight in a federal court where the rule is followed that equitable defenses, so called, are for the court sitting as a chancellor.

³⁰ (1922) 260 U. S. 235, 43 Sup. Ct. 118.

³¹ *Emlenton Refining Co. v. Chambers* (C. C. A. 3d, 1926) 14 F. (2d) 104.

decided in the trial court where the trial court holds the equitable cross action has not been sustained.

As time goes on other interesting questions will arise. The cases decided do not involve all the problems raised by the new procedure. Seemingly, though, the act discussed has received interpretation as to its main features. That it constitutes a valuable addition to federal procedure seems clear. From the standpoint of both analysis and desirable result it is thought that the sound view is that section 274b only authorizes cross actions in equity and that the view first expressed by a district judge in 1915³² that "Congress by the Act substantially abolished all technical distinctions between proceedings at law and in equity" is unsound. Law and equity in the federal courts have not been amalgamated. They should not and cannot be amalgamated, in any complete sense, in a legal system based upon a Constitution which confers legal and equitable jurisdiction upon the courts and guarantees a jury trial in a large class of common law actions. If a so called amalgamation should be attempted, the right to trial by jury will be raised and when raised the question must be decided, and the determination of this question will require the court to differentiate between law and equity. There is little reason for thinking that the constitutional guaranty of a jury trial will be ignored by the courts. Seemingly their amalgamation only may go forward by adding more and more to the power of the jury. If the amalgamation should become complete, equity would no longer exist.

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³² United States to Use of Morris v. Richardson (C. C. A. 4th, 1915) 223 Fed. 1010. The statement was unnecessary to the decision.