COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD-PARTY PETITIONS UNDER THE 1945 MISSOURI CODE*

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COUNTERCLAIMS AND THIRD-PARTY PROCEDURE

The Missouri Code of Civil Procedure of 1945 liberalized the practice as to counterclaims, cross-claims, and third-party petitions. This is not an attempt at a critique. The attempt is solely one at a clarification of existing practices within a novel pattern.

I. COUNTERCLAIMS

Under this Code, counterclaims may be classified as mandatory or permissive. Section 73 provides:

> A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrences that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.[1]

This is the so-called mandatory counterclaim provision. Unless a party pleads any claim not the subject of a pending action which he has against the opposing party when the pleading is filed, and which arises out of the same transaction or occurrences, he will be held to have waived such claim.[2] The clear intention of the framers was that the court in one action should settle all matters in controversy relating to the transaction or occurrences which is the foundation of the suit.[3] Since no attempt has been made to define "counterclaim," "transaction," or "occurrences," some difficulty is to be expected in construing this section.

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*The Code of Civil Procedure of Missouri, which became effective 1 January, 1945, may be found in MO. REV. STAT. ANN. § 847.1-847.145 (Supp. 1949). The references throughout this article are to Sections 1-145, which correspond to the numbers following the decimal point in the Missouri statutes.

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1. Compare FED. R. CIV. P. 13 (a).

2. It is claimed that the compulsory provision is too harsh and that a penalty of barring recovery for costs in a subsequent action on the counterclaim is to be preferred. See Legis., 37 COL. L. REV. 462 (1937).

3. State *ex rel.* Fawkes v. Bland *et al.*, 357 Mo. 634, 210 S.W.2d 31 (1948).

In interpreting the terms in question, it is necessary to keep in mind that the codifiers intended to leave much to the discretion of the court in each case. Thus, how directly a cause of action must arise out of the transaction or occurrences might properly be left to the circumstances of each case. That it would include the aggregate of all the circumstances which constitute the foundation therefore seems clear. The word "transaction" has been defined in *Ritchie v. Hayward* to include "all the facts and circumstances out of which the injury complained of . . . arose."[4]

That the terms under consideration have been given broad meanings is supported by recent Missouri cases. In *State* ex rel. *Fawkes v. Bland* et al.,[5] the relator-husband sued for divorce. The wife denied the husband's alleged grounds for divorce. She further filed a cross-petition (counterclaim) for separate maintenance for herself and her child. Among the questions the court considered was one of procedure, whether the wife had the legal right to file a counterclaim for separate maintenance in her husband's divorce suit. The court by way of dictum made it very clear that while under Section 1516[6] the defendant retained the *optional* right to file a counterclaim for divorce, notwithstanding the mandatory provision of Section 73, the latter nevertheless applies to counterclaim for separate maintenance. The court said:

> We agree with the Court of Appeals opinion that Sec. 2[7] [of the new Civil Code] does continue Sec. 1516 in force as to divorce, and that the defendant still retains the optional

4. 71 Mo. 560, 562 (1880).

5. 357 Mo. 634, 210 S.W.2d 31 (1948).

6. Mo. Rev. Stat. § 1516 (1939) provides: "In all suits for divorce from the bonds of matrimony, it shall be lawful for the defendant in his or her defense thereto, to set forth and charge, in his or her answer to the plaintiff's petition, any of the facts specified in this article which, if proved, would entitle such defendant to a divorce; and the defendant may, in his or her answer, pray the court, for the causes stated in the answer, that he or she be divorced from the bonds of matrimony entered into with the plaintiff; and such answer shall be sworn to in the same manner as the original petition; and upon the hearing of the cause, if the court shall be satisfied that the defendant is the injured party, it shall enter judgment divorcing the defendant from the said plaintiff, as prayed in the answer."

7. Civil Code of Missouri, Section 2, provides: "This code shall be known and cited as the Civil Code of Missouri and shall govern the procedure in the supreme court, court of appeals, circuit courts and common pleas courts in all suits and proceedings of a civil nature whether cognizable as cases at law or in equity, *unless otherwise provided by law.* It shall be construed to secure the just, speedy, and inexpensive determination of every action." [Italics supplied].

right granted by Sec. 1516 to file a cross-bill for divorce or not, notwithstanding the compulsory provision of Sec. 73 of the new Code. That right is more substantive than procedural; and it can hardly be thought the new Code intended to *compel* the innocent and injured defendant in such a suit to file a cross-action for divorce and seek to sever the marital relation, or else waive the right altogether (on the same grounds). Sec. 61(9)[8] of the new Code still recognizes there are *some* claims which not only need not be, but cannot be, properly united in the same pleading.

But we do not agree that the same conclusion follows by analogy with respect to separate maintenance. It is true Secs. 3376, 3382[9] conferring that right are permissive (as are all statutory causes of action). But they are very general, and wholly unlike Sec. 1516 in the divorce law. Sec. 3382 merely adopts the general practice in civil suits. There is nothing to the contrary anywhere in the chapter. The claim seeks only a money judgment, not a severance of the martial relation—thereby coming partly but not wholly within the scope of a divorce case. Where a husband has instituted the divorce litigation and the wife merely files a defensive answer, if he prevails she will be entitled to nothing, whereas if she prevails the marriage relation will still exist and he will be legally bound to provide maintenance for her. She chooses the battle ground. If she elects merely to contest his divorce and preserve the marital status, undoubtedly her right to separate maintenance is within the subject matter of the divorce suit. It clearly comes under the requirement of Sec. 73 of the new Code, the objective of

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8. Civil Code of Missouri, Sec. 61 (9), provides: "The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause: . . . (9) that several claims have been improperly united; . . . ."

9. Mo. REV. STAT. § 3376 (1939) provides: "When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require, and compel the husband to give security for such maintenance, and from time to time make such further orders touching the same as shall be just, and enforce such judgment by execution, sequestration of property, or by such other lawful means as are in accordance with the practice of the court; and as long as said maintenance is continued, the husband shall not be charged with the wife's debts, contracted after the judgment for such maintenance." Mo. REV. STAT. § 3382 (1939) provides: "The petition of a married woman for any of the purposes before mentioned may be filed and the case heard and determined in the circuit court, and the like process and proceedings shall be had as in other civil suits."

> which is to discourage separate litigations covering the same subject matter, and to require their adjudication in the same action. . . .[10]

At this point, consideration must be given to Section 74, which is complementary to and a further clarification of Section 73. Section 74 provides:

> A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

Prior to the adoption of this section, it had been held that a counterclaim that does not tend to defeat or diminish plaintiff's right of recovery does not lie.[11] Any existing doubt that Section 73 did not remove that requirement is eliminated by Section 74. Thus in *McCluskey* et al. *DeLong*,[12] the plaintiffs brought an action to replevy an automobile truck and equipment. Defendant filed both a general denial and a counterclaim, seeking in the latter to recover a sum of money for labor and material furnished in repairing the truck. Plaintiffs contended that since the enforcement of a repairman's lien was not sought in the counterclaim, it did not tend to defeat or diminish plaintiff's right of recovery of the possession of the property, and therefore the relief sought should not be granted. The court denied that contention on the basis of Section 74 and further held that the counterclaim arose out of the transaction or occurrences that was the subject matter of the plaintiff's claim within the meaning of Section 73.

That Section 73 is a procedural statute has been emphasized by the court in two cases, both of which held that that section was not intended to change the substantive law as to what constitutes a cause of action, or when it accrues. *Zickel v. Knell* et al.[13] was an action for the dissolution of a partnership agreement, an accounting to determine profits, and the plaintiff's

10. State *ex rel.* Fawkes v. Bland *et al.*, 357 Mo. 634, 645, 210 S.W.2d 31, 36 (1948).

11. Riss & Co. v. Wallace, 350 Mo. 1208, 171 S.W.2d 641 (1943), where it was held that a counterclaim that does not tend to defeat or diminish plaintiff's right of recovery of possession of the property does not lie. And see Bandy v. Westover, 200 Cal. 222, 252 Pac. 593 (1927), where a counterclaim for money damages was held to be not proper in a suit to cancel a deed on the same grounds, and Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40 (1903), where in an action to quiet title to certain land, the defendants set up a claim for damages for breach of a contract not affecting the title to the land in question.

12. 239 Mo. App. 1026, 198 S.W.2d 673 (1946).

13. 357 Mo. 678, 210 S.W.2d 59 (1948).

share therein, and for the appointment of a receiver *pendente lite*. Plaintiff alleged that more than $3,932.00 was due him. Defendants denied the existence of a partnership, stated *inter alia* a counterclaim for malicious prosecution for $50,000.00 actual and $25,000.00 punitive damages. The court below found for the plaintiff and entered judgment in his favor. Defendants' counterclaim for malicious prosecution was dismissed. It appeared that defendants' malicious prosecution counterclaim was based on the filing of this very action by plaintiff against them. They claimed that this was a mandatory counterclaim under Section 73 contending that it arose "out of the transaction or occurrences that is the subject matter of the opposing party's claim," and was a claim which they then had against plaintiff. The Supreme Court rejected the contention of defendants as being incorrect because no action for malicious prosecution for the filing of this action by plaintiff:

> Then existed, or does now exist, or could ever accrue to defendants until this suit terminated in their favor. . . . Section 73 is only a procedural statute and it does not change the substantive law as to what constitutes a cause of action or when it accrues. Therefore, the court's action in dismissing this counterclaim was correct.[14]

In *Niedringhaus v. Zucker*,[15] plaintiff filed a petition in ejectment against the defendant. The defendant filed an answer and a counterclaim. The malicious prosecution alleged in the counterclaim was based upon the petition in ejectment. Thereafter plaintiff dismissed his petition and filed a motion to dismiss the counterclaim, which the trial court sustained, and a judgment of dismissal was entered. In affirming the judgment of the court below, the Supreme Court held, *inter alia*, that defendant's counterclaim failed to state a cause of action.

> It fails to allege the termination of the alleged malicious action in favor of the appellant. Nor could the appellant truthfully allege that the alleged malicious action terminated in his favor because it is the respondent's petition in this action that was pending at the time appellant's answer and counterclaim were filed.
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> The termination of the alleged malicious action in favor of the plaintiff who sues for damages must be alleged in order to state a cause of action.[16]

14. *Id.* at 681, 210 S.W.2d at 60.
15. 208 S.W.2d 211 (Mo. 1948).
16. *Id.* at 211.

In other words at the time the counterclaim was filed no cause of action had accrued for malicious prosecution. It could not arise so long as plaintiff's petition was undisposed of and still pending.

Whether the somewhat similar defense of recoupment is still available in view of the broad provisions of Section 73 has recently been determined in the St. Louis Court of Appeals.[17]

A counterclaim differs from recoupment in that, under a counterclaim, the defendant may have an affirmative judgment where he establishes a demand in excess of the plaintiff's demand, whereas in the case of recoupment, whatever the damages proved by the defendant, they can only go to reduce, or extinguish the claim against him. In Missouri, recoupment must arise out of the transaction or occurrences upon which the plaintiff's claim is founded, as must a counterclaim under Section 73. The only difference is the scope of recovery. If the defendant seeks merely to reduce or extinguish plaintiff's claim he may plead recoupment; if he claims damages of his own, he pleads counterclaim. To illuslustrate: in *Brush v. Miller*,[18] plaintiff brought an action upon an express contract for services rendered. The answer was a general denial coupled with a special plea not pertinent to the matter herein discussed. The controversial question in the case was whether the defendant was entitled to make the defense, under a mere generial denial, that the work was performed and the services rendered in an unskillful and unworkmanlike manner, or, should the defense of defective and unworkmanlike performance be specially pleaded by the defendant in order to authorize the introduction of evidence in support of such defense. In an opinion by Bennick, C., which was adopted as the opinion of the St. Louis Court of Appeals, the court said that had the action been in *quantum meruit* for the reasonable value of the services, the defendant could have shown, under general denial, any matter affecting the value of services, such as the fact that the work was unskillfully performed. However, in view of the fact that the action was on an express contract, evidence of defective performance was improperly admitted as it authorized defendant to prove new matter which constituted an affirmative defense without pleading the same. The court then entered upon a discussion of the defense of recoupment and said:

17. Brush v. Miller, 209 S.W.2d 816 (Mo. App. 1948).
18. *Ibid.*

> The defense of which she was seeking to obtain the benefit was actually one that the work, even though performed, was so defective as to have been worthless, and thus have not entitled plaintiff to recover the agreed price. Such a defense involves a defendant's common-law right to recoupment, and is very frequently asserted in actions of this character. In its strict and literal sense it is a purely defensive matter growing out of the transaction constituting the plaintiff's cause of action, and applicable only to reduce or satisfy the plaintiff's claim. In other words, it goes only to mitigation or extinguishment of damages, and, differing from a counterclaim, permits no affirmative judgment for the defendant. . . .
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> While the defense of recoupment has lost much of its identity under the codes and is generally embraced in the subject of counterclaim, it is none the less still available as a purely defensive matter going only to the reduction or satisfaction of the plaintiff's claim. In fact it would seem that in a case such as this, the defendant, claiming defective performance, has his election whether to merely plead the defective work in reduction of the plaintiff's damages, or whether to plead his own damages as a counterclaim to be found affirmatively by the jury. . . .
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> However the important thing, from the standpoint of our present inquiry, is that recoupment is a defense based upon new matter not included among the matters necessary to make out the plaintiff's cause of action. By such a defense the defendant does not deny the contract and the plaintiff's performance under it, but by proof of defective performance he seeks to avoid his liability to the plaintiff for payment of the agreed price. In view of the nature of the defense as one in confession and avoidance, the authorities consequently hold that "in an action to recover the contract price agreed to be paid for work and materials, defendant cannot show that the work was done in an unworkmanlike manner, unless he has pleaded such defense." . . .[19]

All of which means that a counterclaim under Section 73 need not be asserted if the defense of recoupment will serve the defendant's purpose. But whether recoupment as a defensive matter can be shown under a general denial or must be specially pleaded depends upon the character of the plaintiff's action.

We pass now to a consideration of Section 37 of the new code, which provides:

> The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth

19. *Id.* at 820.

> a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims where there are multiple parties if the requirements of Sections 15, 16 and 18 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Section 77 and Section 20, respectively, are satisfied.[20]

It is apparent that the legislature, in adopting the above section, intended to give the parties the opportunity to set up cross-demands going beyond the set-off as it existed long prior to the adoption of the Code. Set-off had its origin in courts of equity. It consisted of a pleading filed by the defendant in which he confessed his indebtedness to the plaintiff, but alleged that, because of an existing indebtedness which the plaintiff owed him,

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20. Civil Code of Missouri, Section 37: Section 15.—(a) Subject to the provisions of Section 19 of this code, persons having a joint interest shall be parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant. (b) When a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in by an amendment of the petition, or by a supplemental petition and a new summons. (Section 19 relates to the subject of class actions.) Section 16—(a) All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defendiing against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. (b) The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice. Section 18. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claims or counter-claim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in Section 16 of this code. Sections 20 and 77 relate to the subject of counterclaims by third party plaintiffs or defendants and cross-claims.

the plaintiff ought not to recover more than the difference between the two claims. At common law, however, if the claim arose out of a transaction other than the one sued upon and was not connected with the subject of the action, it could not be used as a cross-demand. Not until 1705 was set-off of mutual debts allowed by statute in actions at law brought by insolvents[21] and by a later statute in 1729, mutual debts generally were allowed to be set off in actions at law.[22] But the word "debt" had a technical meaning and restricted the application of the statute to claims arising from contract, express or implied, where the amount was liquidated and certain. The Missouri statutes now repealed by the new Code, treated mutual debts[23] separately from actions arising on contracts.[24] It is to be noted that Section 37 imposes no limitations of that kind, but rather encourages the liberal use of cross-demands. In view of the fact, however, that Section 37 contemplates setting forth independent or alternative counterclaims, that is counterclaims which do not grow out of the same transaction upon which the plaintiff's claim is based, the use thereof is permissive only, so that defendant may, if he chooses, maintain an independent action against the plaintiff, and failure on his part to assert his claim in plaintiff's action will not constitute a waiver.

It is to be noted parenthetically that Section 37 permits either party in his pleading to join claims either legal or equitable or both as he may have against an opposing party. Thus the plaintiff in an action at law for negligence and trespass on his lands in discharging surface water thereon from the defendant's higher land may join an equitable action to enjoin the defendant from permitting flow of surface water onto plaintiff's lands.[25] Prior to the adoption of the new Code, and Section 37 in particular, the subject of joinder of causes of action presented one of the most perplexing problems to the courts. Joinder of causes was restricted according to a fixed classification set out in the Code. These classes included actions arising out of the same transaction or transactions connected with the same subject of action; con-

21. STAT., 4 ANNE, c. 17, § 11 (1705).
22. STAT., 2 GEO. II, c. 22, § 13 (1729), and the amendment thereto STAT., 8 GEO. II, c. 24 (1735).
23. MO. REV. STAT. § 989 (1939).
24. MO. REV. STAT. § 929 (1939).
25. Casanover et al. v. Villanova Realty Co., 209 S.W.2d 556 (Mo. App. 1948).

tracts, express or implied; injuries to person; injuries to the character; injuries to property, actions to recover real property with or without damages; actions to recover personal property with or without damages.[26] The causes so united had to belong to one of these classes and were required to be separately stated. Whether the basis of the classification was convenient is doubtful and that it produced results not foreseen by the framers of the code seems quite apparent from an examination of the cases. For example, under a similar provision of the New York Code, in *De Wolfe v. Abraham*,[27] the plaintiff sued the defendants for slander, alleging that, at their place of business and in the presence and hearing of a large number of people, the defendants, through their agents, charged plaintiff with theft, in that she had stolen from them a certain ring. The question whether the plaintiff should have been allowed to amend her petition for slander by adding thereto the statement of a cause of action for false imprisonment was answered in the negative by the New York Court of Appeals. The court said that false imprisonment was an injury to the person and was embraced in a subdivision different from slander. The court also said that the causes did not arise out of the same transaction though they originated at the same time. Small wonder that in time such restrictions were removed and that eventually freedom was allowed in the joinder of causes of action without any restrictions based on their character or subject matter under more modern codes.

No doubt, both because of the clear idea content of Section 37 of the Code and because of its rather recent adoption, few

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26. MO. REV. STAT. § 917 (1939) provided: "The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action; or, second, contract, express or implied; or, third, injuries, with or without force, to person and property, or either; or, fourth, injuries to character; or, fifth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, sixth, claims to recover personal property, with or without damages, for the withholding thereof; or, seventh, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished."

27. 151 N.Y. 186, 45 N.E. 455 (1896).

cases are to be found in Missouri: *Casanover v. Villanova Realty*,[28] involved joinder of causes of action by the plaintiff. In *Rose* et al. *v. Houser* et. al.,[29] the plaintiffs joined a cause of action in equity with one at law in their petition, as did the defendants in their cross petition. The court found such joinder by defendants proper under Section 37. In *Turner v. Alton Banking & Trust Co.*,[30] the court allowed a counterclaim under Section 37 to be asserted against a foreign executor as an individual. The *Fawkes* case,[31] *supra*, has already been discussed in connection with mandatory counterclaims. No other cases have been found.

Reference must be made at this stage to Missouri Supreme Court Rule 3.16 which places some restrictions on the use of permissive counterclaims. The rule provides:

> A pleading may state as a counterclaim any matured claim against an adverse party, not arising out of the transaction or occurrence that is the subject matter of the adverse party's claim, which the party had at the time of filing his first required pleading. (Supplemental to Secs. 37, 73, 75 and 77, 1943 Act.)

It is difficult to see why this rule should be supplemental to Section 73, since by the very words of the rule the counterclaim contemplated cannot arise out of the transaction or occurrence that is the subject matter of the opponent's claim. Very likely it was not intended that the rule should cover Section 73 and it is suggested here that by its wording it can have reference to Sections 37 and 75 only.

An excellent illustration of the principle, though the case had been decided long before the adoption of the new code, is to be found in a decision by the St. Louis Court of Appeals, *Jansen v. Dolan*,[32] a suit on an account. By way of answer thereto, defendant interposed her counterclaim which alleged that plaintiff deprived her of the use of a one-horse stake wagon and one set of harness, owned by the defendant, between September 4, 1908 and January 26, 1909, excepting Sundays and holidays, the reasonable value of which was alleged to be $1 per day, by reason whereof defendant asked a recovery against plaintiff in

28. 209 S.W.2d 556 (Mo. App. 1948).
29. 206 S.W.2d 571 (Mo. App. 1947).
30. 166 F.2d 305 (8th Cir. 1948).
31. State *ex rel.* Fawkes v. Bland *et al.*, 357 Mo. 634, 210 S.W.2d 31 (1948).
32. 157 Mo. App. 32, 137 S.W. 27 (1911).

the total sum of $113 for the time he retained the stake wagon and set of harness without her consent. The counterclaim showed on its face that the cause of action declared upon therein arose from the tort of plaintiff in withholding possession of defendant's stake wagon and harness against her will. The counterclaim also showed that defendant waived the tort of conversion and elected to sue as in assumpsit for the reasonable value and use at $1 per day. Said the court:

> There can be no doubt that in many instances it is competent for a party to waive the tort and sue in assumpsit for the reasonable value of the article or thing or the use thereof of which defendant by his wrongful act has deprived him and appropriated its benefits to himself. That it was competent for defendant to waive the tort and her right to sue therefor in conversion in the present instance, and instead claim the reasonable value of the use of the wagon and harness during the time defendant retained it, is not to be questioned. Where such right of election obtains and the suit is in contract, the law is well-nigh universal to the effect that one may, under the second subdivision of the statute[33] set forth a counterclaim as also arising on contract, though it originated in the tortious act of plaintiff, if the tort is waived and an implied contract declared upon provided a right of recovery therefor existed at the commencement of the action.[34]

Defendant might have sued in conversion for the value of both wagon and harness, but instead elected to proceed in assumpsit on the implied undertaking to make compensation for the reasonable value for the use. The jury awarded defendant a recovery on the counterclaim for the full amount of $113.

> A considerable portion of this is unauthorized under the statute on counterclaims, for by its express provision no recovery can be had except on a demand existing at the commencement of the action. . . . The present action was instituted by plaintiff November 17, 1908, and the first item of the counterclaim is of date September 4, 1908. So much of the counterclaim as accrued between September 4, 1908 and November 17, 1908, the time the suit was filed, is available to defendant. But that portion of it consisting of

33. MO. REV. STAT. § 1807 (1909), in force at the time, provided that in an action arising in contract, any other cause of action arising also in contract and existing at the commencement of the action could be pleaded and considered as a counterclaim.

34. Jansen v. Dolan, 157 Mo. App. 32, 35, 137 S.W. 27, 28 (1911).

> items from November 17, 1908 to January 26, 1909, inclusive, may not be allowed, and the court erred in submitting it to the jury under instructions given.[35]

It should be noted that with the permission of the court, a party may under Section 75[36] file a counterclaim by way of supplemental pleading if his claim either matured or was acquired after he filed his required pleading. However, to come within the scope of this section a counterclaim must have "matured." If the counterclaim has not matured it states no cause of action. Thus in the two cases discussed in connection with mandatory counterclaims,[37] the proposed counterclaims had not matured because the relief sought was dependent upon plaintiffs' failure to prevail in their action. Pleading a claim for damages arising from the wrongful bringing of an action before the final determination thereof is premature and unauthorized by Section 75.

Should the pleader fail to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment, by authority of Section 76.[38] There are no cases to be found on this subject. It is submitted, however, that the pleader in making the application will be required to show that he is not guilty of laches or apparent lack of good faith.

II. CROSS-CLAIMS

Section 77 of the new Code provides:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.[39]

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35. *Id.* at 36, 137 S.W. at 28.

36. Civil Code of Missouri, Section 75, provides: "A claim which either matured or was acquired by the pleader after the serving of his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading."

37. Zickel v. Knell *et al.*, 357 Mo. 678, 210 S.W.2d 59 (1948); Niedringhaus v. Zucker, 208 S.W.2d 211 (Mo. 1948).

38. Civil Code of Missouri, Section 76, provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires he may by leave of court set up the counterclaim."

39. Civil Code of Missouri, Section 77. Compare FED. R. CIV. P. 13(g).

This section looks to a speedy adjudication of all controversies between co-parties in a single action and without multiplicity of suits. To be a valid cross-claim it must be one that is asserted against a co-party[40] concerning matters in question either in the original petition or in a counterclaim. One case in which Section 77 could have been invoked is *Camden v. St. Louis Public Service Co.*[41] That suit was brought by plaintiff against the St. Louis Public Service Company and certain truck owners for personal injuries sustained in a collision between a truck in which plaintiff was riding and a street car. Plaintiff recovered a judgment in the sum of $2,500 against all defendants. The truck owners thereupon filed a motion for a new trial which was sustained. The Service Company did not file any motion for a new trial. Plaintiff then filed a motion dismissing as to the truck owners and praying for final judgment against the Service Company. The company then filed a motion praying that the court enter its order holding in abeyance the verdict and judgment against the company until a retrial of the cause determined the liability of the truck owners, or, in the alternative, if the court sustained said motion of plaintiff, then to allow the Service Company a reasonable time in which to file a third-party petition against the truck owners. The court sustained plaintiff's motion and dismissed as to the truck owners and also ordered a final judgment against the company. At the same time, the court overruled the alternative motion of the Service Company. The company appealed from the court's order. The St. Louis Court of Appeals found no error in the procedure followed by the trial court and affirmed its orders. It served this admonition:

> There was another remedy open to defendant Service Company of which it did not avail itself. It had a right to file a crossclaim under Section 77 of the new Civil Code. . . . Section 77, *supra*, is exactly the same as Rule 13(g) of the Federal Rules of Civil Procedure.
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> An example of the construction and application of the above mentioned rule will be found in Bohn v. American Export Lines, Inc., 42 F. Supp. 228, which was a case that arose under the Federal Rules of Civil Procedure. In that case Henry Bohn, the plaintiff, brought his action for per-

40. A claim by a defendant against the plaintiff is a counterclaim; a claim against a co-party is a cross-claim.

41. 239 Mo. App. 1199, 206 S.W.2d 699 (1947).

sonal injuries against American Export Lines and the Wyle Lighterage Corporation. In his petition plaintiff alleged that while he was engaged in the performance of his duties as an employee of American Export Lines he was struck by bags of coal which were being hoisted by the Wyle Lighterage Corporation. American Export Lines filed a cross-claim against the Wyle Lighterage Corporation in which it alleged that the Wyle Lighterage Corporation was primarily liable for the injuries sustained, setting forth allegations of facts as grounds for such contention. The Wyle Lighterage Corporation filed a motion to have the cross-claim stricken. This motion was denied by the Court. In reaching its conclusion, the Court said: "Although at common law, . . . the liability sued upon had first to become fixed by a judgment, I think under Rule 13(g), Federal Rules of Civil Procedure, . . . that element is no longer requisite, for it is plain that a cross-claim permitted thereunder may 'include a claim that the party against whom it is asserted is or may be liable to the cross-claimant.'" . . . The above Federal case demonstrates that the defendant Service Company in the case at bar had a remedy against the Beckers [truck owners], but decided for reasons of its own not to pursue such remedy.[42]

III. THIRD-PARTY PETITIONS

Section 20 of the new Code provides:

(a) Before filing his answer, a defendant may move ex parte or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to file a petition and serve a summons upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the petition is filed and summons served, the person so served, hereinafter called the third-party defendant, shall make his defenses, counterclaims and cross-claims against the plaintiff, or any other party as provided in this code. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party had he been joined originally as a defendant. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him or to the third-

42. *Id.* at 1208, 206 S.W.2d at 704.

> party plaintiff for all or part of the claim made in the action against the third-party defendant. (b) When a counterclaim is asserted against a plaintiff, he may cause a third-party to be brought in under circumstances which under this section would entitle a defendant to do so.[43]

The section just quoted furnishes procedure for the bringing in of new parties to an action on the application of a defendant. The third-party defendant may be brought in on a showing that he is or may be liable either to the defendant or to the plaintiff for the claim which plaintiff is asserting against the defendant. From the foregoing it would follow that the original defendant may not implead as a third-party defendant a party who is not liable to either the plaintiff or the defendant, but to whom the defendant is or may be liable. It is also clear that this section precludes a defendant's right of election in the original plaintiff except that a plaintiff may bring in a third party when a counterclaim is asserted against him. This does not mean that the plaintiff may not amend his petition so as to state a claim against the third-party defendant after the latter has been brought in by the original defendant. In fact Section 20 specifically provides that "the plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." That a third-party claim must arise out of the same transaction, occurrence, or series of transactions or occurrences as the original claim presented against the defendent is settled in Missouri by *Camden v. St. Louis Public Service Co., supra,* already adverted to in the section on cross-claims.

Whether leave to implead a third-party defendant should be granted appears to be within the discretion of the court. It is possible to envisage three situations which might determine the court's action. For example, under Section 20 the defendant might bring in (1) a person who is claimed to be liable over to defendant; (2) a person who is claimed to be liable solely to the plaintiff for the claim asserted against the defendant; or (3) a person who is claimed to be liable jointly to the plaintiff for the claim asserted against the defendant.

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43. Compare FED. R. CIV. P. 14 (a) and (b).

The Supreme Court recently had occasion to consider a case falling within the first situation, *State* ex rel. *Algiere v. Russell.*[44] The question to be decided was whether a claim of indemnity, by a principal against an agent, was proper subject matter for a third party proceeding in a case in which the complaining party asserted a claim for damages against the principal based on the agent's negligence. The court held that the agent was properly brought into the case as a third-party defendant on the theory that the agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom. There is actually no reason for denying a motion to implead in a case of this kind, since little prejudice to plaintiff will result. At the same time the defendant should not be put to the delay and expense of a second action.

A case in point under the second situation is *Browne v. Creek* et al.,[45] decided by the Supreme Court. In that case plaintiff brought an action against the defendants for her injuries. Defendants moved for leave to file a third-party petition bringing in the driver of the automobile in which plaintiff was riding, claiming that his negligence was the sole proximate cause of the collision and the injuries complained of. The plaintiff declined to amend her petition so as to include him as a party defendant. The trial court thereupon denied the defendants' application for leave to include him as a party defendant. The Supreme Court in sustaining the position of the trial court stated:

> While there has been some diversity of opinion as to the right of a defendant to tender an additional third party defendant alleged to be solely liable for the injuries complained of and who is not liable to the defendant, it has become the better accepted and the better reasoned view, in the circumstances of this record, that there is no abuse of discretion when the trial court refuses the application. . . .[46]

The court relies heavily on precedents under Federal Rule 14(a), the latter having brought into the civil procedure the practice of admiralty courts, the English courts and certain state

44. 223 S.W.2d 481 (Mo. 1949).
45. 357 Mo. 576, 209 S.W.2d 900 (1948).
46. *Id.* at 580, 209 S.W.2d at 903. See also Dennis v. Creek *et al.*, 211 S.W.2d 59 (Mo. 1948).

courts (New York, Pennsylvania and Wisconsin). Whether the language of the statute that "a defendant may move . . . for leave as a third party plaintiff to file a petition and serve a summons upon a person not a party to the action . . ." is intended to make the impleading of third parties discretionary with the trial court depends upon whether the words "for leave" are susceptible of that construction. The same is true of the language that follows the above quoted abstract *"If* the motion is granted . . ." Against the contention that the right is in the defendant and not in the court is apparently all the case law to be found in the admiralty, English, New York, Pennsylvania and Wisconsin reports.[47] With this background of decisions there can be no doubt that it was intended to make the impleading of third parties discretionary with the trial courts. And the Missouri courts are now committed to this proposition. So, under the *Browne* case, *supra,* if the third-party is not liable over to the original defendant but is only directly liable to the original plaintiff, it would become necessary for the original plaintiff to amend his petition; however, the original defendant cannot compel the plaintiff also to sue a third party whom he does not wish to sue, by tendering in a third-party petition the third party as an additional defendant directly liable to plaintiff. In other words the tender becomes effective only if the original plaintiff amends his petition to state a cause of action against the new defendant, and if the plaintiff declines to assert any claim against the third party it is no abuse of discretion to deny impleader.

The third situation, where liability to plaintiff and to defendant is asserted, is like the second. The case in point is *State* ex rel. *McClure v. Dinwiddie.*[48] It settles the question of impleading joint tort-feasors; the defendant can not compel the plaintiff to accept a third party defendant. This result can be justified on the ground that the old common-law rule of no contribution is to some extent still in effect in Missouri,[49] contribution being

47. See 1 MOORE'S FEDERAL PRACTICE 741 (1938).
48. 213 S.W.2d 127 (Mo. 1948).
49. Mo. REV. STAT. § 3658 (1939) provides: "Contribution.—Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors

permitted only after a joint judgment against the tort-feasors. Since under the statute the defendant has no right to contribution unless a joint judgment is rendered against both tort-feasors, it follows that unless the plaintiff sues the third party or amends his petition to include the third party, the court will have discretion to grant or refuse leave to file the third-party petition.

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or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released."