so it would seem that the decision might have gone the other way. Either the doctrine of *Evans* v. *Lewis* could be disregarded in the field of preferences and the tort claimant be considered a creditor and allowed to upset the preference, or, should the court wish to follow the doctrine to which it professes to its logical conclusion, the tort claimant, having reduced his claim to a judgment and attained the status of a "subsequent creditor" should be allowed to overturn the mortgage made with intent to prefer another creditor over him, specifically. The question seems to be a novel one in Ohio and authority elsewhere is lacking because of the lack of similar statutes.

The disappointed tort claimant has other means of asserting his right. The first is the Federal Bankruptcy Act. While the non-judgment tort claimant cannot be a petitioning creditor,[9] he does have a claim which is provable in bankruptcy.[10] Other creditors can file the petition and the preference (if within four months) can be recovered for the benefit of all the creditors including the tort claimant with a suit pending at the time of the petition. He has also a remedy under the Ohio statute. Any other creditor could have a receiver appointed to hold the preference for all the creditors. The tort claimant would share in the fund once he had reduced his claim to judgment.[11]

R.C.H.

EQUITY

Distinguishing Between Equitable Defenses and Equitable Counterclaims — The Effect of Either on a Jury Trial

The plaintiff brought an action on a promissory note against two signers, Payer and Stanton, which note was secured by a mortgage of even date on certain property described therein. Defendant Stanton filed his answer admitting liability thereon. Defendant Payer filed an answer containing two defenses. The first defense denied that the plaintiff was the owner of the note, that all the credits for payments appear on the note and that he was liable on the note. The second defense the defendant described as a counterclaim and cross petition. The counterclaim set up facts indicating that his signature on the note and the mortgage which secured the note were obtained by fraud, and concluding with a claim for damages in the sum of $14,536.31. The

[9] Chandler Act, sec. 59b (1938).
[10] Chandler Act, sec. 63 (7) (1938).
[11] Lally v. Farr, 9 Ohio Dec. 119 (1889).

cross petition prayed that the note be delivered up and cancelled. The cause was tried to the court over the demands of the plaintiff and the other defendant for a jury trial. This was reversed on appeal, it being held that an equitable defense does not change an action at law to one of equity and that it was error to refuse the plaintiff a jury trial.[1]

The defendant claims that his defense was by way of counterclaim and cross petition; the court says it was merely an equitable defense. Two interesting questions are raised by these pleadings: (1) what is the difference between an equitable defense and an equitable counterclaim; (2) what is the effect of either on a jury trial.

In order to more clearly understand the nature of an equitable defense, the conflict between law and equity prior to the codes should be noted. At common law, in an action on a specialty, for example, all defenses not in the instrument itself were excluded, for the reason that the specialty was the contract in itself.[2] The result of this was that if the specialty had been induced by fraud, the defendant had no defense at law. Equity was the ready friend aiding those who could not maintain a defense at law for such reasons by granting an injunction against the maintenance of the action at law. Because of this injunctive process the equity courts and the law courts engaged in a bitter struggle, which ended in the famous Coke-Ellsmore dispute upholding the right of equity to enjoin actions at law.[3] What was the purpose of going into equity to obtain that injunction? While it looks like an affirmative action its real purpose was defensive, that is, to enjoin the plaintiff's cause of action.

Most states have abolished the distinction in form between law courts and chancery courts and as a result we find statutes like the Ohio statute, providing that the defendant may set up as many defenses, counterclaims or set-offs as he has, whether legal or equitable.[4] What does this type of statute mean? Professor Cook says this type of statute was meant to abolish the old procedure and to permit the invalidity of the instrument to be pleaded in an action at law.[5] From this interpretation of the statute and from knowledge of the procedure under separate courts of law and equity, a definition of an equitable defense may be drawn: facts which prior to the code would have entitled a defendant to go into equity and obtain a permanent injunction against the maintenance of the action at law, may now be set up as a defense to the action at law.

[1] Blair v. Payer, 63 Ohio App. 29, 30 Ohio L. Abs. 4, 16 Ohio Op. 263 (1939).
[2] WALSH, EQUITY (1930) p. 99, n.1.
[3] *Supra*, note 2.
[4] OHIO GENERAL CODE, sec. 11315.
[5] Cook, *Equitable Defenses* (1932) 32 YALE L.J. 645.

In *Brymer* v. *Clark*,[6] the court said that "the defendant in an action upon an award may set up as a defense thereto any matter which constitutes a good ground in equity for setting aside or cancelling the award." In an action on a note, the defendant answered saying that the note was procured by fraud, was without consideration and asked that it be cancelled. The court in that case said: "The equitable relief asked by the defendant's (answer) . . . was the cancellation of the note sued upon. The grounds upon which the relief was asked constituted a perfect defense to the action at law which had been brought by the plaintiff. . . . The general rule in such case undoubtedly is, that where a party has a complete defense at law, he cannot resort to equity."[7] This is carried on in *Rothman* v. *Engel*,[8] the court saying that "facts that are *strictly defensive*, and which, if pleaded as a defense in an action at law, would operate to defeat the plaintiff's right to recover, do not constitute a counterclaim. And if the defendant does not avail himself of such defense, he will be barred from utilizing it in a subsequent suit." Hence, since cancellation is strictly defensive in nature it may be included in the definition stated previously. Thus the definition of an equitable defense could now be said to be this: facts which prior to the code would entitle the defendant to go into equity to have an instrument cancelled and a permanent injunction issued or merely to have a permanent injunction issued would constitute an equitable defense. It is, as the court said in *Gill* v. *Pelkey*,[9] "simply a defense to the cause of action in the petition."

An equitable counterclaim on the other hand is a cross action in itself, on which a separate action might have been maintained, which if successful will extinguish or supersede the case made in the petition.[10] A counterclaim is described by the statute as being "a cause of action existing in favor of the defendant against the plaintiff or another defendant, or both between whom a several judgment might be had in an action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action."[11]

[6] 20 Ohio St. 231 (1870).

[7] Quebec Bank of Toronto, Ontario v. Weyand & Jung, 30 Ohio St. 126 (1876).

[8] 97 Ohio St. 77, 119 N.E. 250 (1917).

[9] 54 Ohio St. 348, 360, 43 N.E. 991 (1896). Other cases discussing the problem of equitable defenses as distinguished from equitable counterclaims are: Brymer v. Clark, 20 Ohio St., 231 (1870); Rothman v. Engel, *supra*, note 8; Patterson v. Volmar, 131 Ohio St. 48, 1 N.E. (2d) 323 (1936); Gowdy v. Roberts, 31 Ohio App. 33, 35 (1929); Chicago & N.W. Ry. Co. v. McKeegue, 126 Wisc. 574, 105 N.W. 1030 (1906); Susquehanna S.S. Co. v. A.O. Anderson & Company, 239 N.Y. 285, 146 N.E. 381 (1925); Wm. Weisman Realty Co. v. Cohen, 157 Minn. 161, 195 N.W. 898 (1923).

[10] Gill v. Pelkey, 54 Ohio St. 348, 43 N.E. 991 (1896).

[11] Ohio General Code, sec. 11317.

To illustrate what is meant, suppose A sues B to recover for the breach of the covenants in a deed of conveyance, the breach being an eviction of the plaintiff from part of the premises. B denies the eviction and as a counterclaim sets up the contention that the covenants were inserted by mistake and prays for a correction of that mistake. Is this answer merely defensive or does it ask for affirmative relief in addition? It is obvious that it is more than a defense because it will not only defeat the plaintiff's action but will deprive the plaintiff of his action. That is to say, the defendant is asking for a correction of a mistake which if granted would settle the controversy and determine the rights of the parties. Thus, in the case of *Buckner* v. *Mear*, [12] where this exact situation was decided, the court said that it would be an equitable counterclaim if the answer set up an equitable cause of action which, if established, would extinguish or supersede the case made out in the petition.

In *Dodsworth* v. *Hopple*,[13] the defendant, in answer to an action to recover possession of land, set up facts showing he was entitled to conveyance, and prayed it be conveyed and title quieted. The court said that this was an equitable counterclaim, that "it seeks affirmative relief on a broader scope than the mere defeat of plaintiff's action for the possession of the land; it seeks also to quiet the defendant's title, by securing to him the legal as well as equitable right thereto." Further on the court said, "(the facts) are such, that had the plaintiffs discontinued their action, or failed to appear, the defendant, under the provisions of the code, might have proceeded to trial and judgment on his cross petition, in the same manner as if it had been an original petition." This case permits a form of definition to be drawn: thus, it may be said that an equitable counterclaim is an affirmative action on the part of the defendant which may be the subject of an action independent of the plaintiff's action, and which has as its purpose not the mere defense to a cause of action, but the depriving the plaintiff of his cause of action. The difference between an equitable defense and an equitable counterclaim may be stated, as did the court in *Gill* v. *Pelkey*,[14] that one "is simply a defense to the cause of action in the petition, while the other is a cross-demand constituting a cause of action in itself, on which a separate action might have been maintained."

In the principal case the defendant sets up as his first defense what he calls a counterclaim, that is, the plaintiff set up facts alleging fraud and false representations in procuring his signature and in procuring

[12] 26 Ohio St. 514 (1875).
[13] 33 Ohio St. 16 (1877).
[14] Gill v. Pelkey, *supra*, note 10.

the mortgage and in addition had asked for damages. Under the definition stated earlier and under the cases, fraud and false representation are now equitable defenses to the action at law, and where a party has a complete defense at law he cannot resort to equity.[15] The second defense is a cross petition asking for cancellation of the note. Now the ground on which the defendant here would have to sustain his suit for cancellation if it had been brought as an independent action are fraud and false representation, the same facts as in his counterclaim. But fraud and false representations are defenses to an action at law; consequently, the defendant has a good defense to the action at law without the help of equity, and his defense cannot be an equitable countreclaim. It must be designated as an equitable defense. Hence, it would seem that the form of the answer is immaterial, and that the nature of the case determines whether or not the defense is an equitable defense or an equitable counterclaim.

A second question arises and that is, what effect, if any, does an equitable defense or an equitable counterclaim have on the right to a trial by jury. In regard to an equitable defense the problem may be dismissed by saying that it has no effect whatsoever on the right to a jury trial. The courts have uniformly held that an equitable defense does not change the mode of trial.[16] Thus, if the plaintiff's action is one which entitles him to a jury, there will be a jury trial, unless waived, regardless of whether or not an equitable defense has been imposed.

On the other hand an equitable counterclaim does change the mode of trial.[17] In *Gill* v. *Pelkey*[18] the court said that an equitable counterclaim asking affirmative relief will draw to it the mode of trial appropriate to such cause of action. It not only changes the mode of trial to the appropriate action, but it requires a trial in advance of the trial on the plaintiff's claim.[19] Since this is a separate trial the manner in which the case shall be appealed arises, and this is answered by saying that, if the case was one that would have been tried in a chancery court prior to the code of civil procedure then it may be appealed on questions

[15] *Supra*, note 7.

[16] Quebec Bank of Toronto, Ontario v. Weyand & Jung, *supra*, note 7. However, in Liberty Oil Co. v. Condon National Bank, 260 U.S. 235, 67 L. Ed. 232 (1922), the court said that if an equitable defense is set forth against a suit at law, the equitable issue should be first tried to a court. Thus, the court is saying that an equitable defense does change the mode of trial. The court cites three Ohio cases to substantiate this ruling, but it is submitted that under the analysis of equitable defenses and counterclaims set forth in this article the cases cited are not equitable defenses but equitable counterclaims.

[17] Massie v. Stradford, 17 Ohio St. 596 (1867); Dodsworth v. Hopple, 33 Ohio St. 16 (1877); Lust v. The Farmers Bank & Savings Co., 114 Ohio St. 312 (1926).

[18] 54 Ohio St. 348, 43 N.E. 991 (1896).

[19] Dodsworth v. Hopple, *supra*, note 17.

of law and fact; otherwise, it would be appealed on questions of law.[20] This historical interpretation has not been applied to the determination of the right to a jury trial. Under Ohio G.C., Section 11379 all actions for money only, or for the recovery of specific real or personal property are entitled to a jury trial. The statute limits the right to a jury trial to these specific instances whether historically legal or equitable, so that some cases historically equitable may have a jury trial as of right. The equitable counterclaim historically is an affirmative action in equity. Now if the historical distinction does not apply to the right to a jury trial, it may theoretically be that in some instances the defendant pleading an equitable counterclaim may be entitled to a jury trial under the statute. However, if we assume that the action is equitable and does not fall within the classification of Ohio G.C. Section 11379, and the plaintiff's action is one entitled to a jury, what effect does the counterclaim have? In *Buckner* v. *Mear*[21] it is said that even though the plaintiff's cause of action is triable by a jury, if the answer constitutes an equitable cause of action which if established will extinguish or supersede the plaintiff's cause of action, the new issues are triable to the court and not as a matter of right to the jury. Thus, it may be said that an equitable counterclaim, unless it falls within the requirements of Ohio G.C. Section 11379, will not admit of a trial by jury as of right. It is an independent action calling to it its own mode of trial.

In the principal case it would seem that the court was right in requiring a jury trial. The plaintiff's action was one at law for money only and entitled to a jury trial unless changed by an equitable counterclaim in the defendant's answer. However, the answer in the principal case was an equitable defense and could not, therefore, change the mode of trial. Consequently, the plaintiff was entitled to a jury trial and it was error to allow a trial to the court. F.A.R.

INSURANCE

INSURANCE — BANKRUPTCY — RIGHTS OF INJURED PARTY TO PROCEED AGAINST THE INSURER

Morris, Inc., an Ohio corporation engaged in the business of interstate hauling, carried liability insurance with the defendant company for the benefit of shippers using its service. On February 25, 1936, merchandise consigned to the plaintiff was destroyed in transit. Morris, Inc. filed a petition in bankruptcy and was duly adjudged a bankrupt on

[20] *Supra*, notes 9 and 16; OHIO GENERAL CODE, sec. 12223-1.

[21] 26 Ohio St. 514 (1875).