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Comment

LAW AND EQUITY: PLEADING PROBLEMS RESULTING FROM INCOMPLETE MERGER

I. INTRODUCTION

In 1849, Missouri became the second state to pass a general code of practice for civil cases.¹ The code sought to facilitate the administration of justice through the abolition of useless and burdensome technicalities of pleading. To that end, it provided that a plaintiff was to state in his petition only facts sufficient to constitute a cause of action.² This provision was aimed at the common law rule that an erroneous theory of recovery was fatal to plaintiff's case.³ The plaintiff was only required to plead facts sufficient to show that he was entitled to relief, and having done so, it was for the court to apply the law and determine what remedies were available. It was to make no difference that the plaintiff's theory of recovery was erroneous, or his prayer for relief inappropriate. The only code requirement was that he state a cause of action.

After a series of conflicting cases, Missouri accepted the code reform in suits involving an erroneous choice between two purely legal theories. These cases typically involve plaintiffs who have pleaded the wrong theory of recovery.⁴ Although accepting the code reform where only legal theories are involved, there remains a strong tendency for Missouri courts to adhere to pre-code distinctions between legal theory and equitable theory. These cases usually involve a request for improper relief. The most frequent problem encountered is the petition which prays for an equitable remedy when only legal relief is appropriate, or vice versa. Asking for the wrong remedy under these circumstances often results in dismissal. This is true even though the facts as originally stated would sustain the new theory. The effect is to treat an equitable theory and a legal theory based on identical facts as separate causes of action.

Ironically, the 1849 code purported to abolish the distinction between actions at law and suits in equity,⁵ but the merger fell far short of its goal. This comment

1. Mo. Laws 1849, at 73, §§ 1,2; CLARK, *THE LAW OF CODE PLEADING* 24 (2d ed. 1947).

2. The modern counterpart, § 509.050, RSMo 1959, provides that a pleading "shall contain a short and plain statement of facts showing that the pleader is entitled to relief."

3. Dismissal of plaintiff's case was normally without prejudice.

4. For example, pleading trover and conversion when the theory should be negligence, *Duncan's Adm'r. v. Fisher*, 18 Mo. 403 (1853).

5. Section 506.040, RSMo 1959, states quite simply, "there shall be one form of action to be known as 'civil action.'"

is an examination of pleading relief under the Missouri code, one area where law-equity distinctions remain important.

II. THEORY OF PLEADING VS. CAUSE OF ACTION

A. At Law

Dealing first with cases which involve only legal theories, early decisions under the code were contradictory. *Link v. Vaughn*,⁶ decided in 1853, held that under a petition for goods sold and delivered, the plaintiff could not recover on facts which constituted trespass *d.b.a.* The decision is based on the principle that a plaintiff can recover only on the cause of action alleged. The principle is undoubtedly correct, but the court confused the theory of the pleading with the cause of action. Although the plaintiff must recover on the cause of action pleaded, the code permits changes in the legal theory of the case. The cause of action is determined by the facts, not the theory pleaded.

The second case decided under the code involved a similar misconception. In *Duncan's Adm'r. v. Fisher*,⁷ the court dismissed the case because the plaintiff attempted to change his theory from trover and conversion to negligence. The facts, as pleaded, justified a recovery on the negligence theory, but the court erroneously held that the plaintiff had changed his cause of action.

A few early cases did accept the code reform. In *Ahern v. Collins*⁸ the court, recognizing the distinction between the theory of pleading and the cause of action, held: "The true object is to ascertain, not whether this averment would bring it within any one of the different forms of action as they existed at common law, because the use of them has been entirely superseded by our own statutes, but as to whether it contains a sufficient statement of facts showing a right on the part of the plaintiff to recover."⁹

In spite of the language in *Ahern*, Missouri courts for the next forty years continued to dismiss cases rather than allow the plaintiff to change his legal theory. Decisions were handed down which refused to allow plaintiffs to change from an express contract theory to a quantum meruit theory;¹⁰ or from trover and conversion to fraud and deceit;¹¹ or from express warranty to implied warranty.¹²

Finally, in 1910, Missouri began to consistently recognize the code reform with *Central American S.S. v. Mobile and Ohio R.R. Co.*,¹³ which held in clear and unmistakable terms that there is but one form of civil action. The court said, in speaking of the plaintiff, "he must give a plain and concise statement of the facts constitutive of the cause of action. From such statement the court will

6. 17 Mo. 585 (1853).

7. 18 Mo. 403 (1853).

8. 39 Mo. 145 (1866).

9. *Id.* at 150.

10. *Eyerman v. Mount Sinai Cemetery Ass'n of St. Louis*, 61 Mo. 489 (1876).

11. *Waldhier v. The Hannibal & St. Joseph R.R. Co.*, 71 Mo. 514 (1880).

12. *Huston v. Tyler*, 140 Mo. 252, 41 S.W. 795 (1897).

13. 144 Mo. App. 43, 128 S.W. 822 (1910).

determine the nature of the cause, and will not turn the plaintiff out of court where the facts averred comprise all the elements of a good cause of action."¹⁴

Acceptance of the code reform in Missouri is currently well settled in those cases involving only legal theories. The recent case of *Aetna Cas. & Sur. Co. v. Lindell*¹⁵ involved a choice between the legal theories of trover and conversion. The plaintiff made the wrong choice, but the court held, "the form of the action will be determined from allegations of the petition and from the real nature and substance of the facts alleged in said petition and not from what the pleader may have called it."¹⁶

B. In Equity

Although Missouri has accepted reform in those cases involving an erroneous choice between two legal theories, it has not where the choice is between a legal theory and an equitable theory. The reason most frequently given for preserving the distinction is defendant's right to trial by jury. Two cases decided by the Missouri Supreme Court shortly after the passage of the code illustrate the problem.

*Walker's Adm'r. v. Walker*¹⁷ was a suit brought by the defendant's wife's administrator asserting a gift from defendant to his wife. Such gifts were not recognized at law because they were prevented by the unity of the husband and wife. In equity, however, a trust could be imposed. Although the suit was brought after the merger of law and equity and after the consolidation of the different forms of action, the Missouri court held, "[T]his trust cannot be enforced in an action as asserting a legal title to the property designed for the separate use of the wife, and claiming damages for its conversion. The gift, or more properly, trust, can only be carried into effect through the instrumentality of a petition in the nature of a bill in equity. . . ."¹⁸ In other words, equitable relief cannot be given in a suit asserting a legal right and seeking its enforcement.

The converse was also established early in *Magwire v. Tyler*.¹⁹ The plaintiff there sought to recover possession of land. In denying legal relief, the court said, "[A] bill in equity is not the proper remedy to recover possession of land. . . ."²⁰ The court later concluded that "although legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action."²¹

Both of the above cases involved plaintiffs who mistakenly conceived the nature of the relief to which they were entitled. Presumably each stated a good cause of action but simply pleaded the wrong theory of relief.

In a more recent case, plaintiffs sued for an accounting based on an alleged agreement between one of the plaintiffs and one of the defendants.²² At the close

14. *Id.* at 54, 128 S.W. at 824.

15. 348 S.W.2d 558 (St. L. Mo. App. 1961).

16. *Id.* at 563.

17. 25 Mo. 367 (1857).

18. *Id.* at 375.

19. 47 Mo. 115 (1870).

20. *Id.* at 127.

21. *Id.* at 128.

22. *England v. Barnes*, 70 S.W.2d 69 (St. L. Mo. App. 1934).

of the evidence, plaintiffs sought to amend their petition by including a request for legal relief. The court found that there was no agreement to account, and refused to determine the legal rights of the parties. The reviewing court said, "again we concede the general rule that equity, having once become possessed of a cause, will retain it for the purpose of administering full and complete relief, but such principle does not and cannot apply when the facts relied upon to sustain the jurisdiction of equity have failed of establishment."²³ Again, the plaintiffs stated a good cause of action but asked for the wrong remedy. They were apparently entitled to legal relief, but the court refused to consider the question.

The justification for such a decision is found in defendant's right to trial by jury. Had the court gone ahead and decided the issue of damages, his right would have been lost. Consequently, when the plaintiff changed his theory of recovery, the court was required to reclassify the case as legal rather than equitable. The result is a return to the common law rule that an erroneous theory of recovery is fatal to plaintiff's case. Missouri's approach has been to dismiss such cases without prejudice.²⁴

In the leading case, *Krummenacher v. Western Auto Supply Co.*,²⁵ decided by the Missouri Supreme Court in 1949, plaintiffs sued to abate a nuisance and for damages caused by the alleged nuisance. The trial court refused to grant the injunction, but awarded actual and punitive damages. The St. Louis Court of Appeals reversed, holding that the suit was in equity for the abatement of a nuisance, and since the trial court had held that plaintiffs were not entitled to any equitable relief, it was without jurisdiction to award damages on purely legal issues. The Supreme Court approved this decision saying, "[A] court of equity does not have jurisdiction to render a judgment for a plaintiff on legal issues in the absence of a finding that some equitable right of the plaintiff has also been violated."²⁶ Again the conflict between the code provision for "one form of action" and defendant's right to trial by jury was in issue. The code reform was deemed subordinate, and as a result, the plaintiffs were required to plead the identical facts to the same court, but this time "at law." The approach is not only out of harmony with a unification of law and equity into one system of jurisprudence, but also results in delay and multiplicity of suits. The complaint in *Krummenacher*, for example, was dismissed after a complete trial and award of damages.

The most recent case in point, *Sapp v. Garrett*,²⁷ involved a suit for injunctive relief against operation of a rock quarry and for damages to plaintiff's realty from the operation. The trial court refused to grant the injunction, and dismissed the

23. *Id.* at 72.

24. In *Wimer v. Wagner*, 323 Mo. 1156, 20 S.W.2d 650 (1929), the plaintiffs sought to convert their action for specific performance into a suit for money had and received. Although the facts pleaded justified such an amendment, the trial court dismissed plaintiff's petition with prejudice. The Missouri Supreme Court affirmed the dismissal, but held it should have been without prejudice as to the action for money had and received.

25. 358 Mo. 757, 217 S.W.2d 473 (1949).

26. *Id.* at 761, 217 S.W.2d at 475.

27. 284 S.W.2d 49 (K.C. Mo. App. 1955).

action for damages without prejudice. The Kansas City Court of Appeals affirmed, saying, "[T]he rule in this state is well settled that a court of equity does not have jurisdiction to render a judgment for a plaintiff on legal issues in the absence of a finding that some equitable right of the plaintiff has also been violated. In the instant case the court found plaintiffs were not entitled to equitable relief, consequently the issue of damages became a law action and should be tried as such."²⁸ The rationale again seems to be that the erroneous theory of pleading put the case in the "wrong" court, thereby depriving defendant of the right to trial by jury.

A clear majority of Missouri decisions support the above cases.²⁹ Nevertheless, on four occasions Missouri courts have reached a result compatible with code reform in cases in which both legal and equitable theories were involved.³⁰ Even in these cases, however, the distinction between law and equity was retained and there was no indication in the opinions that the courts accepted the philosophy behind merger of law and equity.

The most significant decision is *Pittman v. Faron*,³¹ decided in 1958. Plaintiff sought a declaratory judgment to determine the status of a mining lease. The defendant amended his answer during the trial, thus causing the issues concerning the construction of the contract to drop out of the case and leaving only an issue of fact of whether plaintiff had made the required payments under the lease. Although there were no longer any equitable issues before the court, the St. Louis Court of Appeals affirmed the lower court's proceeding to judgment. "[T]he test of equitable jurisdiction is based upon the issues at the time the action is commenced, and jurisdiction will not be defeated by subsequent changes, even though equitable relief might thereby be rendered unnecessary."³² As the defendant was the moving party, the court held that he was not prejudiced by lack of a jury trial. It seems fair to conclude that the court reached the right result but that its justification for the result was not based upon complete acceptance of code reform.

CONCLUSION

Presumably, the purpose of the pleadings is to state facts constituting a cause of action. The demand for relief is not a part of the facts, and hence not a part of the cause of action. The issues raised by the facts should settle the form of the trial. If the pleader states facts which would entitle him to legal relief but mistakenly asks for an equitable remedy, his cause should not be dismissed, but should

28. *Id.* at 52.

29. See also, *Endler v. State Bank & Trust Co. of Wellston*, 352 Mo. 961, 180 S.W.2d 596 (1944), and *Yellow Mfg. Acceptance Corp. v. American Taxicab Inc.*, 344 Mo. 1200, 130 S.W.2d 601 (1939).

30. The opinions are not of the Supreme Court and represent weak authority. These courts nevertheless indicate a feeling for the hardship which might result from dismissal. *Supreme Lodge, K.P. v. Dalzell*, 205 Mo. App. 207, 223 S.W. 786 (1934); *Grinnell Co., Inc. v. Farm & Home Sav. & Loan Ass'n.*, 75 S.W.2d 409 (Spr. Mo. App. 1934). See also *Paris v. Haley*, 61 Mo. 453 (1875).

31. 315 S.W.2d 836 (St. L. Mo. App. 1958).

32. *Id.* at 839.

be brought to trial and the proper relief awarded.³³ Dismissal of the complaint might cripple plaintiff's cause in cases where an attachment has been levied, or the applicable statute of limitations has run after the original complaint. Even where the complaint is dismissed with leave to amend, delay inevitably results.

Once the plaintiff has pleaded sufficient facts to show he is entitled to relief, his theory of the case should be disregarded. It is for the court to apply the law and determine what remedies are available, not the plaintiff. Dean Charles E. Clark, in speaking to this point, has said:

It seems to have been thought by some that legal rights denote a legal cause and equitable rights denote an equitable cause, and that on claims for both legal and equitable relief there must necessarily be separate causes of action. Such a view is at variance with the whole idea of the Code. It makes the relief, which means the plaintiff's lawyer's idea of the law, the test of the cause of action. Then a cause of action, instead of being a statement of facts, of past acts and events, would be an attempted prophecy of law. The sound view is that a single cause of action may give rise to various rights of action, 'formerly denominated' legal or equitable, as the case may be.³⁴

The duty of the pleader is to give a fair and sufficient statement of the facts. If he gives fair notice to his opponent and to the court, his cause should continue to judgment. Moreover, there is no reason why acceptance of Code reform should jeopardize the defendant's constitutional right to a trial by jury.³⁵ The right to trial by jury doesn't carry with it a correlative constitutional requirement of a special method of pleading. While it is beyond the scope of this article to discuss the various ways of protecting one's jury right in a merged system, other writers have pointed out ways of protecting this right without resorting to theories of pleading which are incompatible with code reform.³⁶

33. Mo. Sc. Ct. Rule 74.11 provides, in part, that the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues.

34. Clark, *The Union of Law and Equity*, 25 COL. L. REV. 1, 6 (1925).

35. The following may clarify the right to trial by jury as it relates to acceptance of the code reform. "The constitutional right of trial by jury is usually the final and ultimate argument of those who feel that old distinctions are inherent in the nature of things. . . . It applies to the form of trial, not to the form of pleading. The constitution requires no special method of pleading and the legislature was free to choose such method as it pleased. It decided upon a system of stating facts. When the pleadings are closed, and the issues formed, then comes the question of form of trial. At this point our constitution says, in effect, that either party has a right to trial by jury on issues which were formerly decided by a jury. Broadly speaking, this includes all "law" and no "equity" cases of the old regime, although this is not the exact line of demarcation. The pleadings settle the issues; the issues settle the form of trial. If the pleadings do not settle the issues, they should be made clearer. No serious constitutional difficulty need be had in working out these rules, and as a matter of fact, none is had in many jurisdictions. In a single case there may therefore be both jury issues and court issues, though the court may, if it chooses, send all the issues to the jury. The procedure is no more complicated than sending a case to a master or referee. No fundamentals of distinctive forms of action or tribunals are involved." *Id.* at 7.

36. Morris, *Jury Trial Under the Federal Fusion of Law and Equity*, 20

More than one hundred years ago, the Missouri legislature sought to abolish the distinctions between actions at law and suits in equity. It also attempted to ease technical pleading requirements by adopting a system of fact pleading. Neither code reform has been completely accepted. Although strict fact pleading is the rule when the requested remedy and the appropriate remedy are both legal, it is not when either depends upon an equitable theory to support it. In the latter situation Missouri courts go beyond the facts and classify the case as either equitable or legal depending upon the prayer for relief.³⁷ Such cases are subsequently dismissed for being brought in the "wrong" court.³⁸

The courts can and should insist that the pleader give his opponent fair notice. The courts can and should accord full protection to the right to trial by jury. It is not inevitable, however, that either of these must be sacrificed simply because of a rejection of the rule that an erroneous theory of recovery is fatal to plaintiff's case. The distinctions between legal and equitable cases are not inherent in our judicial system. Fact pleading and the union of law and equity have always been considered the foundation principles of code reform. It is time for the Missouri courts to accept these principles and thereby complete the process of reform which was initiated in 1849.

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TEXAS L. REV. 426 (1942); Van Hecke, *Trial By Jury in Equity Cases*, 31 N. C. L. REV. 157 (1952); Fraser, *The Effect of the Merger of Law and Equity on the Right to Trial by Jury*, 31 OKLA. BAR JOUR. 561 (1960).

37. In *Kesinger v. Burtrum*, 295 S.W.2d 605 (Spr. Mo. App. 1956), where the question was whether the plaintiff pleaded an action at law or in equity the court said, "[E]ven though our courts have on several occasions loosely stated the prayer is no part of the petition . . . it is clear that, in determining the cause of action intended to be pleaded under the new code, we may consider the facts pleaded and the relief sought."

38. Interestingly, every case dismissed because the action was brought in the "wrong" court necessarily involves a consideration of the relief sought, for how else does the merged court know when a case is "in equity" or "at law"?