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DEFENSES—LEGAL AND EQUITABLE: MERGED IN MISSOURI?

I. INTRODUCTION

In 1849, Missouri adopted a general code¹ relating to practice in civil cases. It was the system inaugurated by the New York Code of 1848, which abolished the forms of action and did away with the separation of law and equity.² The original New York Code of 1848 made no reference to equitable defenses as such³ and, consequently, neither did the Missouri version.⁴ However, the New York Code of 1852⁵ specifically provided that the defendant might plead as many defenses as he had, equitable or legal, and Missouri incorporated this provision into its code in 1855.⁶ The language of that provision, while expressly recognizing the past distinction between "legal" and "equitable" defenses, indicates some intent to abolish the distinction by the use of the words "whether *heretofore denominated* legal or equitable, or both."⁷ In the area of defenses, the case law in Missouri generally reflects such a blending of law and equity, fairly consonant with the "one form of action" spirit of the code. It would be a mistake, however, to assume that no problems or exceptions exist in this state today respecting the use of equitable defenses, whether raised by answer or reply.

Prior to the adoption of the code in Missouri, a party who had an equitable defense to an action at law could not assert it in the legal action. He was instead required to bring an affirmative suit in equity.⁸ It is difficult to fully appreciate a procedure which permits litigants to assert equitable defenses in a legal action without referring to the practice that existed in a number of states long after Missouri adopted the code.⁹ Missouri abolished this procedure in 1855,¹⁰ but a defendant has since occasionally found himself defeated by a ruling that a defense which he asserted is "not cognizable by a court of law in a purely legal action."¹¹ Because of judicial adherence to ancient distinctions, an examination of our present statute¹² fails to disclose some of the problems that can arise in asserting defenses under the modern code.

1. MO. LAWS 1849, at 73, §§ 1,2.

2. CLARK, CODE PLEADING 23 (1947).

3. *Id.* at 621.

4. MO. LAWS 1849, at 80, § 7.

5. N. Y. LAWS 1852, at 392, § 150.

6. MO. LAWS 1855, at 1233, § 13.

7. *Ibid.* (Emphasis added.)

8. *Supra* note 2, at 623-24.

9. "At the present time in Michigan a separate chancery suit is required whenever a defendant wishes to assert an equitable rule or principle as a defense to a legal cause of action." Joiner & Geddes, *The Union of Law and Equity: A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059, 1072 (1957). This is no longer the law in Michigan. See MICH. CONST. art. VI, § 5 (1963); MICH. STAT. ANN. § 27A.1901 (1961); MICH. GEN. CT. R. 111.2.

10. *Supra* note 6.

11. *Rudolph Wurlitzer Co. v. Rossman*, 196 Mo. App. 78, 87, 190 S.W. 636, 639 (St. L. Mo. App. 1916). See part VI *infra*.

12. § 509.110, RSMo 1959.

Pomeroy defines a defense as "a right, possessed by the defendant, arising from the facts alleged in his pleadings, which defeats the plaintiff's cause of action or claim for the remedy demanded by his action."¹³ An equitable defense is "such a right which exists solely by virtue of equitable doctrines, and which was originally recognized by courts of equity alone."¹⁴ No single approach to the use of equitable defenses in actions at law has been universally accepted by jurisdictions having the code.¹⁵ Some courts permit as defenses in bar any matter which a court of equity formerly recognized as grounds for relief. Others recognize only some equitable matters as defenses, while requiring others to be invoked by way of a prayer for affirmative relief¹⁶ or counterclaim. A third group apparently allows a defendant to plead facts entitling him to equitable relief only where he seeks affirmative relief.¹⁷ Missouri generally adheres to the first view.¹⁸

Not long after the adoption of the code provisions, Missouri's appellate courts made it clear that, as a general proposition, equitable defenses could be pleaded in actions at law.¹⁹ However, most of the early cases applying the new code provisions were actions of ejectment in which the defenses of fraud or default on a mortgage debt were raised.²⁰

II. AVOIDING RELEASES

Today, as a general rule, the Missouri defendant can set up as defenses any matter which "defeats the plaintiff's cause of action,"²¹ including those "originally recognized by courts of equity alone."²² However, collateral problems have kept the waters muddied for defendants in certain kinds of litigation. The

13. POMEROY, EQUITY JURISPRUDENCE, § 1369 (5th ed. 1941).

14. *Ibid.* Professor Hinton took the view that "equitable defense" was a contradiction of terms. "Either the equitable matter is not a defense at all, because it does not destroy the legal right, or it is a legal defense because it does destroy the legal right." Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717, 719 (1920).

15. CLARK, CODE PLEADING, *op. cit. supra* note 2, at 624-28; Hinton, *supra* note 14, at 725.

16. Scott v. Norris, 6 Ind. App. 102, 32 N.E. 332 (1892), *rehearing denied*, 33 N.E. 227 (1893) (mistake); Weld v. Johnson Mfg. Co., 86 Wis. 549, 57 N.W. 378 (1893) (equitable defense involving an accounting).

17. Crawford, *Equitable Defenses To Actions at Law Under the Missouri Code*, 25 WASH. U.L.Q. 60, 63 (1939).

18. Kostuba v. Miller, 137 Mo. 161, 38 S.W. 946 (1897); McCollum v. Boughton, 132 Mo. 601, 620, 34 S.W. 480, 481 (1896); Sachleben v. Heintze, 117 Mo. 520, 24 S.W. 54, 56 (1893); Potter v. Whitten, 161 Mo. App. 118, 128, 142 S.W. 453, 456 (Spr. Ct. App. 1912); Engler v. Knoblauch, 131 Mo. App. 481, 490, 110 S.W. 16, 20 (St. L. Ct. App. 1908).

19. Harrington v. Fortner, 58 Mo. 468, 474-75 (1874); Ward v. Quinliven, 57 Mo. 425, 427 (1874); Hubble v. Vaughan, 42 Mo. 138, 141 (1868); Dwyer v. Rohan, 99 Mo. App. 120, 129, 73 S.W. 384, 387 (St. L. Ct. App. 1903). *Cf.* Moreau v. Detchemendy, 18 Mo. 522, 530 (1853).

20. Cases cited note 19 *supra*. See also Wolf v. Schaeffer, 4 Mo. App. 372 (St. L. Ct. App. 1881), *aff'd*, 74 Mo. 154 (1881); Kelly v. Hurt, 74 Mo. 561 (1881).

21. POMEROY, EQUITY JURISPRUDENCE, *supra* note 13.

22. *Ibid.*

first of such problems arose in *Hancock v. Blackwell*,²³ an action for slander. The defendant pleaded a release. Replying, plaintiff admitted that she signed the release, but sought to avoid it on the ground that she had been induced to execute it by fraudulent representations and undue influence. The court held that "[w]hen the release was executed by plaintiff, it was, to all intents and purposes, a bar to this action until set aside in a direct proceeding in equity for that purpose."²⁴ The court felt two problems required this holding. First, "the issue of fraud should be tried by the court." Second, "the evidence, in order to justify setting aside the release, should be clear and satisfactory. . . ."²⁵ Apparently the court felt these were insuperable obstacles to applying the code provisions then in force,²⁶ and it therefore did not discuss their effect on pleading equitable defenses in actions at law. The court seemed to reason that the fraud rendered the release "voidable" and not "void," citing earlier cases which had distinguished between releases obtained by fraud where "the admitted signatures are to no agreed contract," and those where "the signatures are admitted, where the contents have been read, and when its full purport is understood."²⁷ The latter are legally binding until set aside in an independent proceeding. That the "direct proceeding in equity" would be a pleading filed with the same court, and that Missouri had a statute²⁸ which should have permitted an "equitable counterclaim," were not mentioned.²⁹ Thus arose a Missouri exception to the general rule that a plaintiff could set up fraud in a legal action.³⁰

A statute was passed in 1899, purporting to abolish the exception stated in *Hancock*.³¹ Some subsequent cases declared that the statute made clear a legislative intent to do away with the requirement of a separate equitable action to

23. 139 Mo. 440, 41 S.W. 205 (1897).

24. *Id.* at 208.

25. *Ibid.*

26. §§ 2049, 2050, RSMo 1889.

27. *Homuth v. Metropolitan Street Ry. Co.*, 129 Mo. 629, 646-47, 31 S.W. 903, 907-08 (1895); *Och v. Missouri, K. & T. Ry. Co.*, 130 Mo. 27, 31 S.W. 962 (1895).

28. §§ 604, 605, RSMo 1899.

29. This case came before the Supreme Court of Missouri again in 1899, after the remand to the trial court where plaintiff was allowed to amend her petition by inserting an additional count for cancellation of the release. *Courtney v. Blackwell*, 150 Mo. 245, 51 S.W. 668 (1899).

The plaintiff may anticipate an affirmative defense of release by a count in his petition setting out the fraud in its procurement and asking its cancellation, but should not be required to do so; nor should a plaintiff be reverted to a separate bill in equity for such purpose, for the whole question can logically be determined, when the release is pleaded, by an issue of fraud raised by the reply, and tried by the chancellor, before the action at law is tried. *Id.* at 676-77 (concurring opinion).

30. *Cook, Equitable Defenses*, 32 YALE L.J. 645, 649 (1923). "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." *Id.* at 650.

31. § 654, RSMo 1899:

Whenever a release, composition, settlement, or other discharge of the

avoid a release for fraud.³² However, other decisions³³ kept the question somewhat confused by referring back to the distinctions drawn in the *Hancock* case,³⁴ no doubt to the great frustration of litigants who had relied on the statutes³⁵ and cases holding that these statutes had abolished the need for an independent suit to cancel the release.³⁶ This exception to allowing equitable matter in bar in what were formerly actions at law was due in part to the distinction drawn between fraud which rendered a release voidable and fraud which made it void.³⁷ However, a substantial part of the difficulty can be attributed to the Missouri courts' adherence to distinctions between actions in law and proceedings in equity several decades after adoption of the "one form of action" provision.

The problem raised by *Hancock* appears to be settled today in favor of permitting any fraudulent matter to be set up in the same action.³⁸ The present

cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient.

32. *Berry v. St. Louis & S.F.R. Co.*, 223 Mo. 358, 369-70, 122 S.W. 1043, 1046-47 (1909) (holding that the 1899 statute did not violate the constitutional right of trial by jury "as heretofore enjoyed"); *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, 171, 102 S.W. 642, 643 (1907); *Austin v. Brooklyn Cooperage Co.*, 285 S.W. 1015, 1016 (Spr. Mo. App. 1926); *Non-Royalty Shoe Co. v. Phoenix Assur. Co.*, 178 S.W. 246, 248-49 (St. L. Mo. App. 1915); *Carroll v. United Rys. Co. of St. Louis*, 157 Mo. App. 247, 291-93, 137 S.W. 303, 317-18 (St. L. Ct. App. 1911).

33. *Metropolitan Paving Co. v. Brown-Crummer Inv. Co.*, 309 Mo. 638, 274 S.W. 815 (1925); *Reed v. John Gill & Sons Co.*, 201 Mo. App. 457, 464-65, 212 S.W. 43, 46 (K.C. Ct. App. 1919) (on rehearing); *Loveless v. Cunard Mining Co.*, 207 S.W. 375, 379 (Spr. Mo. App. 1918) (concurring opinion); *Putnam v. Boyer*, 158 S.W. 861, 862 (Spr. Mo. App. 1913); *In re T. S. Heath & Son*, 136 Mo. App. 347, 352, 117 S.W. 125, 126 (K.C. Ct. App. 1909); *Magnuson v. Continental Cas. Co.*, 125 Mo. App. 206, 211-12, 101 S.W. 1125, 1127 (K.C. Ct. App. 1907).

34. *Hancock v. Blackwell*, *supra* note 23.

35. §§ 1727, 1812, RSMo 1909.

36. As to the question of whether the plaintiff must first tender a refund of the consideration for the release he is seeking to avoid, see *Loveless v. Cunard Mining Co.*, *supra* note 33, at 380-81; *Nelson v. Browning*, 391 S.W.2d 873, 877 (Mo. 1965).

37. Statutes cited note 26 *supra*. This distinction should have had no bearing on the right to assert the fraud in a reply in the same action, but would affect only the question of whether a tender of refund of the consideration for the release is necessary. Cases cited note 36 *supra*.

38. *Watson v. Bugg*, 280 S.W. 67, 69 (Mo. 1955); *Drake v. Kansas City Pub. Serv. Co.*, 63 S.W.2d 75, 78 (Mo. 1933); *Crawford*, *supra* note 17, at 76.

statute³⁹ leaves little room for qualification by the old voidable and void and law side and equity side distinctions.⁴⁰

III. TRIAL OF ISSUES

Another problem raised by the *Hancock* case was what happens to the trial of the issues once equitable matter is pleaded in bar to an action at law. Judge Marshall, concurring on the second appeal, argued that the equitable issue raised by the responsive pleading ought to be tried by the chancellor before trial of the action at law.⁴¹ Subsequent statutes⁴² expressly provided that where fraud was asserted to avoid a release, "the issue or issues thus raised shall be submitted with all the other issues in the case to the jury. . . ."⁴³ The present statute provides specifically that "any issue as to whether a release, composition or discharge of plaintiff's claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless otherwise waived."⁴⁴ As to interposing other equitable matters in actions at law, the rule now is that if the equitable defense is merely set up in bar the case remains one at law with all issues therein triable by a jury.⁴⁵ However, if the equitable matter is accompanied by a prayer for affirmative relief, the case is "converted from one in law to one in equity," and there is no right to trial by jury.⁴⁶ However, if one making such a prayer for affirmative relief fails to allege facts showing he is entitled to it the other party does not

39. § 509.090, RSMo 1959. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . *fraud* . . . and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleadings as if there had been a proper designation." (Emphasis added.) This section was first formulated in 1943 by rewriting certain provisions of sections 928, 934, 962, 1105, and 1106, RSMo 1939. (Mo. LAWS 1943, at 353, § 40).

40. CLARK, *supra* note 2, at 111. Nelson v. Browning, *supra* note 36, assumed the validity of pleading in the reply such equitable matter in bar to a release, without discussion.

41. Courtney v. Blackwell, *supra* note 29, at 676-77. Cf. Non-Royalty Shoe Co. v. Phoenix Assur. Co., *supra* note 32.

42. Statutes cited notes 31, 35, *supra*; § 934, RSMo 1939.

43. *Ibid.*

44. § 510.190, RSMo 1959. The various aspects of right to trial by jury under the merger accomplished by the code are outside the scope of this comment, and will be the subject of a forthcoming comment in this publication.

45. Goodman v. Missouri Pacific R.R. Co., 312 S.W.2d 42, 47 (Mo. 1958); Watson v. Bugg, 280 S.W.2d 67, 69-70 (Mo. En Banc 1955); Toler v. Edwards, 249 Mo. 152, 155 S.W. 26 (1913); Lee v. Conran, 213 Mo. 404, 412, 111 S.W. 1151, 1153 (1908); Kostuba v. Miller, 137 Mo. 161, 172, 38 S.W. 946, 949 (1897); Kerstner v. Vorweg, 130 Mo. 196, 201, 32 S.W. 298, 299 (1895); Carter v. Prior, 78 Mo. 222, 224 (1883); Northcutt v. McKibben, 159 S.W.2d 699, 704 (St. L. Mo. App. 1942).

46. Burnett v. Johnson, 349 S.W.2d 19, 22-24 (Mo. 1961); Bouton v. Pippin, 192 Mo. 469, 473, 91 S.W. 149, 150 (1905); Wendover v. Baker, 121 Mo. 273, 290, 25 S.W. 918, 922 (1894); Chilton v. Chilton, 297 S.W. 457 (Spr. Mo. App. 1927); Berryman v. Maryland Motorcar Ins. Co., 199 Mo. App. 503, 204 S.W. 738 (K.C. Ct. App. 1918).

lose his right to a trial by jury.⁴⁷ This distinction also determines the kind of review on appeal.⁴⁸

IV. BURDEN OF PROOF

The above rule also settles another question which bothered the court in *Hancock*: how is the old distinction between the burden of proof in actions at law and that in suits in equity handled when equitable issues are raised in law actions? Unless there is a prayer for affirmative relief the case remains one at law, and questions of fraud, mistake or estoppel pose the same burden of proof as all other issues—a preponderance of the evidence.⁴⁹

V. EQUITABLE COUNTERCLAIMS

Under the present statutes,⁵⁰ the defendant who has some equitable ground for affirmative relief may set this up as an "equitable counterclaim." If the equitable claim arises "out of the same transaction or occurrence that is the subject matter of the opposing party's claim,"⁵¹ the defendant must plead it or he will be thereafter barred from bringing it as an independent action.⁵² If the defendant mistakenly designates his counterclaim as a defense, the court is required to treat his answer as if there had been a proper designation.⁵³ Further, even if the plaintiff dismisses his action, the defendant who has set up an equitable counterclaim in his answer has a right to have his counterclaim tried.⁵⁴

VI. REFORMATION FOR MISTAKE

Defendants sued on written instruments have long been able to assert mistakes by way of an equitable counterclaim seeking reformation.⁵⁵ However, in 1916, the St. Louis Court of Appeals held in an action upon a note that a mistake

47. *Chilton v. Chilton*, *supra* note 46. See also *Burnett v. Johnson*, *supra* note 46 (indicating that the right to affirmative relief has to be proved as well as adequately pleaded before case becomes one in equity).

48. *Liflander v. Bobbitt*, 111 S.W.2d 72 (Mo. 1937); *Price & Anderson v. Morrison*, 291 Mo. 249, 236 S.W. 297 (1921); *Brightwell v. McAfee*, 249 Mo. 562, 155 S.W. 820 (1913). *Cf. Marsden v. Nipp*, 325 Mo. 822, 30 S.W.2d 77 (1930).

49. *Baker v. Bickel*, 386 S.W.2d 105, 111 (Mo. 1964). *Cf. Edwards v. Maples*, 388 S.W.2d 850, 852 (Mo. 1965), an "equity case" which was tried before a jury. The degree of proof required was "clear, cogent and convincing," and it was held that the jury's findings were advisory only.

50. §§ 509.060, .110, RSMo 1959.

51. Mo. R. Civ. P. 55.45(a) (Supp. 1966).

52. § 509.420, RSMo 1959. *State v. Moss*, 392 S.W.2d 260 (Mo. En Banc 1965); *State ex rel. Buchanan v. Jensen*, 379 S.W.2d 260 (Mo. En Banc 1963); *Woodson v. Woodson*, 255 S.W.2d 770, 771 (Mo. En Banc 1953) (holding that the compulsory counterclaim rule applied to a legal claim not asserted in an action for an injunction); *Kelly v. Hurt*, 74 Mo. 561, 570-71 (1881). *Cf. Mo. R. Civ. P. 55.48; Landers v. Smith*, 379 S.W.2d 884 (Spr. Mo. App. 1964).

53. § 509.090, RSMo 1959.

54. § 510.170, RSMo 1959. *Clark Real Estate Co. v. Old Trails Inv. Co.*, 76 S.W.2d 388, 392 (Mo. 1934); *Dezino v. William S. Drozda Realty Co.*, 13 S.W.2d 659, 662 (St. L. Mo. App. 1929); *Roach v. Landis*, 1 S.W.2d 203, 204 (K.C. Mo. App. 1927).

55. *Williamson v. Brown*, 93 S.W. 790, 796 (Mo. 1906).

of fact which would have authorized reformation in an independent suit was no defense.⁵⁶ The opinion mingled the old law-equity distinctions, the law of bills and notes, and the parol evidence rule in arriving at this conclusion. Apparently the court had failed to read Judge Lamm's opinion in *Williamson v. Brown*.⁵⁷ Thereafter, the *Wurlitzer* case was cited as declaring the rule in Missouri to be that mistake of fact could not be pleaded in bar to an action based on a written instrument.⁵⁸ Thus, in Missouri, the defendant who wished to rely on mistake to overcome plaintiff's action on a written instrument had to include a prayer for the affirmative relief of reformation, or the mistake was no defense. A review of the cases raises some question as to how widely this proposition has been followed in Missouri.⁵⁹ The *Wurlitzer* case stands unreversed today, but the present civil rules⁶⁰ and recent decisions⁶¹ have greatly weakened its authority.

VII. OTHER DEFENSES

The cases indicate that there has been little difficulty in asserting the other predominate equitable defenses, laches and estoppel in pais, under the modern statutes and rules in Missouri. The oft-quoted rule is that laches is an equitable defense only,⁶² but an exception exists in the area of the extraordinary remedies

56. *Rudolph Wurlitzer Co. v. Rossman*, 196 Mo. App. 78, 87, 190 S.W. 636, 639 (St. L. Ct. App. 1916). "Mistakes of fact may be relieved in a court of equity, but are not cognizable by a court of law in a purely legal action." *Ibid.* A New York court recognized in 1851 that the new code had made mistake a good defense to an action on a covenant. *Haire v. Baker*, 5 N.Y. 357 (1851), discussed in Hinton, *Equitable Defenses under Modern Codes*, 18 MICH. L. REV. 717 at 724 (1920).

57. *Supra* note 55. "The power of a court of equity to reform an instrument which, by reason of a mistake, fails to execute the intention of the parties is unquestionable. It is not material whether the instrument is an executory or an executed agreement; nor is it material whether the proceeding is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense." *Ibid.*

58. *Farmers' Bank of Weatherby v. Redman*, 24 S.W.2d 235, 237-38 (K.C. Mo. App. 1929); Crawford, *supra* note 17, at 83.

59. *Fricke v. Belz*, 177 S.W.2d 702, 704 (St. L. Mo. App. 1944); *Buhler Mill & Elevator Co. v. Jolly*, 217 Mo. App. 240, 245, 261 S.W. 353, 355 (K.C. Ct. App. 1924); *McNeill v. Wabash Ry. Co.*, 207 Mo. App. 161, 172, 231 S.W. 649, 652 (St. L. Ct. App. 1921) (allowing plaintiff to set up mistake defensively in his reply).

60. Mo. R. Civ. P. 55.10, 55.17; §§ 509.110, .160, RSMo 1959.

61. *Wolf v. St. Louis Pub. Serv. Co.*, 357 S.W.2d 950, 959 (St. L. Mo. App. 1962), citing *Employers' Indem. Corp. v. Garrett*, 327 Mo. 874, 38 S.W.2d 1049 (1931). Cf. *Goodman v. Missouri Pacific R.R. Co.*, 312 S.W.2d 42, 47 (Mo. 1958), decided under the Federal Employers' Liability Act, 45 U.S.C.A. § 51; *Bogus v. Birnbaum*, 375 S.W.2d 156 (Mo. 1964) (issue of mistake tried separately by court by consent of parties).

62. *Coleman v. Crescent Insulated Wire & Cable Co.*, 350 Mo. 781, 168 S.W.2d 1060 (1943); *Paxton v. Fix*, 190 S.W. 328, 330 (Mo. 1916); *American Life & Accident Ins. Co. v. Morris*, 281 S.W.2d 601 (St. L. Mo. App. 1955); *Ritchie v. Ritchie*, 173 S.W.2d 101 (K.C. Mo. App. 1943).

of mandamus, prohibition and certiorari. Laches has been held to bar relief by way of these writs in Missouri.⁶³

VIII. MAGISTRATE COURTS

Another area in which the defendant cannot avail himself of equitable defenses is in actions before the magistrate courts.⁶⁴ Furthermore, it has been held that the jurisdiction of the circuit court over an appeal from the magistrate is derivative; hence, an equitable defense cannot be asserted for the first time on appeal in the circuit court.⁶⁵ The proper procedure is for the defendant to obtain a stay of the proceedings in magistrate court and to bring an independent action on his equitable rights in the circuit court.⁶⁶ The actions of forcible entry and unlawful detainer, placed by statute⁶⁷ within the jurisdiction of the magistrate courts, are examples of actions in which equitable defenses cannot be set up.⁶⁸ The present law in this area makes for cumbersome procedure and should, it seems, be changed by statutes consonant with the code provisions.

IX. LEGAL CLAIMS IN ACTIONS BASED UPON EQUITABLE RIGHTS

Subject to the abovementioned exceptions, equitable defenses can be asserted in any action based upon rights which they can bar or defeat under our law. In an action which is based upon a right formerly the subject of a suit in equity, can a legal claim be asserted in the answer and tried in the same action? If it "defeats the plaintiff's cause of action or claim for the remedy demanded by his action,"⁶⁹ then clearly under modern pleading and practice it should be allowed.⁷⁰ However, as in the development of the equitable defense in the action at law, old distinctions and collateral problems keep the answer to this question from being clear. *Boland v. Byrne*⁷¹ is a good example. This case was a suit to enjoin defendant from blockading a roadway across defendant's land. Defendant set up a "legal" counterclaim for damages in her answer and the court held that such

63. *State ex rel. Al G. Barnes Amusement Co. v. Trimble*, 318 Mo. 274, 300 S.W. 1064 (1927) (certiorari); *State ex rel. Kennedy v. Hogan*, 306 Mo. 580, 267 S.W. 619 (1925); *State ex rel. Berkshire v. Ellison*, 287 Mo. 654, 230 S.W. 970 (1921); *State ex rel. McIntosh v. Rainey*, 397 S.W.2d 344, 346-47 (St. L. Mo. App. 1965) (mandamus). See also *State ex rel. Gibson General Hospital v. Warrick Circuit Court*, 214 N.E.2d 655, 657 (Ind. 1966) (prohibition).

64. § 482.100(2), RSMo 1959; *Hoover v. Abell*, 231 S.W.2d 217 (K.C. Mo. App. 1950); *Sanders v. Brooks*, 183 S.W.2d 353 (K.C. Mo. App. 1944); *Nance v. Metcalf*, 19 Mo. App. 183 (K.C. Ct. App. 1885).

65. *Newman v. Weinstein*, 230 Mo. App. 794, 75 S.W.2d 871 (St. L. Ct. App. 1934); *Sanders v. Brooks*, *supra* note 64.

66. *Sanders v. Brooks*, *supra* note 64.

67. §§ 534.060, .070, .160, RSMo 1959.

68. *Joseph v. Horan*, 29 S.W.2d 234 (St. L. Mo. App. 1930); *Noonan v. Mason*, 285 S.W. 118 (St. L. Mo. App. 1926). Compare *Abstract Investment Co. v. Hutchinson*, 22 Cal. Rptr. 309, 313 (1962).

69. *Supra* note 13.

70. §§ 509.090, .110, RSMo 1959; Mo. R. Civ. P. 55.10, .12.

71. 145 S.W.2d 755, 758 (St. L. Mo. App. 1940). "[W]e know of no case, and defendant cites us to none which allows a purely legal claim to be raised by the answer in which no equity is plead or sought." *Ibid.*

relief could be given only "as an incident to or in lieu of other equitable relief."⁷² However, the rules requiring that a claim mistakenly designated as a defense in the answer be treated as if there had been a proper designation⁷³ and permitting separate trials when convenient, should clear up any problems, real or imaginary, envisioned by the court in *Boland*.⁷⁴

X. MOLASKY V. LAPIN

There are few very recent cases on the defenses which a defendant may or may not assert in an action. This is probably the best evidence of the success of the code in this area. Some decisions by Missouri courts on other questions, however, serve as *caveats* to those who believe all of the old distinctions and stumbling blocks have been obliterated. *Molasky v. Lapin*⁷⁵ is a good example. The plaintiff, a minority stockholder of a corporation, brought a derivative action against the majority stockholders for an accounting for profits allegedly realized by them and for losses allegedly sustained by the corporation as a result of the sale of certain stock owned by the defendants to the corporation. The plaintiff procured service of process on the individual defendants by attachment of their stock in an unrelated corporation. The court of appeals affirmed the trial court's dissolution of the attachments and dismissal upon the ground that "a derivative shareholder's suit can lie only in equity, and attachment is not available in an equity action."⁷⁶ The court held that the Missouri Constitution⁷⁷ had prohibited the supreme court from adopting rules of practice and procedure which changed substantive rights. Therefore, the court reasoned, the present rules⁷⁸ were rules of pleading only and did not affect the demarcation between equity and law cases in matters of substance and remedy.⁷⁹ In deciding the case on this basis, the court made it clear that the differences between law and equity have not yet become unimportant in Missouri, to plaintiffs or defendants. It might be pertinent to consider whether the only "substantive right" involved in the constitutional provision on which *Molasky* was decided isn't the right to trial by jury.⁸⁰ If so, the decision seems insupportable. The wrong by defendants, if any, created the rights, if any, in plaintiff, under principles of law already well established. No issue of a right to jury trial was involved. The plaintiff stated a claim which formerly was one "in equity." The defendants being non-residents, adherence to the old "substantive-procedural" distinctions left plaintiff without a remedy. To say that the differences between law and equity are unimportant in matters of pleading,

72. *Ibid.*

73. Mo. R. Civ. P. 55.10.

74. *Supra* note 71.

75. *Molasky v. Lapin*, 396 S.W.2d 761 (St. L. Mo. App. 1965).

76. *Id.* at 762.

77. Mo. CONST. art. V, § 5.

78. Mo. R. Civ. P. 42.01, 52.08.

79. *Molasky v. Lapin*, *supra* note 75, at 765.

80. If the plaintiff was otherwise able to state a claim showing that he was entitled to an accounting, and the only defect which allowing attachment would cure was jurisdiction, query whether allowing it would change any "substantive rights"?

but still important in matters of substance is to draw a sharp distinction that would seem valid only for the purpose of determining the right to a jury trial. Until the supreme court of this state redefines the proper limitations upon use of the old distinction between law and equity to deny relief, *Molasky* and other recent decisions⁸¹ disclose the fallacy of assuming that law and equity are merged in Missouri.

XI. CONCLUSION

Undoubtedly the constitutional provisions which bothered the court in *Molasky*, and the mandate⁸² that the right to trial by jury shall remain inviolate, will continue to have their restraining effect upon a complete merger of law and equity. The language of our present statutes⁸³ refers to "claims or defenses, whether legal or equitable." As long as we continue to talk in terms of a claim or defense being legal or equitable, we are perpetuating the old distinctions. Whether these distinctions are any longer useful other than in determining when there is a right to a jury trial seems questionable.⁸⁴ Yet the Missouri courts have generally restricted the application of the modern code to that of a set of pleading rules.

Possibly the best statement of what the code should accomplish by its provision for one form of action is found in an opinion rendered by the New York court shortly after the adoption of the code there:

the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defense against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.⁸⁵

Courts have traditionally been reluctant to depart from the old distinctions. It has taken new legislation to remove many of the obstacles that formerly confronted litigants attempting to adjudicate their differences in one lawsuit. Judging from such recent decisions as *Molasky*, a more effective merger of law and equity into one form of civil action will be achieved only through additional legislation.

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81. *Krummenacher v. Western Auto Supply Co.*, 217 S.W.2d 473 (Mo. En Banc 1949); *Kesinger v. Burtrum*, 295 S.W.2d 605 (Spr. Mo. App. 1956). "The form of the action is determined by the substance of the petition." *Id.* at 608. But Missouri does have just "one form of action" now.

82. Mo. CONST. art. I, § 22(a).

83. *Supra* note 70.

84. Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717, 731 (1920).

85. *Crary v. Goodman*, 12 N.Y. 266, 268 (1853).