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LAW OR EQUITY: THE RIGHT TO TRIAL BY JURY IN A CIVIL ACTION

I. RIGHT TO A JURY TRIAL

A. *The State Constitutional Guarantee*

The Missouri Constitution article 1, section 22 (a) provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate. . . ."¹ The Missouri Supreme Court has interpreted this to mean that it does not extend or contract the right to trial by jury, but preserves the right as it existed at the time of the adoption of the constitution.² In other words, since each of Missouri's four constitutions have similar provisions, the right is preserved as it existed in 1820, the date of adoption of Missouri's first constitution.³ At common law not all civil matters were tried before a jury. Issues in actions at law were triable by a jury as a matter of right while issues in suits in equity were not.⁴ Equitable issues could, however, be submitted to an advisory jury at the discretion of the chancellor.⁵ This distinction between law and equity has been perpetuated by constitutional provision and is today the most important remaining difference between the two systems.⁶

The mandate of the constitution provides a test which is primarily historical⁷ in that it requires the right of trial by jury to exist today as it did at common law in 1820. One exception to the provision that suits at law are triable by a jury as a matter of right in Missouri is the sanctioning of the pre-existing practice of appointing a referee to determine long and complicated factual issues in a suit at law.⁸ The state constitutional right to a jury trial does not extend to newly created remedies which did not exist at common law. This means that the legislature has authority to de-

1. Mo. CONST. art. II, § 28 (1875); Mo. CONST. art. I, § 17 (1865); and Mo. CONST. art. XIII, § 8 (1820) contained similar provisions.

2. *Lee v. Conran*, 213 Mo. 404, 412, 111 S.W. 1151, 1153 (1908). The court stated that the constitutional provision:

means that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law.

3. In *Berry v. St. Louis & S.F. R.R. Co.*, 223 Mo. 358, 122 S.W. 1043 (1909), the court spoke of the date of the Constitution of 1875 as controlling. However, 1820 is the effective date because, theoretically at least, the right of trial by jury existed in *status quo* from 1820 to 1875. See note 1 *supra*.

4. *Berry v. St. Louis & S.F. R.R. Co.*, *supra* note 3; *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151 (1908).

5. *E.g.*, *Adams v. Adams*, 348 Mo. 1041, 156 S.W.2d 610 (1941); *McCullough v. McCullough*, 31 Mo. 226 (1860).

6. Mo. Laws 1849, at 773, §§ 1 and 2 purported to abolish the distinctions between actions at law and suits in equity. See §§ 506.040, .050, RSMo 1959.

7. *James, Trial by Jury and the Federal Rules of Procedure*, 45 YALE L.J. 1022, 1024-25 (1936).

8. *E.g.*, *Durwood v. Dubinsky*, 291 S.W.2d 909 (Mo. 1956); *Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S.W. 791 (1897); *Edwardson v. Garnhart*, 56 Mo. 81 (1874); *Shepard v. Bank of Missouri*, 15 Mo. 143 (1851); see § 515.020, RSMo 1959.

termine if a new remedy carries with it the right to a trial by jury.⁹ If the legislature fails to state how a new remedy is to be tried, it is for the courts to apply the historical test and determine whether the remedy is of legal or equitable cognizance. It has also been held that the legislature has the power to provide for a jury trial in civil cases where it previously did not exist as a constitutional right.¹⁰ A few states have construed their constitutions to guarantee the right of a non-jury trial in equitable matters.¹¹ The right to a jury trial may be waived¹² and both the legislature and the courts have the power to set forth reasonable regulations concerning when a jury trial may be demanded, the form of the demand, and what constitutes waiver.¹³

B. *The Historical Patterns*

Before the adoption of Missouri's first constitution in 1820 there was no fixed line separating law and equity. Historically, each system continually borrowed from the other.¹⁴ As a result many matters which were once exclusively equitable in nature became defenses to legal actions.¹⁵ Likewise, issues which were once exclusively legal in nature became triable in equity.¹⁶ One such case was the situation in which the plaintiff requested specific performance but defendant denied the existence of the contract. Prior to merger of law and equity the parties would have been left to an action at law, which meant that the plaintiff would first have to establish the existence of the contract at law and if successful sue on it in equity.

9. *E.g.*, *New York Life Ins. Co. v. Feinberg*, 357 Mo. 1044, 212 S.W.2d 574 (1948); *Reliable Life Ins. Co. v. Beell*, 246 S.W.2d 371 (St. L. Mo. App. 1952); see § 76.580, RSMo 1959; *cf.* *Nistendirk v. McGee*, 225 F. Supp. 881 (W.D. Mo. 1963).

10. *Berry v. St. Louis & S.F. R.R. Co.*, 223 Mo. 358, 122 S.W. 1043 (1909). The defendant argued that a statute making fraud actions triable by jury was unconstitutional because it denied him his right to a non-jury trial. The court rejected this argument holding that the constitution only preserved the right to jury trial and did not preserve any right to a non-jury trial. *But see* *Wolfsberger v. Hoppenjon*, 334 Mo. 817, 68 S.W.2d 814 (1933) where the trial court was held in error for trying a case before a jury because the issue of quiet title was historically equitable in nature and defendant demanded a trial by the court without a jury.

11. *Brown v. Buck*, 75 Mich. 274, 42 N.W. 827 (1899); *Callanan v. Judd*, 23 Wis. 343 (1868).

12. *E.g.*, *State ex rel. State Highway Comm'n v. Tighe*, 386 S.W.2d 115 (Mo. 1964); *Davis v. Davis*, 284 S.W. 2d 575 (Mo. 1955); *O'Day v. Conn*, 131 Mo. 321, 32 S.W. 1109 (1895).

13. *City of St. Louis v. International Harvester Co.*, 350 S.W.2d 782 (Mo. En Banc 1961); § 510.190 (2), RSMo 1959.

14. VI W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 456 (1931).

15. *E.g.*, *Hubbard v. Slavens*, 218 Mo. 598, 117 S.W. 1104 (1909) (estoppel); *Kitchen v. Cape Girardeau & State Line R.R. Co.*, 59 Mo. 514 (1875) (certain issues of fraud); *Joyce v. Murnaghan*, 17 Mo. App. 11 (St. L. Ct. App. 1855) (mistake). *But cf.* *Och v. The Missouri, Kansas & Texas Ry. Co.*, 130 Mo. 27, 31 S.W. 962 (1895); *Homuth v. Metropolitan St. Ry. Co.*, 129 Mo. 629, 31 S.W. 903 (1895) (fraud in defense of a release). The latter two cases have, however, been legislatively overruled so that fraud in defense of a release is triable by a jury. § 510.190 (1), RSMo 1959. *See* *Berry v. St. Louis & S.F. R.R. Co.*, 223 Mo. 358, 122 S.W. 1043 (1909) where the predecessor of § 510.190 (1) was held constitutional. *See also* I. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 456 (1931).

16. *James, Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 658 (1963).

Later, equity assumed jurisdiction to decide if the contract existed.¹⁷ The result was a growth of law and equity characterized by overlapping and concurrent jurisdiction. Obviously, this increased the difficulty of determining which issues were legal and which were equitable. Professor Fleming James indicated that, because of the manner in which law and equity developed, those issues triable by jury were determined as an automatic result of which court was the "proper forum" rather than by a consideration of which issues were best suited to jury trial.¹⁸

C. Merger of Law and Equity

In an attempt to solve the problems inherent in the burdensome separation of law and equity,¹⁹ Missouri, in 1849, adopted a general code of civil practice merging the two systems.²⁰ A single court using a single system of procedure was charged with the administration of all law.²¹ One of the immediate problems arising from the merger was the question of when the right to trial by jury was protected by the Missouri Constitution. The legislature attempted to solve the problem with the enactment of legislation purporting to set forth the manner in which matters triable by jury were to be determined.²² In 1849 the following two statutes were enacted:

§ 6. Whenever in an action for the recover of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial be waived as provided in section 1, of Article XV, or a reference be ordered as provided in Article XVI.

§ 7. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it as provided in the last section, and those to which it refers.²³

The statutory scheme gave birth to considerable confusion because it did not always require the same result as did the historical test of the constitution. For instance, an action for an accounting would seem to be triable by jury under the old statutes while the historical test would prevent such a jury trial.²⁴ Many of the older cases relied, at least in part, on the application of the statutory test.²⁵ The better reasoned cases, however, applied the historical constitutional test, holding the right of trial by jury

17. *Denton v. Stewart*, 29 Eng. Rep. 1156 (Ch. 1786).

18. James, *supra* note 16, at 661-63.

19. W. WALSH, EQUITY § 7 (1930).

20. Mo. Laws 1849, at 73, § 1. See also Morgan, *Law and Equity: Pleading Problems Resulting From Incomplete Merger*, 32 Mo. L. REV. 375 (1967).

21. For the difference in law and equity pre-merger rules of procedure and evidence see 2 J. WIGMORE, EVIDENCE §§ 575-77 (3d ed. 1940).

22. Missouri patterned its legislation after an early New York provision. N.Y. Sess. Laws ch. 379, § 208 (1848).

23. Mo. Laws 1849, at 89, §§ 6, 7. These same provisions last appeared in §§ 1099, 1100, RSMo 1939. The present section was formulated in 1943 and is now § 510.190 (1), RSMo 1959.

24. *E.g.*, *Ely v. Coontz*, 167 Mo. 371, 67 S.W. 299 (1902).

25. *E.g.*, *Johnson v. Blell*, 61 Mo. App. 37 (St. L. Ct. App. 1895).

inviolable.²⁶ Finally, in 1943 the confusion was alleviated when the language of the original jury trial statute was abandoned in favor of the present statute which provides:

(1) The right of trial by jury as declared by the constitution or as given by a statute shall be preserved to the parties inviolate. In particular, any issue as to whether a release, composition, or discharge of plaintiff's original claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless waived.²⁷

This change in wording indicated a preference for the historical constitutional test.

D. Civil Actions Which Are Counterparts of Former Legal Action or Equity Suits

1. Actions Legal in Nature

Following the premise that issues which were formerly legal in nature give rise to a right to trial by jury, many cases are easily classified. Action in tort for personal injury,²⁸ property damage,²⁹ trespass,³⁰ and fraud or misrepresentation,³¹ are legal in nature and triable by jury as a matter of right. Likewise, on action for recovery of a debt,³² a suit on a note,³³ and the question of damages for breach of contract³⁴ are triable by jury. Actions "on account" and "for account" are considered legal in nature as distinguished from an accounting which is equitable in nature.³⁵ Several actions involving disputes concerning title to land are also triable by jury including: suits to partition,³⁶ to quiet title,³⁷ ejectment,³⁸ adverse

26. *E.g.*, *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1914); *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151 (1908); *Hunter v. Whitehead*, 42 Mo. 524 (1868). See generally 4 J. POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941).

27. § 510.190 (1), RSMo 1959.

28. *Axley v. Hammock*, 185 Ark. 939, 50 S.W.2d 608 (1932).

29. *New Harmony Lodge, I.O.O.F. v. Kansas City, Fort Scott & Memphis R.R. Co.*, 100 Mo. App. 407, 74 S.W. 5 (St. L. Ct. App. 1903).

30. *Minor v. Burton*, 228 Mo. 558, 128 S.W. 964 (1910).

31. *Sheldon v. Brace Motor Co.*, 210 S.W.2d 110 (K.C. Mo. App. 1948).

32. *Buckley v. Maupin*, 344 Mo. 193, 125 S.W.2d 820 (1939).

33. *Stalter v. Stalter*, 151 Mo. App. 66, 131 S.W. 747 (Spr. Ct. App. 1910); *Bank of Missouri v. Anderson*, 1 Mo. 244 (1822).

34. *E.g.*, *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S.W. 1007 (1903); *Kitchen v. Cape Girardeau & State Line R.R.*, 59 Mo. 514 (1875); *Wolf v. Hartford Fire Ins. Co.*, 219 Mo. App. 307, 269 S.W. 701 (K.C. Ct. App. 1925); *Donovan v. Barnett*, 27 Mo. App. 460 (St. L. Ct. App. 1887).

35. *Dahlberg v. Fisse*, 328 Mo. 213, 40 S.W.2d 606 (1931).

36. *Benoist v. Thomas*, 121 Mo. 660, 27 S.W. 609 (1894); *Hagemann v. Pinska*, 225 Mo. App. 521, 37 S.W.2d 463 (St. L. Ct. App. 1931).

37. *E.g.*, *Wolfsberger v. Hoppenjon*, 334 Mo. 817, 68 S.W.2d 814 (1934); *Flynn v. McNeely*, 178 S.W. 69 (Mo. 1915); *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1914); *Peniston v. Hydraulic Press Brick Co.*, 234 Mo. 698, 138 S.W. 532 (1911).

38. *Hagemann v. Pinska*, 255 Mo. App. 521, 37 S.W.2d 463 (St. L. Ct. App. 1931).

possession,³⁹ and accretion.⁴⁰ Will contests⁴¹ and actions for replevin⁴² are considered legal in nature and carry with them the right to trial by jury. Actions in magistrate court, such as the statutory remedies of forcible entry and unlawful detainer, are also triable by jury because their counterparts before 1820 were legal in nature.⁴³

2. Actions Equitable in Nature

Similarly, the modern counterparts of actions which were formerly recognized only in equity⁴⁴ are not accompanied by the right to trial by jury.⁴⁵ Thus, actions involving the establishment, enforcement, protection, and preservation of a trust,⁴⁶ suits to establish a resulting trust,⁴⁷ and suits to partition equitable estates and interests⁴⁸ do not raise issues for jury determination. The right to jury trial may not be present even though the character of the relief is such that the action will be legal in nature.⁴⁹ This is the case when a constructive trust is enforced by an action for money had and received⁵⁰ or damages are obtained from a trustee who is liable for breach of trust.⁵¹ Foreclosure of a deed of trust,⁵² a creditor's bill in equity,⁵³ a suit to establish a lien on real or personal property,⁵⁴ and an application for a widow's allowance⁵⁵ are all equitable in nature.

39. *Hatton v. City of St. Louis*, 264 Mo. 634, 175 S.W. 888 (1915); *Hubbard v. Slavens*, 218 Mo. 598, 117 S.W. 1104 (1909).

40. *Withers v. Kansas City Suburban Belt R.R.*, 226 Mo. 373, 126 S.W. 432 (1910); *Lee v. Conran*, 213 Mo. 4041, 111 S.W. 1151 (1908).

41. *Lamb v. Stubblefield*, 186 S.W. 730 (Spr. Ct. App. 1916).

42. *E.g.*, *Walter v. Alt*, 152 S.W.2d 135 (Mo. 1941); *Garland v. Smith*, 125 Mo. 39, 28 S.W. 191 (1894), *aff'd*, 127 Mo. 583, 29 S.W. 836 (En Banc 1895); § 473.083 (1), RSMo 1959.

43. *E.g.*, *Renshaw v. Reynolds*, 317 Mo. 484, 297 S.W. 374 (1927); *Sanders v. Brooks*, 238 Mo. App. 485, 183 S.W.2d 353 (K.C. Ct. App. 1944); *Jackly v. Taylor*, 210 Mo. App. 195, 242 S.W. 997 (St. L. Ct. App. 1922). *See* Mo. Constr. art. V, §§ 19, 20; *State v. Anderson*, 413 S.W.2d 161 (Mo. 1967); § 513.630, RSMo 1959. *But see State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551 (K.C. Ct. App. 1891).

44. *See generally* I W. HOLDSWORTH, *supra* note 14, at 466.

45. Except where the legislature has specifically provided for a jury trial. *Berry v. St. Louis & S.F. R.R.*, 223 Mo. 358, 122 S.W. 1043 (1909); § 510.190, RSMo 1959.

46. *State ex rel. Clay County State Bank v. Waltner*, 346 Mo. 1138, 145 S.W.2d 152 (1940).

47. *Shelton v. Harrison*, 182 Mo. App. 404, 167 S.W. 634 (Spr. Ct. App. 1914).

48. *Coffman v. Gates*, 142 Mo. App. 648, 655, 121 S.W. 1078, 1079 (St. L. Ct. App. 1909).

49. *Kimberlin v. Roberts*, 341 Mo. 267, 269, 107 S.W.2d 24, 26 (1937).

50. *Campbell v. Webb*, 363 Mo. 1192, 258 S.W.2d 595 (1953).

51. *Sherwood v. Saxton*, 63 Mo. 78 (1876). When, however, the prayer for relief is to trace trust property as a definite charge upon an estate the remedy is equitable in nature. *Ibid.*

52. *E.g.*, *Long v. Long*, 141 Mo. 352, 44 S.W. 341 (1897). *Cf. Louis v. Andrea*, 338 S.W.2d 96, 105 (Mo. 1960).

53. *Cape County Sav. Bank v. Wilson*, 225 Mo. App. 14, 34 S.W.2d 981 (St. L. Ct. App. 1931).

54. *E.g.*, *Bronson v. Wanzer*, 86 Mo. 408 (1885); *Ellis & Cavender v. Kreutzinger*, 31 Mo. 432 (1862); *Swan v. Tabor*, 266 S.W. 754 (Spr. Mo. App. 1924).

55. *Bradley v. Woerner*, 46 Mo. App. 371 (St. L. Ct. App. 1891).

All actions in which specific performance⁵⁶ or an injunction⁵⁷ is properly sought are equitable in nature. The same is true of actions which pray for relief from penalties, fraud, undue influence or mistake in an action for either rescission,⁵⁸ reformation,⁵⁹ or cancellation of an instrument.⁶⁰ Actions involving the administration of estates,⁶¹ suits for an accounting,⁶² and suits for partnership accounting⁶³ are also equitable in nature and are not accompanied by a right to trial by jury. There is also no right to a jury trial in a stockholders' derivative suit.⁶⁴

When the civil action involves only a counterpart of a former legal or equitable action the application of the historical test is simple. However, application becomes more difficult when both legal and equitable issues appear in the same lawsuit.

II. THE EQUITABLE CLEAN-UP DOCTRINE OF

A. *The Historical Patterns*

Although purporting to apply the historical test as required by the constitution, the Missouri courts apply the "equitable clean-up doctrine" to determine when a right to trial by jury exists. Briefly stated equitable clean-up is the concept that if a ground for equitable relief exists, equity will retain jurisdiction to decide all issues of controversy between the parties to the suit, including the purely legal issues involved.⁶⁵ Prior to the merger of law and equity, there were at least three areas where application of the clean-up doctrine was important:⁶⁶ (1) a plaintiff entitled to both legal and equitable relief needed the opportunity to have one action settle both claims and thus save the time and expense involved in presenting the claims in two separate actions;⁶⁷ (2) a plaintiff who had sought equitable relief in good faith but had been unsuccessful needed relief from the running, at law, of the statute of limitations, and (3) a plaintiff who made a wrong choice of forum needed relief from the undue expense and

56. *E.g.*, *Ragsdale v. Achuff*, 324 Mo. 1159, 27 S.W.2d 6 (1930); *Spague v. Carroll*, 188 S.W. 63 (Mo. 1916); *McCullough v. McCullough*, 31 Mo. 226 (1860).

57. *State ex rel. Burns v. Shain*, 297 Mo. 369, 248 S.W. 591 (*En Banc* 1923); *Eckhardt v. Bock*, 159 S.W.2d 395 (St. L. Mo. App. 1942).

58. *Shearer v. Farmers' Life Ins. Co.*, 262 F. 861 (8th Cir. 1919).

59. *Toucey v. New York Life Ins. Co.*, 102 F.2d 16 (8th Cir.), *cert. denied*, 307 U.S. 638 (1939).

60. *Seested v. Dickey*, 318 Mo. 192, 300 S.W. 1088 (1927); *Weil v. Kume*, 49 Mo. 158 (1871); *Bray v. Thatcher*, 28 Mo. 129 (1859).

61. *Stevens v. Larwill*, 110 Mo. App. 140, 84 S.W. 113 (K.C. Ct. App. 1904); *Pearson v. Haydel*, 87 Mo. App. 495 (St. L. Ct. App. 1901).

62. *E.g.*, *Johnson v. Blell*, 61 Mo. App. 37 (St. L. Ct. App. 1894). *See also* 4 J. POMEROY, *supra* note 26.

63. *E.g.*, *Ely v. Coontz*, 167 Mo. 371, 67 S.W. 299 (1902); *Hunter v. Whitehead*, 42 Mo. 524 (1868).

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

65. I J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 71 (5th ed. 1849). *See Crenshaw v. Looker*, 185 Mo. 375, 84 S.W. 885 (1904).

66. Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

67. I J. STORY, *supra* note 65, at § 456.

delay of refiling his action at law.⁶⁸ Because of these needs equity expanded its jurisdiction⁶⁹ to include the power to grant damages and other legal relief incidental to some substantial equitable right.⁷⁰

Equitable clean-up was not universally applied. It had strict limitations and was exercised only when in the discretion of the chancellor it was proper to do so.⁷¹ One element which weighed heavily against the decision to exercise the jurisdiction conferred by the clean-up doctrine was the absence of a right to a jury trial in the courts of equity.⁷² Justice Story felt that the jury determination of an issue of damages was of such importance that in the proper case equity would refuse to exercise its jurisdiction and leave the parties to their remedy at law.⁷³

B. Present Missouri Law

1. The Need for the Doctrine

The reasons for application of equitable clean-up were arguably eliminated by the merger of law and equity, since the new rules concerning joinder of claims and causes of action have removed the need for multiple actions.⁷⁴ Liberal rules of amending the petition prevent the need to dismiss upon denial of the equitable relief. Today, simply by transferring the action to the jury docket the statute of limitations problem is avoided. Furthermore, since total jurisdiction has been conferred on a single court, it is unnecessary to consider the law and equity sides of the court as separate. Thus, the only reason the ancient differences in law and equity jurisdiction should be examined is to determine when the historical test requires a jury trial.

Modern application of the clean-up doctrine has very limited justification. Professor Levin suggests only three instances in which it should be used:⁷⁵ (1) the situation where the plaintiff comes into equity for specific relief and thereafter the defendant's conduct renders such relief improper;⁷⁶ (2) the situation where the plaintiff seeks specific relief in equity in good faith only to learn that some prior action of the defendant has rendered equitable relief improper;⁷⁷ and (3) the situation where the plaintiff sues for specific relief and is not entitled to such because of his own impropriety in dealing with the defendant. The harm in denying equity jurisdiction in

68. See *Waddle v. Frazier*, 245 Mo. 391, 151 S.W. 87 (1912); *Grinnell Co. v. Farm & Home Sav. & Loan Ass'n*, 75 S.W.2d 409 (Spr. Mo. App. 1934).

69. Originally equity did not have jurisdiction to grant damages of any nature. E. FRY, *SPECIFIC PERFORMANCE OF CONTRACTS* § 764 (2d ed. 1871).

70. I J. STORY, *supra* note 65, at § 71. Justice Story indicates that the principle that once equity jurisdiction attaches the court can grant complete relief evolved, in part at least, from the use of equitable discovery.

71. I J. STORY, *supra* note 65, at §§ 71, 72.

72. 2 A. FREEMAN, *LAW OF JUDGMENTS* 1252, 1360-62 (5th ed. 1925).

73. I J. STORY, *supra* note 65, at § 90. See *Thias v. Siener*, 103 Mo. 314, 15 S.W. 772 (1890).

74. § 509.060, RSMo 1959.

75. Levin, *supra* note 66, at 335.

76. *Greenaway v. Adams*, 12 Ves. Jr. 395, 33 Eng. Rep. 149 (Ch. 1806). See *Pittman v. Faron*, 315 S.W.2d 836 (St. L. Mo. App. 1958).

77. *Lee v. Howe*, 27 Mo. 521 (1858).

this latter situation is that to do so would leave the plaintiff to a jury at law. In such a situation a jury may reduce the damages because of the plaintiff's sharp practice.⁷⁸ But even in these three situations the problems involved can be avoided without applying the clean-up doctrine. The defendant's conduct subsequent to the filing of the petition can still either be enjoined or be remedied by an award of increased damages. Should the plaintiff mistake his remedy, liberal allowance of amendment will avoid any harm. When the plaintiff is denied equitable relief because of his misconduct it would seem that his demand for relief would require the rigid scrutiny of a jury.

2. Use of the Doctrine to Deny the Right to Trial by Jury

The Missouri courts have applied the doctrine of equitable clean-up in deciding when the right to a jury trial exists in three situations involving both legal and equitable claims: (1) the situation where the plaintiff presents both an equitable and a legal claim in the same action;⁷⁹ (2) the situation where the plaintiff presents a legal claim and the defendant presents an equitable defense;⁸⁰ and (3) the situation where the plaintiff presents an equitable claim and the defendant asserts a legal counterclaim.⁸¹ In all three situations the courts have stated that since prior to the merger of law and equity the clean-up doctrine would have drawn the entire controversy into equity, no right to trial by jury now exists.

The remainder of this comment will examine the right to a jury trial in a civil action in terms of what the historical patterns were, what the present stage of development of Missouri law is, and what changes, if any, are needed in order to comply with the constitutional requirement. The following four categories⁸² of civil actions will be examined in detail: (1) actions in which the plaintiff injects both legal and equitable claims; (2) actions in which the plaintiff presents a legal claim and the defendant sets up an equitable defense; (3) actions in which the plaintiff presents an equitable claim and the defendant a legal counterclaim; (4) actions for declaratory judgment.

III. CIVIL ACTIONS IN WHICH PLAINTIFF INJECTS BOTH LEGAL AND EQUITABLE CLAIMS

A. Historical Patterns

Many situations arose in which both legal and equitable relief were necessary to render full and complete relief to the plaintiff. There were four basic patterns present at common law: (1) the situation in which the plaintiff had to obtain equitable relief prior to obtaining legal relief; (2) the situation in which legal relief had to be obtained prior to obtaining equitable relief; (3) those situations in which the plaintiff had a limited

78. See *Hanson v. Neal*, 215 Mo. 256, 114 S.W. 1073 (1908).

79. *Sebree v. Rosen*, 374 S.W.2d 132 (Mo. 1964).

80. *Martin v. Turnbaugh*, 153 Mo. 172, 54 S.W. 515 (1899).

81. *McKinley v. Durbin*, 231 S.W.2d 286 (St. L. Mo. App. 1950).

82. These categories are patterned after those found in James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

choice between a legal and an equitable remedy; and (4) those situations in which the plaintiff could, to some extent, control the issues to be determined by the jury.

1. Equitable Relief First

Prior to the merger of law and equity, if the plaintiff desired both legal and equitable relief he was often required to seek the equitable relief first. For example, suppose X claimed that a written contract with Y was incorrect as written and that Y had breached the real agreement which did not appear on the face of the writing.⁸³ In such a case X would first have had to go into equity and seek a decree of reformation so that the written instrument would represent the real terms of the agreement. If the chancellor found that X was entitled to equitable relief, reformation would be granted along with other incidental relief to which X was entitled, including the legal relief of damages for breach of contract (equitable clean-up).⁸⁴ Also, had Y first instituted suit at law on the written contract X could have obtained an injunction abating this action until determination of the issue of equitable reformation.⁸⁵ In both situations neither party would have a choice as to the mode of trial, because the equitable issues would have to be determined first, without the presence of a jury.⁸⁶ As will be seen however, the favored view as to the clean-up doctrine was that it would *not* require the plaintiff to seek his incidental legal relief in the action in equity.⁸⁷

Suppose, however, that X had sought only reformation in the court of equity. After equity had decreed such reformation X could then sue at law for damages. Issues of fact which were necessarily determined in the equity proceeding would not carry the right to a jury trial in the later action because the doctrine of collateral estoppel would bind the parties as to such issues determined.⁸⁸ But as to the fact issues not previously determined either party could demand a trial by jury. In this example, such fact issues not determined would include the issues of breach of the reformed contract and damages. Thus, the plaintiff by presenting his claims in this manner could exercise some control over whether any issues were to be determined by a jury.

2. Legal Relief First

In the second pre-merger situation, the plaintiff desired both legal and equitable relief but equity refused relief until a preliminary legal issue could be determined. An example of this situation would be a suit to enjoin a trespass in which the legal title to the land had been disputed. Be-

83. *E.g.*, *Smith v. Githens*, 271 S.W.2d 374 (Spr. Mo. App. 1954); *accord*, *Kelly v. Hurt*, 61 Mo. 463 (1875).

84. *James*, *supra* note 82, at 670; *accord*, *Goldman v. Ashbrook*, 262 S.W.2d 165, 168 (K.C. Mo. App. 1953).

85. *Enlow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); 1 J. POMEROY, *EQUITY JURISPRUDENCE* 370, 371, 375 (5th ed. 1941).

86. *Ibid.*

87. *See* notes 99 and 100 *infra*.

88. *McCoid*, *Right to Jury Trial in the Federal Courts*, 45 IOWA L. REV. 726 (1960); *RESTATEMENT OF JUDGMENTS* § 68 (1942).

cause equity refused to try issues of legal title to land,⁸⁹ the plaintiff had to proceed at law and either party could demand a jury trial. If the plaintiff won he could then present a petition in equity to restrain the defendant from interfering with the land.⁹⁰ In the subsequent equity suit the principle of collateral estoppel would bind the parties to the extent that the prior action at law had determined the issues.⁹¹

3. Election of Remedy

The third situation gave the plaintiff a limited choice between a legal remedy and an equitable remedy. The typical case involved a breach of contract for the sale of realty in which the purchaser could sue for specific performance or for damages.⁹² In such a situation plaintiff's election of remedy would govern the mode of trial. If he desired to have a jury trial he would choose the legal remedy of damages. If he wanted to avoid a jury trial he would choose the equitable remedy of specific performance.

4. Plaintiff Controls the Issues

The first three situations did not represent the majority of pre-merger cases. Usually, the plaintiff had a great deal of control over whether a jury would determine the issues common to his legal and equitable claims. The plaintiff's power to control the issues triable by jury was aptly described as follows:

On the one hand, he might have filed a bill in equity for injunctive relief with an additional prayer for incidental damages which equity had power to award under the cleanup doctrine. Under this procedure neither party had a right to jury trial on any fact issue. Or he might first have filed a bill in equity for injunctive relief and later sued at law for damages. Arguably this was splitting a cause of action since he could have gotten damages in the equity proceeding; but assuming the availability of this option, it appears that plaintiff could limit jury trial to the damage issue alone. Principles of collateral estoppel would make the equity court's determination of such facts . . . binding in the later law action, to the extent that they were necessarily decided by the equity decree. Conversely, plaintiff might sue first at law for damages and later proceed in equity for injunctive relief. Here principles of collateral estoppel would make the jury's determinations binding on the court in the later equity proceeding. Thus plaintiff could completely avoid jury trial, block it except for the damage issue, or guarantee it on all issues except right to an injunction.⁹³

89. *E.g.*, *Freer v. Davis*, 52 W. Va. 1, 43 S.E. 164 (1903); *New Castle v. Raney*, 130 Pa. 546, 18 A. 1066 (1890). *See also* *Goldman v. Ashbrook*, 262 S.W.2d 165 (K.C. Mo. App. 1953).

90. *James*, *supra* note 82, at 671.

91. *McCoid*, *supra* note 88, at 729; W. WALSH, *EQUITY* § 16 (1930).

92. *Hamilton v. Hamilton*, 59 Mo. 232 (1875); *accord*, *Holland v. Anderson*, 38 Mo. 55 (1866).

93. *McCoid*, *supra* note 88, at 729-30.

These same principles applied to situations where plaintiff needed both an injunction and damages,⁹⁴ or where he needed both specific performance and damages,⁹⁵ in order to have complete relief.

5. Did the Clean-Up Doctrine Cause the Rules of Res Judicata to Apply?

Two periods in the history of equity jurisdiction must be examined with regard to the plaintiff's ability to present his equitable and legal issues in separate actions: (1) original or classical equity and (2) equity as it existed just prior to merger. In classical equity the chancellor refused to entertain any legal issues, including damages;⁹⁶ hence the plaintiff could have presented his legal and equitable claims in different suits and the doctrine of res judicata would not have barred the second suit. In the more recent situation, however, a question arose as to whether the jurisdiction obtained by reason of the equitable clean-up doctrine was such as to cause the application of the rules of res judicata.⁹⁷ Specifically, if the plaintiff first proceeded in equity where he could have presented his legal claim by reason of the clean-up doctrine, would his failure to present the legal claim bar a subsequent action at law for damages? The authorities were split on this issue.⁹⁸ One line of cases reasoned that if no claim for damages was made in the equity action and damages were not mentioned in the chancellor's decree, the right to damages had not been adjudicated and could be asserted in a subsequent action at law.⁹⁹ Under this view, the jurisdiction obtained by the clean-up doctrine did not require the application of the rules of res judicata, *i.e.*, the jurisdiction was considered discretionary. A second line of cases adopted the view that since the petition in equity could have included a claim for incidental legal relief under the clean-up rule, the plaintiff had a duty to present all claims in a single equity action.¹⁰⁰ Under this view the clean-up doctrine conferred mandatory, rather than discretionary, jurisdiction and the rules of res judicata applied. This view, however, was criticized because it results in a denial of trial by jury on the legal issues presented.

In the case of a complete denial of equitable relief there is ordinarily either no jurisdiction to grant legal relief at all or the court is not bound to retain jurisdiction for that purpose . . . For

94. *Sapp v. Garrett*, 284 S.W.2d 49 (K.C. Mo. App. 1955).

95. *Dyer v. Union Elec. Co.*, 318 S.W.2d 401 (Spr. Mo. App. 1958).

96. E. FRY, *SPECIFIC PERFORMANCE OF CONTRACTS*, *supra* note 69.

97. II A. FREEMAN, *supra* note 72, at § 593.

98. *Ibid.*

99. *E.g.*, *Hofstetter v. Myers Const., Inc.*, 170 Kan. 464, 227 P.2d 115 (1951); *Chanute Brick & Tile Co. v. Gas Belt Fuel Co.*, 89 Kan. 177, 130 P. 649 (1913); *Hampton v. Cope*, 144 Ky. 720, 139 S.W. 937 (1911); *Piro v. Shipley*, 33 Pa. Super. 278 (1907); *Perdue v. Ward*, 88 W. Va. 371, 106 S.E. 874 (1921). *See* Annot., 26 A.L.R.2d 446 (1952).

100. *E.g.*, *Walzl v. King*, 113 Md. 550, 77 A. 1117 (1910); *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N.W. 767 (1902); *Interlied v. Whaley*, 32 N.Y.S. 640 (1895); *Coulter v. Davis*, 81 Tenn. (13 Lea) 451 (1884). *See also* *Prothero v. Phelps*, 25 L.R. 105 (ch 1855).

this reason unless it appears that the question of legal relief has actually been litigated, the judgment is not a bar.¹⁰¹

It is submitted that the preferred view was that a prior equity decree was not a bar to the subsequent action at law on a separate claim, thus making the jurisdiction obtained by the clean-up doctrine discretionary.¹⁰²

The rules of *res judicata* did not apply when the plaintiff proceeded first at law and then in equity.¹⁰³ Because there was no rule at law comparable to the doctrine of equitable clean-up, the plaintiff had no duty to present his equitable claim along with his legal claim for relief.¹⁰⁴ The same results occurred both in equity just prior to merger and in classical equity. Notwithstanding the existence of the clean-up doctrine the plaintiff was able to proceed in either court without the law action being a bar to a later suit in equity.¹⁰⁵

B. Present Missouri Law

1. Equitable Relief First

Since the merger of law and equity, the application of the historical test to situations involving both legal and equitable relief presents some very perplexing problems concerning the order of trial and the existence of the right to trial by jury. Where the equitable issue must be decided before the legal issue, application of the historical test requires that the equitable issue be tried first by the court and then, if either party demands it, the legal issue should be tried before a jury. However, many Missouri cases have taken the position that the clean-up doctrine is mandatory and that once the court takes such a case it has jurisdiction to determine the legal factual issues without a jury. *Sebree v. Rosen*¹⁰⁶ involved a suit to cancel a forgiveness of a debt because of fraud and for a legal judgment on the notes. The equitable decision on cancellation of the forgiveness had to be made prior to any determination of recovery on the notes. The Missouri Supreme Court stated in dictum that

[a] suit on a promissory note is ordinarily an action at law, but where, as here, a court of equity once acquires jurisdiction, it can retain jurisdiction to do full and complete justice even though the additional relief involves adjudicating matters of law and rendering a money judgment.¹⁰⁷

The danger in reciting this classic rule unnecessarily is that it may be used to deny the parties valid opportunity to have a jury try the legal issue involved. Under the favored view,¹⁰⁸ the equitable clean-up doctrine was

101. II A. FREEMAN, *supra* note 72, at 1252.

102. I J. STORY, *supra* note 65, at §§ 71, 72.

103. See *Tipping v. St. Helen's Smelting Co.*, L.R. 1 Ch. 66 (1865); *St. Helen's Smelting Co. v. Tipping*, 642 11 Eng. Rep. 1483 (1865).

104. II A. FREEMAN, *supra* note 72, at §§ 643, 644, 647.

105. *Givens v. Peake*, 31 Ky. 225 (1833).

106. 374 S.W.2d 132 (Mo. 1964). See also *Kelly v. Hurt*, 61 Mo. 463 (1875).

107. See *Sebree v. Rosen*, 374 S.W.2d 132, 138 (Mo. 1964).

108. II A. FREEMAN, *supra* note 72, at § 593.

not considered mandatory in this situation and the chancellor would take jurisdiction over legal matters only when the plaintiff prayed for the additional relief in equity.¹⁰⁹ Since merger, however, the plaintiff is compelled to request in one civil action all the relief he desires concerning a single transaction.¹¹⁰ The point is that equitable clean-up should not be applied when the plaintiff demands a jury trial of legal issues which have not been determined by the adjudication of the equitable issues. To do so would deny plaintiff his constitutional right to trial by jury. This is because under the favored historical view the plaintiff had an option of combining his claims into one action in equity or separating his actions into an equity suit and a legal action in which collateral estoppel¹¹¹ would bind some issues and leave others triable by a jury.

2. Legal Relief First

There have also been Missouri cases since merger where the situation required both legal and equitable relief, but where equity was forced to refuse relief until the legal issue had been determined.¹¹² In this type of situation, the trial judge should see that the legal issue is determined before the equitable issue. Historically, the equitable clean-up doctrine was never applied to this situation because the plaintiff would have presented his legal claim at law before instituting the equity action. However, the Missouri courts have applied the equitable clean-up doctrine to deny trial by jury. In *Goldman v. Ashbrook*¹¹³ plaintiff brought suit for money lent to the defendant for the purpose of remodeling defendant's home. Plaintiff also prayed for both specific performance of an agreement in which defendant agreed to subject her home to a lien for the loan and for an injunction restraining defendant from disposing of the home. Historically, legal issues of the amount and incurring of the debt would have been determined at law, and then the plaintiff would have had to go into equity to establish the lien.¹¹⁴ The defendant's demand for a jury trial however, was denied. On appeal, the Kansas City Court of Appeals affirmed the denial stating:

109. I J. STORY, *supra* note 65, at § 71. Justice Story interpreted the rule of equity jurisdiction over legal issues as discretionary rather than mandatory. He stated that the rule is that the equity court *may* retain jurisdiction over the legal issues if the plaintiff prays for it to do so.

110. *Williams v. City of Hayti*, 184 S.W. 470 (Mo. 1916); *Dunn v. Pickard*, 284 S.W.2d 6 (K.C. Mo. App. 1955). See generally *Krummenacher v. Western Auto Supply Co.*, 358 Mo. 757, 217 S.W.2d 473 (En Banc 1949); *Goldman v. Ashbrook*, 262 S.W.2d 165 (K.C. Mo. App. 1953); § 509.060, RSMo 1959.

111. *Austin v. Brooklyn Cooperage Co.*, 285 S.W. 1015, 1016 (Spr. Mo. App. 1926). See also *McCoid*, *supra* note 88, at 730.

112. *Wynn v. Cory*, 43 Mo. 301 (1869). In this case the plaintiff sued for ejectment, damages and for cancellation of a quitclaim deed from a third party to the defendant. The trial court proceeded to try the case as one in equity but first submitted the issues of title to the land and damages to the jury which found for plaintiff on both. The supreme court reversed stating that the equitable and legal claims were improperly joined. This decision is clearly erroneous since the merger of law and equity occurred in Missouri in 1849, but the importance of the case lies in the mode of trial at the lower level.

113. 262 S.W.2d 165 (K.C. Mo. App. 1953).

114. Cases cited note 54 *supra*.

It would appear clear to the trial court in the instant case that if the plaintiff should be entitled, in his equitable action as pleaded, to a judgment for the money loaned and an equitable lien on certain real estate of defendant to secure the same, that a mere judgment in his action at law for the money loaned would not afford the plaintiff complete and adequate relief. In fact there is no action at law conceivable, that would adjudge in the plaintiff an equitable lien on real estate. . . . The equity jurisdiction of the court having attached under the pleadings and the proof, the court was authorized to dispose of both the legal and equitable aspects of the controversy and to do full and complete justice therein.¹¹⁵

The power to do "full and complete justice" was, however, discretionary in the court of equity and such discretion was never exercised in such a way as to harm either plaintiff or defendant. It is in this respect that the *Goldman* case departs from the pre-merger treatment in denying defendant her constitutional right to a jury trial.¹¹⁶ The case also applies the clean-up doctrine in a situation where historically it would not have been applicable. In *Goldman* a jury should have been called to hear all the evidence pertaining to the legal issues of the making of the loan and the amount of the debt. Evidence on both the legal and the equitable issues could have been taken at the same time, unless there was evidence on the equitable issue which might have unduly influenced or confused the jury in which case such evidence could be taken outside the jury's presence. The jury would determine the legal issues first and, then, if necessary, the court would determine the equitable issues of fact not resolved by the jury's determination.¹¹⁷

3. Election of Remedy

Confusion has resulted in the situation where the plaintiff has a choice of either legal or equitable relief, but not both. In *Hamilton v. Hamilton*,¹¹⁸ decided in 1875, plaintiff sued for specific performance of an oral contract to convey realty and for such other decree as the court might deem just. The trial court construed the situation as one in which plaintiff had the right to either equitable relief or legal damages, but not both. Apparently the remedy of damages was elected because a jury was called which awarded damages to plaintiff. Defendant appealed claiming that the submission of the case to a jury was improper. The supreme court affirmed the lower court's decision indicating that the jury was an "advisory jury" convened within the discretion of the chancellor, not a constitutional jury.¹¹⁹ Clearly, the *Hamilton* opinion was erroneous in its assumption that equity jurisdiction could be retained even though the plaintiff was not entitled to equitable relief. The proper rule, as stated in *Krummenacher v. Western Auto Supply Co.*,¹²⁰ decided in 1949, is that

115. *Goldman v. Ashbrook*, 262 S.W.2d 165, 168 (K.C. Mo. App. 1953).

116. *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151 (1908).

117. *Wynn v. Cory*, 43 Mo. 301 (1869).

118. 59 Mo. 232 (1875).

119. *Id.* at 234.

120. 358 Mo. 757, 761, 217 S.W.2d 473, 475 (En Banc 1949); see *Chicago, R.I. & P. Ry. Co. v. State Highway Comm'n. of Missouri*, 322 Mo. 419, 17 S.W.2d 535 (1929). See also *Yellow Mfg. Acceptance Corp. v. American Taxicabs*, 344 Mo. 1200, 1219, 130 S.W.2d 601, 610 (1939).

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 plaintiff has also been violated.

Confusion however has resulted from the misapplication of the doctrine that once equity obtains jurisdiction it can retain it to do full and complete justice, including the determination of legal remedies.¹²¹ By adopting the view that the application of this doctrine is mandatory, rather than discretionary, Missouri courts have extended the doctrine beyond its intended area of concern.¹²²

4. Plaintiff Controls the Issues

The more common situation in which the plaintiff seeks both equitable and legal relief is a suit for specific performance of a contract plus damages resulting from the lack of timely performance¹²³ or a suit for abatement of a nuisance along with damages for past injuries to the plaintiff's property.¹²⁴ In such situations, prior to merger, the plaintiff had a choice of presenting his claims in both courts in any order he desired. In *Hudson v. Burk*¹²⁵ plaintiff sued to restrain defendant from rebuilding a levee which, prior to the destruction of the embankment, had obstructed plaintiff's normal watercourse for two years. Plaintiff also sued to recover damages caused by the embankment's interference with the water flow. Defendant claimed he had only impounded the surface water. The issue was tried before a jury which found for plaintiff and awarded him damages. The question on appeal was whether the amount of damages was improper. However, the St. Louis Court of Appeals expressly approved the mode of trial, stating:

The court and the litigants proceeded, and we think correctly, to try the case as an action at law. All issues necessary to the defendant's liability were submitted to the jury under instructions, and upon the verdict the court entered a judgment, and in addition to this he [defendant] was ordered to abate the nuisance.¹²⁶

The result in *Hudson v. Burk* was correct in that it followed the historical test required by the Missouri Constitution.¹²⁷ It also illustrated how the merger of law and equity rendered the application of the clean-up doctrine unnecessary. Since plaintiff could separate his legal and equitable claims prior to merger, he should be given that same option today by allowing

121. *E.g.*, *Godwin v. Graham*, 360 Mo. 418, 228 S.W.2d 789 (1950); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 1168, 130 S.W.2d 611, 621 (1939).

122. *Waddle v. Frazier*, 245 Mo. 391, 151 S.W. 87 (1912). *See Grinnell Co. v. Farm & Home Sav. & Loan Ass'n*, 75 S.W.2d 409 (Spr. Mo. App. 1934). *Compare Paris v. Haley*, 61 Mo. 453 (1875) with *Supreme Lodge, K.P. v. Dazell*, 205 Mo. App. 207, 223 S.W. 786 (St. L. Ct. App. 1920).

123. *Hamilton v. Hamilton*, 59 Mo. 232 (1875); *Dyer v. Union Elec. Co.*, 318 S.W.2d 401 (Spr. Mo. App. 1958).

124. *Sapp v. Garratt*, 284 S.W.2d 49 (K.C. Mo. App. 1955); *Hudson v. Burk*, 48 Mo. App. 314 (St. L. Ct. App. 1892).

125. 48 Mo. App. 314 (St. L. Ct. App. 1892).

126. *Id.* at 316.

127. *Grayson v. Weddle*, 80 Mo. 39 (1883).

him to demand a jury trial on the legal issues presented in his claim for damages.

5. Misapplication of The Clean-Up Doctrine

The Missouri courts are likely to apply the clean-up doctrine so as to deny a right to trial by jury, in the situation where both legal and equitable claims are joined by the plaintiff. However, there are at least four reasons why it is improper for the courts to apply the doctrine in this manner: (1) primarily application of the clean-up doctrine disregards the constitutional mandate regarding the right to a jury trial; (2) the reasons for applying the clean-up doctrine were removed by the merger of law and equity; (3) if the clean-up doctrine is to be applied at all, it is discretionary in nature and should never be applied to deny the substantive rights of either party;¹²⁸ and (4) application of the clean-up doctrine thwarts the purpose of the rules of permissive joinder since plaintiffs who are not required to join their legal and equitable claims will not do so if they desire a jury trial.

IV. CIVIL ACTIONS IN WHICH PLAINTIFF PRESENTS A LEGAL CLAIM AND DEFENDANT SETS UP AN EQUITABLE DEFENSE

A. *Historical Patterns*

Prior to merger a plaintiff could institute an action at law against a defendant who had a defense in equity. For example, assume the plaintiff sued at law to recover rent due under a lease agreement which remained binding even though the leased building had been destroyed by fire.¹²⁹ Also assume that the plaintiff had breached a covenant to rebuild, creating a proper basis for rescission of the contract. Equity would have enjoined the law action until the issue of rescission was determined.¹³⁰ If the chancellor decided the issue of rescission in favor of the law defendant (the equity plaintiff) he would have granted rescission and a permanent injunction against the law action.¹³¹ If the issue of rescission were decided against the law defendant, the temporary injunction would have been dissolved and the plaintiff at law would proceed with the action for rent due. The findings in the equity action were binding at law by reason of collateral estoppel.¹³² Accordingly, there was no right to a jury trial on any issue if the law defendant's action in equity prevailed. If it failed, however, there was a jury trial of all issues except those necessarily determined in the suit in equity.

In one situation existing in pre-merger equity the equitable clean-up doctrine could have been applied. Suppose the plaintiff sued at law for damages for breach of contract and the defendant presented a bill in equity to reform the contract. In such a case the law action would have been tem-

128. II H. BLACK, JUDGMENTS §§ 517, 518 (2d ed. 1902); McCoid, *supra* note 88.

129. *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S.W. 1007 (1903).

130. *James*, *supra* note 82, at 679.

131. It must be noted here that the equitable clean-up doctrine never applied to the legal claim for it was properly instituted at law.

132. *McCoid*, *supra* note 88, at 738. Professor McCoid indicates that this was so only if the law plaintiff pleaded the result in equity to bind the defendant to the equity finding of facts.

porarily enjoined. If the law defendant prevailed in equity and the contract was reformed and, as reformed, it was breached by the law plaintiff, the equity plaintiff (the law defendant) could have petitioned the chancellor to exercise his clean-up jurisdiction by awarding damages incidental to the reformation of the contract. In this situation the chancellor might settle the entire dispute in one action to avoid unnecessary delay and expense.¹³³ However, under the view that the application of the clean-up doctrine was discretionary, the chancellor weighed the cost of delay and expense to the equity plaintiff in denying jurisdiction against the value to the equity defendant of his opportunity for a jury trial on the issue of damages.

B. Present Missouri Law

1. Equitable Defenses and Counterclaims

There is a need to distinguish between "equitable defenses" and "equitable counterclaims" in order to fully appreciate the position of the Missouri courts.¹³⁴ Before merger, many formerly equitable defenses such as estoppel,¹³⁵ fraud,¹³⁶ and mistake¹³⁷ had appeared in the law court.¹³⁸ Many courts labeled such matters as equitable defenses and attached the name of equitable counterclaim only to those matters requiring a separate suit in equity. The meaning of equitable defense as used in this article is of the *latter* type and has the characteristic of completely destroying the plaintiff's claim at law if accepted.¹³⁹ Rather than allow labels to control, one must examine whether the equitable matter would completely destroy the plaintiff's claim¹⁴⁰ and if the matter would have required a separate action in equity prior to merger.¹⁴¹

2. Application of the Historical Approach

Since merger Missouri courts have followed the same pattern as that prevailing under the dual system of law and equity. When the plaintiff presents a legal claim and the defendant pleads matter which would have

133. Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

134. Professor James criticizes this distinction in James, *Right to Jury Trial in Civil Actions*, 72 YALE L.J. 655, 680 (1963), but the discussion throws light on the Missouri cases in this area. See *State ex rel. American Cent. Ins. Co. v. Reynolds*, 289 Mo. 382, 232 S.W. 683 (1921).

135. *Citizens Trust Co. v. Going*, 288 Mo. 505, 232 S.W. 996 (1921); *Withers v. Kansas City Suburban Belt R.R.*, 226 Mo. 373, 126 S.W. 432 (1910); *Hubbard v. Slavens*, 218 Mo. 598, 117 S.W. 1104 (1909).

136. *E.g.*, *Schuermann v. Union Cent. Life Ins. Co.*, 165 Mo. 641, 65 S.W. 723 (1901); *Earl v. Hart*, 89 Mo. 263, 1 S.W. 238 (1886); *Kitchen v. Cape Girardeau & State Line R.R.*, 59 Mo. 514 (1875); *Routt v. Milner*, 57 Mo. App. 50 (St. L. Ct. App. 1894).

137. *Joyce v. Murnaghan*, 17 Mo. App. 11 (St. L. Ct. App. 1885).

138. The equitable defense of laches never appeared at law. There was no need for it to operate at law because of the various statutes of limitations applicable. *Hecker v. Bleish*, 319 Mo. 149, 3 S.W.2d 1003 (1928).

139. *State ex rel. American Cent. Ins. Co. v. Reynolds*, 289 Mo. 382, 232 S.W. 683 (1921).

140. *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1914).

141. *Citizen's Trust Co. v. Going*, 288 Mo. 505, 232 S.W. 996 (1921).

formerly established a separate suit in equity and which, if true, would completely destroy the plaintiff's cause of action, the equitable issues are tried first by the court without a jury.¹⁴² It does not matter whether equity is raised as a defense or as a counterclaim so long as the equitable matter would defeat the plaintiff's right to recovery.¹⁴³ If the equitable issue is determined in favor of the defendant there is no jury trial of any issue.¹⁴⁴ If the equitable issue fails both parties have the right to a jury trial on the remaining legal issues.¹⁴⁵ If, however, the defendant admits the plaintiff's legal claim and loses on the determination of the equitable issue, there is no longer a factual controversy and no right to a jury trial remains.¹⁴⁶ It is clear that the plaintiff would be entitled to counter the defendant's equitable defense with any claim which might defeat it.¹⁴⁷

It must be remembered that when the defense pleaded is a matter which was formerly for purely equitable determination the equitable issues must be tried first without a jury.¹⁴⁸ However, when the defense is one which was available at either law or equity there should be a jury trial of the issues. In *Babcock v. Rieger*,¹⁴⁹ the Missouri Supreme Court followed this view. There the plaintiff sued for damages for breach of contract, and the defendant pleaded failure of consideration and prayed for cancellation of the contract. The defendant moved to transfer the case from law to equity thus denying plaintiff a jury trial. The trial court sustained the motion, but the supreme court reversed stating:

It is not disputed that, if the defendant, in a suit wherein the petition states a cause of action at law, sets up an equitable defense which entitles him to affirmative relief and prays for such relief, the whole case is converted into a suit in equity. Neither can it be doubted that the cancellation of instruments . . . is a matter of equitable cognizance. But a prayer for affirmative equitable relief amounts to nothing unless the facts alleged authorize such relief. As a general rule, where suit has been brought upon a written instrument setting up a purely legal demand and wherein the defendant has a complete and adequate remedy by way of defense available in the legal action, a court of equity will not take jurisdiction of the cause and deprive the plaintiff of his right to a jury trial.¹⁵⁰

Thus, where the defense of failure of consideration presents an adequate remedy at law the defendant cannot defeat the plaintiff's right to a jury

142. *Burnett v. Johnson*, 349 S.W.2d 19 (Mo. 1961); *Dahlberg v. Fisse*, 328 Mo. 213, 40 S.W.2d 606 (1931); *Keltner v. Threlkel*, 316 Mo. 609, 291 S.W. 462 (1927); *Withers v. Kansas City Suburban Belt R.R.*, 226 Mo. 373, 126 S.W. 432 (1910).

143. *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S.W. 1007 (1903).

144. *Martin v. Turnbaugh*, 153 Mo. 172, 54 S.W. 515 (1899).

145. *Burnett v. Johnson*, 349 S.W.2d 19, 23 (Mo. 1961). See also *Miller v. St. Louis & K.C. Ry.*, 162 Mo. 424, 63 S.W. 85 (1901).

146. *Lewis v. Rhodes*, 150 Mo. 498, 52 S.W. 11 (1899).

147. *Martin v. Turnbaugh*, 153 Mo. 172, 54 S.W. 515 (1899).

148. *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1914).

149. 332 Mo. 528, 58 S.W.2d 722 (En Banc 1933).

150. *Id.* at 538, 58 S.W.2d at 726.

trial by praying for some unnecessary affirmative equitable relief. If equitable relief is necessary and no adequate remedy at law exists the equitable issues will then be tried first by the court without a jury. If the equitable defense fails the remaining legal issues are triable by jury as a matter of right.¹⁵¹

The Missouri courts seem to have followed the historical test in this area. However, in the situation where the defendant's affirmative equitable relief also entitles him to legal relief, it is likely that a Missouri court would improperly apply the clean-up doctrine and hold that there was no right to a jury trial. An example of this situation is where a defendant claims breach by plaintiff of the actual contract following reformation. The correct result, if the contract is reformed, would be to grant a jury trial of the issue of defendant's claim for damages when either the plaintiff or the defendant demands it. Historically, the clean-up doctrine would have been available here to prevent the unnecessary delay in prosecuting two separate actions. However, this reason for clean-up has disappeared. Furthermore, the clean-up doctrine was discretionary; hence it would not have been applied prior to merger to deny either party a trial by jury. The proper solution is for the court to take evidence on the issue of reformation, decide the issue of reformation, and then convene a jury to determine any damage issues remaining.

3. Compulsory and Permissive Counterclaims

There is an important distinction between compulsory and permissive counterclaims. Prior to merger an equitable counterclaim or defense which arose out of the same transaction as plaintiff's legal action had to be prosecuted separately. After merger, but before the reformed civil procedure codes, the equitable counterclaim could either be brought against the defendant at law or be the basis of an independent suit.¹⁵² However, an equitable counterclaim arising out of a separate transaction could be joined only in a few instances.¹⁵³ Since Missouri's adoption of the new civil procedure code in 1943,¹⁵⁴ an equitable claim arising out of the same transaction as the plaintiff's action at law must be joined.¹⁵⁵ All other equitable and legal counterclaims which arise out of separate transactions *may* be joined.¹⁵⁶ That is, what was formerly permissive was made compulsory and what was formerly prohibited was made permissive.¹⁵⁷ It should be noted

151. *Accord*, *Burnett v. Johnson*, 349 S.W.2d 19 (Mo. 1961); *Johnson v. Mc-Aboy*, 350 Mo. 1086, 169 S.W.2d 932 (1943); *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1914); *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S.W. 1007 (1903); *Martin v. Turnbaugh*, 153 Mo. 172, 54 S.W. 515 (1899).

152. C. CLARK, *LAW OF CODE PLEADING* 646 (2d ed. 1947).

153. *Id.* at § 100.

154. Mo. Laws 1943, at 353-401. Now, chapters 506-512, RSMo 1959.

155. *Brinkman v. Common School Dist. of Gasconade County*, 255 S.W.2d 770 (Mo. En Banc 1953); *Davidson v. Mayhew*, 169 Mo. 258, 68 S.W. 1031 (1902).

156. A counterclaim of any matured legal or equitable claim against the adverse party which does not arise out of the same transaction as plaintiff's claim may be presented in the action. §§ 509.060, 420-440, 460, RSMo 1959.

157. *McCoid, Right to a Jury Trial in the Federal Courts*, 45 IOWA L. REV. 726, 738 (1960).

that while the introduction of an equitable compulsory counterclaim requires that all issues be tried without a jury the same rule should not apply to the permissive equitable counterclaim. This is because the permissive equitable counterclaim is a separate cause of action which could not have been used at common law to deny the plaintiff a jury trial because it could not have been presented in the same suit. Neither should the permissive equitable counterclaim be used to establish a theory of waiver denying the defendant the right to demand a jury trial on the legal issues of the plaintiff's claim.¹⁵⁸ To do so would defeat the purpose of the new rules of civil procedure which favor joinder in order to reduce litigation.¹⁵⁹

4. Summary

The Missouri courts currently reach the result an application of the historical test would demand. When the plaintiff submits a legal claim to which the defendant asserts either an equitable defense or a compulsory equitable counterclaim necessary to the defendant's full relief and which would completely defeat the plaintiff's cause of action at law, the equitable issues must be determined first, thus eliminating the right to a jury trial. If the equitable issues are determined in the defendant's favor, there is a total destruction of the plaintiff's claim and neither party can demand a jury unless the defendant had joined a claim for legal relief with his equitable defense. If the defendant's equitable defense or counterclaim fails then both parties have the right to demand a trial by jury on the factual issues presented in the plaintiff's legal demand.¹⁶⁰ If the defendant's equitable defense is such that it would not completely destroy the plaintiff's cause of action or if the defense is a matter of concurrent jurisdiction between law and equity, the case remains triable at law by a jury as a matter of constitutional right.

V. CIVIL ACTIONS IN WHICH PLAINTIFF PRESENTS AN EQUITABLE CLAIM AND DEFENDANT PRESENTS A LEGAL COUNTERCLAIM

A. *Historical Patterns*

Historically, there were three varieties of the situation in which the plaintiff presented an equitable claim and the defendant possessed a legal claim against the plaintiff. The first arose when the plaintiff presented an equitable claim seeking actual or substantive relief and the defendant's legal claim arose from the same transaction. For example, should the plaintiff sue for foreclosure of a mechanic's lien on real property, the defendant might contest the foreclosure and bring a legal claim for damages arising out of the plaintiff's alleged faulty construction work done on the property under the contract.¹⁶¹ In such a case the defendant could choose

158. In New York the problem is specifically provided for by statute. N.Y. Civ. PRAC. ACT § 4102 (c) (McKinney 1963).

159. C. CLARK, *supra* note 152.

160. *E.g.*, Axley v. Hammock, 185 Ark. 939, 50 S.W.2d 608 (1932); Blair v. Payer, 63 Ohio App. 29, 24 N.E.2d 965 (1939); Coleman v. Coleman, 208 S.C. 103, 37 S.E.2d 308 (1946).

161. Distefano v. Hall, 218 Cal. App. 2d 657, 32 Cal. Rptr. 770 (1963).

either to submit his legal claim for damages as a defense in the equity suit¹⁶² or to bring a separate suit at law.¹⁶³ Since the clean-up doctrine did not require the defendant to present his legal claim in the equity action, an adverse decree in equity would not operate as *res judicata* to bar a subsequent legal action. Normally if the defendant chose to assert his legal claim in a separate action at law, his chances of losing the equity suit would be increased. Also, since the equity suit would bind the defendant in a later suit at law as to common issues necessarily decided,¹⁶⁴ there could only be a jury trial in the law action to the extent collateral estoppel did not operate to bar relitigation of these common issues. Moreover, if the defendant chose to assert his legal claim in equity, there would be no jury trial as to any issues. This result would be reached either because the defendant would be deemed to have waived a jury trial,¹⁶⁵ or by application of the clean-up doctrine.¹⁶⁶

The second variety arose when the plaintiff was a prospective defendant at law and filed a bill in equity to defeat his opponent's prospective action. A present day example is the case in which an insurance company seeks to defeat the beneficiary's recovery on the policy by suing in equity to cancel the policy on grounds of fraud. Prior to merger the equity defendant could have used his legal claim for recovery on the policy either as a defense or as grounds for a separate cause of action at law.¹⁶⁷ Another example would be where a party to a contract has not only committed a material breach but also has grounds for rescission of the contract and for an accounting for profits. Here, the party would sue in equity for rescission and an accounting and thereby effectively overcome his opponent's legal claim for damages.¹⁶⁸ Generally, the same procedure would apply in the above situations as in the first variety. If the defendant presented his legal claim as a defense, equity would assume jurisdiction by application of the clean-up doctrine.¹⁶⁹ It should be noted, however, that the chancellor had a great deal of discretion in retaining jurisdiction over legal issues,¹⁷⁰ and where it was clear that the plaintiff's equitable action was merely a result of a race to the courthouse, equity would decline to hear the case thus leaving the parties to their remedies at law.¹⁷¹ Also, the chancellor might,

162. *Coleman v. Coleman*, 208 S.C. 103, 107, 37 S.E.2d 305, 313 (1946).

163. *James*, *supra* note 134, at 682.

164. RESTATEMENT OF JUDGMENTS § 68, comments j at 305, o at 309 (1942). See *New Jersey Highway Authority v. Renner*, 18 N.J. 485, 114 A.2d 555 (1955). See also *McCoid*, *supra* note 157, at 735.

165. *McCoid*, *supra* note 157, at 734.

166. I. J. POMEROY, EQUITY JURISPRUDENCE § 232 (5th ed. 1941).

167. *Bankers Life Co. v. Bennett*, 220 Ia. 922, 263 N.W. 44 (1935). See also *Merchants Fire Assur. Corp. v. Watson*, 104 Mont. 1, 64 P.2d 617 (1937).

168. *McKinley v. Durbin*, 231 S.W.2d 286, 290 (St. L. Mo. App. 1950); *Supreme Lodge K.P. v. Dalzell*, 205 Mo. App. 207, 223 S.W. 786 (St. L. Ct. App. 1920). See also *Jones Drilling Corp. v. Rotman*, 179 N.E.2d 312 (Ind. Ct. App. 1962), *rev'd*, 245 Ind. 10, 195 N.E.2d 857 (1964).

169. I. J. POMEROY, *supra* note 166, at §§ 261h, 264a, 264b, 269.

170. Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1325-26, (1932).

171. I. J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 73 (5th ed. 1849).

in his discretion, deem it proper to call an advisory jury.¹⁷² If instead the defendant chose to pursue his claim in a separate action at law he would not be barred by an adverse decree in equity, although collateral estoppel would bind him as to common issues of fact necessarily determined in the equitable proceeding.

The third variety arose when the plaintiff filed a claim in equity and the defendant had a legal claim which arose out of a totally unrelated transaction. In this case, prior to merger, there had to be two actions, one in equity and one at law.¹⁷³ The clean-up doctrine had no application because equitable jurisdiction extended only to incidental legal relief and separate causes of action were not incidental to each other.

B. Present Missouri Law

1. Plaintiff Seeks Substantive Equitable Relief

In *McKinley v. Durbin*¹⁷⁴ plaintiff presented an equitable claim for substantive relief and defendant presented a legal counterclaim. Plaintiff had obtained sales contracts for defendant and brought an action for an accounting for commissions due. Defendant denied plaintiff's allegations and asserted a legal counterclaim for damages, alleging that the plaintiff had wrongfully and falsely represented defendant's product to customers. Defendant's demand for a jury trial was denied. The case was assigned to a referee who found for plaintiff on both issues. Defendant appealed claiming that the trial court was without jurisdiction to enter a judgment on a legal issue in the absence of a finding that plaintiff was entitled to equitable relief. In affirming, the St. Louis Court of Appeals stated that an equitable right was involved and that the action of the trial court was correct.¹⁷⁵ The court pointed out that even if all the issues had been legal, under Missouri law, the case would have required assignment to a referee because of the long account involved.¹⁷⁶ The court stated:

where there is a long and involved account requiring a reference under . . . [section 515.020, RSMo 1959] . . . the distinction between legal and equitable jurisdiction has about disappeared . . . [Defendant's counterclaim in tort for damages] states an action *ex delicto*, not of itself subject to compulsory reference, but as it is here pleaded it is incident to the account sued on and in such a case it is the petition which determines the character of the action.¹⁷⁷

The court further said that no right of defendant had been lost or abridged because the suit had been designated as equitable. The decision is most

172. E. DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 1080 (4th ed. 1871).

173. James, *supra* note 134, at 681.

174. 231 S.W.2d 286, 290 (St. L. Mo. App. 1950); *accord*, Crenshaw v. Looker, 185 Mo. 375, 84 S.W. 885 (1904).

175. Krummenacher v. Western Auto Supply Co., 358 Mo. 757, 217 S.W.2d 473 (En Banc 1949).

176. § 515.020 (1), RSMo 1959. See cases cited note 8 *supra*.

177. *McKinley v. Durbin*, 231 S.W.2d 286, 290 (St. L. Mo. App. 1950).

unfortunate¹⁷⁸ in two respects. First, the nature and adequacy of the remedy should be controlling, rather than mere pleadings; in other words, substance should control rather than form.¹⁷⁹ Second, the court failed to recognize that the problem could have been solved by allowing the referee to decide the matters concerning the long account and then calling a jury to determine defendant's legal counterclaim. Because of this "oversight" it would seem that defendant has been denied his constitutional right to trial by jury¹⁸⁰ on those issues presented in his counterclaim which were not necessarily determinable in an examination of the long accounts.¹⁸¹ Historically defendant could have either submitted his claim for legal damages in the plaintiff's equity bill or initiated an action at law.¹⁸² Defendant in *McKinley v. Durbin* did not have this choice because of the compulsory counterclaim rule.¹⁸³ It would seem, however, that the existence of the choice prior to merger would require the trial court to honor defendant's demand for a jury trial in such a situation today.¹⁸⁴ In failing to recognize this fact, *McKinley v. Durbin* constricts the right to trial by jury and disregards the constitutional mandate.¹⁸⁵

The Missouri position is further evidenced by the holding in *Spaue v. Carroll*¹⁸⁶ in which plaintiff sued for specific performance of a contract to convey real estate. Defendant prayed for cancellation of the contract for want of consideration. On appeal defendant claimed that he had been denied his right to a jury trial. There were, however, two valid reasons why no right to a jury trial existed: defendant had not claimed the right at trial and defendant's remedy was not legal in nature. The court recognized the first ground for denial of a jury trial but failed to recognize the second. Instead, it emphasized the fact that plaintiff's suit for specific performance was a suit in equity and stated that:

no answer filed therein can change it from the equity side of the court. . . . [T]he petition is one in equity, and the status of the case cannot be changed by the answer. We have universally ruled that if the petition states an action at law, the case is converted into an action in equity by the filing of an equitable answer. So that it may be said that if either of the pleadings [petition or answer] sound in equity, no jury trial can be peremptorily demanded.¹⁸⁷

178. Justice Story might have been astounded by such language. I J. STORY, *supra* note 171, at §§ 72, 73.

179. *Babcock v. Rieger*, 332 Mo. 528, 58 S.W.2d 722 (En Banc 1933).

180. Mo. CONSR. art. I, § 22a.

181. *New Jersey Highway Authority v. Reimer*, 18 N.J. 485, 114 A.2d 555 (1955).

182. See notes 160 and 161 *supra*.

183. Cases cited note 155 *supra*.

184. *Distefano v. Hall*, 218 Cal. App. 2d 657, 32 Cal. Rptr. 770 (Dist Ct. App. 1963). *Accord*, *Connell v. Bowes*, 19 Cal. 2d 870, 123 P.2d 456 (1942). *Contra*, *Butler Bros. Dev. Co. v. Butler*, 111 Mont. 329, 108 P.2d 1041 (1941).

185. Compare *Cooper v. Cook*, 347 Mo. 528, 148 S.W.2d 512 (1941) with *Field v. Oliver*, 43 Mo. 200 (1869). But see *Connell v. Bowes*, 19 Cal. 2d 870, 123 P.2d 456 (1942).

186. 188 S.W. 63 (Mo. 1916).

187. *Id.* at 65.

It is this type of language which arguably leads the law in the wrong direction. Once again the court's underlying theory is that the power of equity to attach jurisdiction to clean up all issues is mandatory rather than discretionary. This approach ignores the fact that since merger, a court can sit in judgment of a single case both as a court of law and as a court of equity. It also fails to recognize that the defendant historically could have chosen between submitting his legal claim as a defense to the suit in equity and initiating a new cause of action at law in which he could demand a jury trial.¹⁸⁸

The New Jersey courts have taken the proper position on this issue. In *New Jersey Highway Authority v. Riemer*,¹⁸⁹ plaintiff sued for specific performance of an agreement to convey real estate. Defendant counterclaimed for damages alleging that plaintiff had wrongfully prevented the removal of her house from the land. The Supreme Court of New Jersey affirmed this procedure followed by the trial court:

The pre-trial order set forth that there were equitable as well as legal issues involved and "that all equitable issues arising out of the complaint, the defense and counterclaim will be tried by the court; all law issues will be tried by a jury. . . . The theory of the trial of this case was that we first try the equity case. If the plaintiff succeeds on the equity case there would be no necessity for the law case. We take one step at a time."¹⁹⁰

This procedure and rationale should be followed in Missouri. The equitable issues of plaintiff's claim, along with any defenses to that claim, should be tried by the court. As for the introduction of evidence, Missouri trial courts could impanel a jury at the beginning of the trial to avoid duplication of evidence. Instructions to the jury would be limited to those issues not previously determined by the court in its equitable decree.¹⁹¹ The equity decree and the law verdict would then be merged into one final judgment.¹⁹²

188. *Supreme Lodge K.P. v. Dalzell*, 205 Mo. App. 207, 222, 223 S.W. 786, 789 (St. L. Ct. App. 1920). See generally *Butler Bros. Dev. Co. v. Butler*, 111 Mont. 329, 108 P.2d 1041 (1941); *Schreiner v. Witte*, 143 Neb. 109, 8 N.W.2d 831 (1943).

189. 18 N.J. 485, 114 A.2d 555 (1955). The 1947 constitution provided for merger of law and equity in New Jersey. N.J. CONST. art. 6, § 3.

190. *New Jersey Highway Authority v. Riemer*, 18 N.J. 485, 489-90, 114 A.2d 555, 557 (1955).

191. *New Jersey Highway Authority v. Riemer*, 18 N.J. 485, 114 A.2d 555 (1955). The court indicated that a determination of equitable issues in favor of the plaintiff will in some instances preclude the defendant's legal recovery where such determination decides an issue vital to the defendant's counterclaim.

192. This exact procedure was followed in *Distefano v. Hall*, 218 Cal. App. 2d 675, 32 Cal. Rptr. 770 (Dist. Ct. App. 1963). There plaintiff sued in equity to foreclose a mechanic's lien on real property. Defendant answered with a general denial and set up a legal counterclaim for damages caused by defective construction work done on the property in question. Upon defendant's demand the trial court convened a jury and presented the legal issues to it. On appeal the First District Court of Appeals stated that

even though the case involves equitable principles, if it is one where the common law courts could and would grant relief, the right to trial by jury

2. Plaintiff Is a Prospective Defendant at Law

In the situation where the plaintiff seeks equitable relief primarily to defeat the defendant's legal cause of action, the equity court, as it did prior to merger, should entertain the plaintiff's cause only if in its discretion¹⁹³ the harm in leaving the plaintiff to his remedy at law¹⁹⁴ would be greater than the harm to the defendant if he loses the opportunity to a trial by jury.¹⁹⁵ Once the plaintiff's equitable claims have been determined and it is clear that they do not preclude recovery by the defendant, any legal issues presented by the defendant's counterclaim which have not already been disposed of should be submitted to a jury. Although no Missouri cases have been found, a representative case in this area is *Bankers Life Co. v. Bennett*,¹⁹⁶ an Iowa case in which the plaintiff insurer sued to cancel a policy of life insurance on the grounds of fraudulent procurement. Defendant beneficiary counterclaimed for the full amount of the policy. Defendant claimed that plaintiff had an adequate remedy at law and moved to transfer the case to the law docket. The trial court sustained this motion, thus enabling defendant to demand a jury trial. In affirming, the Supreme Court of Iowa stated:

[t]o sustain the position of the [plaintiff insurance company] herein would be to sanction a practice by which the plaintiff in every action upon an insurance policy, or, indeed, upon every simple matter of contract, may be deprived of his constitutional right to have his cause submitted to a jury.¹⁹⁷

In the situation where there is some substantial equitable interest in the plaintiff's claim (such as the running of the incontestability period before the opposing party brings his legal claim for recovery) the equity court could choose to entertain the case.¹⁹⁸

3. Plaintiff's Equitable Claim Is Totally Unrelated to the Defendant's Legal Counterclaim

In the situation where the plaintiff presents an equitable claim and the defendant presents a permissive¹⁹⁹ legal counterclaim, the right to trial by jury should be allowed for all the legal issues presented in the counter-

is preserved. . . . [A] party is entitled to a jury trial on the legal issues of fact raised by a cross complaint. . . .

218 Cal. App. 2d 657, 662 n. 6, 32 Cal. Rptr. 770, 773 n. 6 (Dist. Ct. App. 1963). This represents an application of the historical test and should be followed in Missouri. Compare CAL. CONST. art. I, § 7 with Mo. CONST. art. I, § 22 (a).

193. I J. STORY, *supra* note 171; Chafee, *supra* note 170.

194. Professor James indicates that if the insured were allowed to delay, the harm to the insurer would be the running of the incontestability period. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 683 (1963).

195. Prior to *Beacon Theatres Inc., v. Westover*, 359 U.S. 500 (1959), the federal courts had this same discretion in equity.

196. 220 Iowa 922, 263 N.W. 44 (1935).

197. *Id.* at 925, 263 N.W. at 45. See also *Merchants Fire Assur. Corp. v. Watson*, 104 Mont. 1, 64 P.2d 617 (1937).

198. See note 194 *supra*.

199. *Stoops v. Stoops*, 363 Mo. 1075, 256 S.W.2d 799 (1953); § 509.060, RSMo 1959.

claim.²⁰⁰ Historically, there would have been two separate actions, one in equity and the other at law. Moreover, to hold that the defendant waives his right to trial by jury when he presents his legal counterclaim would discourage defendants from joining permissive counterclaims.²⁰¹ Furthermore, the theory that equity has the power to grant incidental legal relief is not applicable because a permissive counterclaim cannot be considered incidental relief. Since the permissive counterclaim rule came into being in 1943, equity has never exerted jurisdiction in this area.²⁰²

VI. CIVIL ACTIONS FOR DECLARATORY JUDGMENT

Preventive or anticipatory actions have been used in equity for a considerable period of time.²⁰³ Such actions were founded on the inherent power of the equity court²⁰⁴ and were employed at the discretion of the chancellor.²⁰⁵ The chancellor exercised his discretion only where necessary to protect the parties' rights.

In the 1920's many states began to adopt uniform statutory rules for declaratory judgment action.²⁰⁶ At the present time thirty-eight states have adopted such provisions.²⁰⁷ Missouri adopted these laws in 1935.²⁰⁸ Despite the fact that the declaratory judgments originated in the court of equity,²⁰⁹ under the Uniform Declaratory Judgment Act, it is considered neither equitable nor legal in nature.²¹⁰ Apparently, the framers of the Uniform Act took a neutral position toward jury trial, intending neither to expand nor to contract the right.²¹¹ This means that the same rules are applicable in this area as in any other in which legal or equitable issues, or both, are presented.²¹²

200. *Jones Drilling Corp. v. Rotman*, 179 N.E.2d 312 (Ind. Ct. App. 1962), *rev'd*, 245 Ind. 10, 195 N.E.2d 857 (1964). See *Fish v. Prudential Ins. Co. of America*, 255 Ind. 448, 75 N.E.2d 57 (1957).

201. *McCoid*, *supra* note 157, at 736.

Professor McCoid suggests that:

[I]f the counterclaim is permissive, its assertion by defendant is a complete waiver of jury trial thereon by him, and his demand should not be allowed if opposed by plaintiff.

This statement was made concerning the rule followed in the federal courts. Judge Clark criticizes this waiver rule; C. CLARK, *supra* note 152, at § 17. It is an unfortunate rule for the defendant for if he wishes a jury trial he must gamble that his counterclaim is permissive in nature, present it as the basis of a separate action at law, and hope it will not be barred by the doctrine of *res judicata*. See *Brinkmann v. Common School Dist. of Gasconade County*, 255 S.W.2d 770 (Mo. En Banc 1953).

202. § 509.060, RSMo 1959. See generally *James*, *supra* note 194, at 684.

203. I W. ANDERSON, *ACTIONS FOR DECLARATORY JUDGMENTS* § 1 (2d ed. 1951).

204. *Id.* at 4-11.

205. *James*, *supra* note 194, at 685. See § 527.060, RSMo 1959.

206. See generally W. ANDERSON, *supra* note 203, at § 214.

207. UNIFORM DECLARATORY JUDGMENTS ACT, 9 A.U.L.A. 1 (1965).

208. Mo. LAWS 1935, at 218, §§ 1-15. Now §§ 527.010-.140; RSMo 1959.

209. W. ANDERSON, *supra* note 203, at 459.

210. Section 527.090, RSMo 1959 provides:

When a proceeding under sections 527.010 to 527.140 involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

211. *James*, *supra* note 194, at 685-86.

212. See *United States Fire Ins. Co. v. Terte*, 351 Mo. 1089, 176 S.W.2d (En

VII. CONCLUSION

In analyzing the difference between law and equity Professor Holdsworth has commented:

The distinction between the strict rule of law and modification of that law on equitable or moral grounds is a distinction well known to many systems of law; and it was familiar to English lawyers from the twelfth century onward. It is not therefore the distinction between law and equity which is peculiar to English law. What is peculiar is the vesting of the administration of law and equity in two quite separate tribunals. The result has been a sharpness and a permanence which it possesses in no other legal system.²¹³

After examining one of the last major distinctions between law and equity, the right to trial by jury, one might reasonably conclude that one result of the merger of these two systems is an entanglement of confusion and complexity.²¹⁴ The situation is not irredeemable, however, and if the cases which arise are analyzed in the manner set out in this comment,²¹⁵ most can be classified and examined with relative ease. In those cases which are counterparts of formerly legal claims, a constitutional right to trial by jury exists. Conversely, in those cases which are counterparts of former equitable claims neither party has a right to trial by jury. Concerning the three situations in which both legal and equitable claims have been involved (IV, V, and VI above), the clean-up doctrine has been applied to deny trial by jury on the legal issues presented.

The application of the clean-up doctrine to deny trial by jury in the situation in which both legal and equitable claims are presented is theoretically improper. Such an application violates the mandate of the Missouri Constitution article I, section 22 (a) because it reaches a result contrary to that required by the historical test. Arguably the clean-up doctrine is altogether inapplicable because merger destroyed all but perhaps a very limited need for the rule. Prior to merger, the doctrine was developed and applied to relieve parties from the evils of a separate system of law and equity. Today, there is no need for such relief because one court is now given the power once held separately by the chancellor and the law court. However, even if it is assumed that a modern need for the clean-up doctrine exists, as originally developed, it was never applied in such an arbitrary manner as to result in the denial of a trial by jury. Unfortunately, these views have not been accepted in Missouri. It is submitted that as a result many Missouri litigants have been denied their fundamental right to trial by jury.

THOMAS JEAN O'NEIL

Banc 1943); *Crollard v. Northern Life Ins. Co.*, 240 Mo. App. 355, 200 S.W.2d 375 (K.C. Ct. App. 1947).

213. I. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 446 (1931).

214. James, *supra* note 194, at 690-93 where Professor James discussed alternative tests for determining when right to jury trial should exist. He concluded that the historical-constitutional test is as workable and practical as any other proposal.

215. *Ibid.*