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MISSOURI'S NEW CIVIL PROCEDURE: A CRITIQUE OF THE PROCESS OF PROCEDURAL IMPROVEMENT

THOMAS E. ATKINSON*

Missouri now has a Civil Code. Section 2 of Senate Bill No. 34 of the 62nd General Assembly declares that the bill shall be known and cited as the Civil Code of Missouri. This sounds as if there was to be a change in substantive law to something like the system which Napoleon gave to the world. However, it turns out that the code deals only with civil procedure and indeed leaves a large part of that field unaltered. The bill by its terms goes into effect January 1, 1945.¹ Before that date much will be said and written in explanation of the practice under the new law.² This is not the purpose of the present paper, though to some extent that result may be accomplished incidentally. The purpose of this article is to show: (1) how far the code failed of the original purpose of the undertaking *viz.*, to modernize Missouri procedure and to expedite and reduce the costs of trials and appeals, (2) how far these failures may be remedied by rules under terms of the code, (3) how a brighter future for the administration of justice can be assured through an improved method of procedure-making.

HISTORY OF NEW CODE

To understand these things it is desirable to review briefly the movement which culminated in the new law. This history may start with an attempt to obtain a grant of the rule-making power to the supreme court

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1. Committee Substitute for Senate Bill No. 34 [Truly Agreed to and Finally Passed] § 3 (1943). The bill as passed appears in *Mo. Laws* (1943) pp. 353-397 and will hereafter be referred to as S.B. 34. The numbering of the sections is not consecutive in all cases, due to the fact that several sections were stricken by amendments without renumbering of the remainder. Other printed legislative versions of the bill are the original Senate Bill No. 34, Committee Substitute for Senate Bill No. 34, [Perfectd] Committee Substitute for Senate Bill No. 34.

2. See Carr, *Modernized Civil Code of Missouri* (1944) 9 *MO. L. REV.* 1. Other discussions of the new code in its formulative stages appear in the *Missouri Law Review*, the *Missouri Bar Journal* and elsewhere.

by the Missouri General Assembly at its 1939 session.³ This attempt was unsuccessful. Instead, the legislature passed a concurrent resolution inviting the court to submit to the next General Assembly "suggestions for a revised code and rules of civil procedure for consideration of said Assembly."⁴ Thereafter the court appointed a committee of fifty-three members of the bench and bar to assist the court in carrying out the purpose of the resolution.⁵ This committee was representative of the legal profession of the state. Due to its size, however, the initial work was delegated to a subcommittee on suggestions and plan,⁶ which met frequently before reporting back to the main committee. All the lawyers of the state were invited to offer suggestions as to the scope and details of recommendations to be made.⁷ There were many responses, which ranged from suggestions of trifling amendments to proposals that all statutes relating to procedure should undergo complete revision.⁸

The subcommittee decided to confine its attention in so far as possible to Chapter 6 of the Revised Statutes, which is denominated "Civil Procedure—General Code." Even after this had been decided there was a difference of opinion as to the scope of amendments which should be proposed. The view was taken by some that only a few most-needed improvements should be suggested; others believed that Chapter 6 should be thoroughly modernized and recast. Those taking the latter view were thinking of patterning the state procedure after the Federal Rules of Civil Procedure which had recently become operative. As the subcommittee was unable to forecast which position would be favored by the main committee and by the court, it decided to prepare two plans.

Plan I,⁹ as submitted by the subcommittee, consisted of a dozen major

3. *Report, Committee Cooperating with Missouri Institute for the Administration of Justice* (1938) 9 Mo. B. J. 216.

4. Teasdale, *Move to Improve Procedure Progressing Although Bill Is Defeated* (1939) 10 Mo. B. J. 41; Teasdale, *Efforts of Missouri Institute for Administration of Justice Finally Bear Fruit* (1939) 10 Mo. B. J. 91; *Report, Committee to Cooperate with Missouri Institute for Administration of Justice* (1939) 10 Mo. B. J. 164.

5. The court named 54 to the committee. (1939) 10 Mo. B. J. 209. One declined to serve. For a list of those remaining on the committee, see (1940) 11 Mo. B. J. 199.

6. (1939) 10 Mo. B. J. 209, 223; (1940) 11 Mo. B. J. 18.

7. (1939) 10 Mo. B. J. 206; (1940) 11 Mo. B. J. 45.

8. *Summary of Suggestions Received by the Committee on Revision of Civil Procedure and Rules* (1940) 11 Mo. B. J. 45.

9. As tendered to the full committee Plan I consisted of a mimeographed pamphlet of 44 pages. The amendments by the full committee were included in a 7 page mimeographed pamphlet. Plan I, as so amended was printed in Report of

proposals for improving the existing procedural statutes without any general revision thereof, though there were also numerous harmonizing amendments chiefly arising out of the existing provisions making pleadings and trials dependent upon terms of court. Plan II¹⁰ was more ambitious. Its provisions were patterned closely after the Federal Rules but it also contained measures not contained in those rules.¹¹ Under this plan as originally proposed, the only articles of the present general code to be retained were those on place of bringing actions, limitations, declaratory judgments, executions and exemptions, and costs, and even in these articles harmonizing amendments were contemplated.¹²

While in the clear majority of cases Plan II followed the provisions and exact language of the Federal Rules there were some deviations therefrom. There were various reasons behind these deviations. In the first place the Federal Rules apply only to actions in the trial courts, and also the new state procedure had to fit with the retained articles of Chapter 6 and other Missouri procedural provisions. These factors called for a somewhat different arrangement and organization from those used in the Federal Rules. Some parts of the Federal Rules are applicable only to the federal courts,¹³ and

Missouri Supreme Court to the Senate and House of Representatives of the 61st General Assembly of the State of Missouri under House Concurrent Resolution No. 23 of the 60th General Assembly of the State of Missouri (1941). See *infra* text at notes 23 to 26. For a summary of the provisions of Plan I as amended by the main committee and as submitted to the court, see *Plans for Improvement of Civil Procedure Submitted by Missouri Supreme Court Committee* (1940) 11 Mo. B. J. 193, 198.

10. As tendered to the main committee Plan II consisted of a mimeographed pamphlet of 56 pages (hereafter cited as Plan II), together with a completion draft of 27 pages (hereafter cited as Completion Draft). The amendments by the main committee were included in a 16 page mimeographed pamphlet (hereafter cited as Amendments to Plan II). Plan II, as so amended, was printed in Proposed General Code of Civil Procedure for the State of Missouri (1941). See *infra* text at notes 23 to 26. For a summary of the provisions of Plan II as amended by the main committee and as submitted to the court see, *Plans for Improvement of Civil Procedure Submitted by Missouri Supreme Court Committee* (1940) 11 Mo. B. J. 193, 199.

11. *E.g.* Plan II, p. 4 (term always open; *id.* p. 5 (compromise and payment of infants' and incompetent persons' claims); *id.*, p. 13 (service on infant or incompetent); *id.* p. 14-15 (service by mail and by publication); *id.* p. 16 (abolishing conclusiveness of sheriff's return); *id.* p. 24 (motion searches record); *id.* pp. 28-31 (change of venue); *id.* pp. 34-35 (continuances); *id.* p. 37 (involuntary nonsuit abolished); *id.* p. 37 (motion in arrest abolished); *id.* p. 45 (from what appeal is allowed); *id.* p. 51 (supreme court rules regarding transcripts and briefs).

12. Specific harmonizing amendments were not presented for Plan II but samples of specific harmonizing amendments can be found in Plan I. As for the methods of dealing with the necessary harmonization of Plan II or the new Civil Code with sections in other parts of the statutes, see *infra* text following note 262.

13. *E.g.* Fed. Rules Civ. Proc., Rule 22(2); Rule 23(b) (part).

these of course were omitted. In some cases the Federal Rules incorporate the state procedure by reference,¹⁴ and here, of course, the state practice had to be made explicit. Change of venue was not treated generally in the Federal Rules at all.¹⁵ For psychological reasons the terms "petition," "referee," and "respondent," which have long been in use in the state practice, were retained in the place of "complaint," "master," and "appellee" employed in the Federal Rules. The substance of several old Missouri provisions were retained because they had proved to be useful.¹⁶ A few new devices were borrowed from the procedure of other states.¹⁷ Occasionally attempt was made to improve the language or the substance of the Federal Rules. However, perhaps ninety per cent of the Federal Rules was contained in Plan II. Primarily this was prompted by belief in the merits of the Federal Rules. Of secondary, but none the less real, importance were the advantages which were thought would result from uniformity between the state and federal practice.¹⁸

Plans I and II were reduced to mimeographed form¹⁹ and submitted by the subcommittee to the main committee. After an opportunity for individual members to study the plans, the committee met twice to consider them—the second meeting extending over two days. It was decided to offer both plans to the court. Consideration was devoted specifically to the provisions of Plan II, inasmuch as the substance of all provisions of Plan I was included in Plan II. The main committee made many amendments in Plan II²⁰—most of them dealing with matters of scope and substance rather than form. It was decided to retain the existing provisions relative to change of venue, referees, judgments, and in the main also those relating to depositions. With the exception of the provisions relative to summary judgments,²¹ none of the proposed changes on these subjects were considered at the subsequent stages of Plan II. In addition to these wholesale omissions the committee eliminated, changed, and rephrased a consider-

14. *E.g.* Fed. Rules Civ. Proc., Rule 4(d) (2); see also Rule 4(e).

15. See *supra* note 11 and *infra* text at notes 41 to 43 and following.

16. *E.g.* Plan II, p. 5 (parties to action arising in other states); *id.* p. 21 (pleading slander and libel); *id.* p. 26 (counterclaims to assigned claims); *id.* p. 36 (jury trial of fraud in obtaining release).

17. *E.g.* Plan II, p. 4 (term always open); *id.* p. 5 (compromise and payment of infants' and incompetent persons' claims); *id.* p. 28 (transfer of case to proper court).

18. See *Report, Committee on Expediting Trials and Appeals* (1940) 11 Mo. B. J. 183.

19. See *supra* notes 9 and 10.

20. See *supra* note 10.

21. See *infra* text at notes 96 to 98.

able number of the other provisions of the original plan. This resulted in further deviations from the Federal Rules; in some of these cases the substance of existing Missouri statutory provisions were incorporated into the plan in lieu of the Federal Rules provisions.²²

Though the supreme court was furnished with copies of the plans as originally drafted by the subcommittee and was otherwise informally advised as to the progress of the committee's work, the first report²³ of the committee was not submitted until December, 1940. The court, desirous of making thorough study of the plans and also of obtaining the reactions of the profession as a whole, asked for²⁴ and obtained a two year extension of time within which to make suggestions to the General Assembly.²⁵ An appropriation was obtained for the printing of the plans, and copies thereof were distributed to the bar generally. The court appointed a special committee to conduct meetings in various parts of the state to explain and discuss the plans and to report to the court the opinion of the bar.²⁶ Committees appointed by two of the largest bar associations of the state rendered detailed reports on Plan II.²⁷ As a result of these meetings and bar association reports the special committee reported that the majority of lawyers who were in favor of any change supported the general mode and provisions of Plan II.²⁸

The court then proceeded to revise Plan II in the light of its own study and of suggestions and criticisms received after the printing and distribution of the plan. For this purpose two members of the court, acting with the chairman and technical adviser of the committee, drafted a number of amendments including the restoration of some of the features which had

22. *E.g.* Proposed General Code of Civil Procedure for the State of Missouri (1941) pp. 7-8 (service of papers); *id.* p. 13 (other parties—how brought in); *id.* p. 50 (waiver of jury trial). The main committee also struck out the general Federal deposition provisions, thus continuing the existing state provisions which are found in Mo. REV. STAT. (1939) c. 9, arts. 4, 6.

23. The report was mimeographed and was accompanied by mimeographed copies of Plans I and II, and of the amendments thereto, together with a copy of the transcript of the committee's proceeding upon consideration of the subcommittee's drafts, minutes of the committee's meetings, and other documents.

24. See printed version of Plan I, *supra* note 9, pp. 3-6; (1941) 12 Mo. B. J. 85.

25. (1941) 12 Mo. B. J. 129, 161.

26. *Ibid.*

27. Report of the Committee on Trial Practice of the Bar Association of St. Louis and Report of the Committee on Proposed Changes in the Civil Code of Missouri of the Lawyers Association of Kansas City (1942).

28. See *Report, Committee on Amendments, Judiciary and Procedure* (1942) 13 Mo. B. J. 124.

been eliminated by the main committee. These changes were submitted first to the subcommittee and then to the main committee and no dissent was registered. The committee's final report,²⁹ including Plan II as so revised, was submitted in December, 1942. Except for a very few changes³⁰ the court submitted its suggestions to the General Assembly in the manner recommended by the final committee report.

The proposal was introduced in the Senate with no material change from the court's recommendation. Two public hearings were held upon the bill in the Senate. A number of lawyers and judges spoke in favor of the measure—some of them generally and some upon particular features of the bill. A committee of the Kansas City Bar Association proposed a number of detailed amendments. Later the Senate Judiciary Committee offered a committee substitute bill which involved a number of substantial changes but retained the general structure and most of the features of Plan II. Thereafter, many amendments were made by the Senate—some dealing with substance, others with form. After passage of the bill by the Senate, the House made a number of further amendments. Upon conference the bill was finally agreed to and passed by both houses, and was approved by the governor on August 6, 1943.

GENERAL SCOPE AND CHARACTER OF NEW CODE

First of all one is struck by the conservative scope of the new code. Only half of the articles of Chapter 6 of the Revised Statutes are revised. The articles on infants as parties, the place of bringing actions, limitations, change of venue, declaratory judgments, referees and receivers, judgments, executions, and costs remain unchanged. In only minor or incidental respects³¹ are the procedural provisions falling outside of Chapter 6 affected by the act. The last section declares that the "present practice and procedure in criminal cases shall not be changed except by a legislative act passed for that specific purpose."³²

There is no intent here to criticize the new code simply on account of its limited scope. Ideally perhaps all our procedural statutes should be carefully examined with the idea of both substantial and formal revision. Prac-

29. Final Report of the Missouri Supreme Court Committee on Civil Procedure (1943).

30. See *infra* text at notes 65 to 67.

31. S. B. 34, §§ 142, 144 relating to depositions. See also *infra* text at notes 228 to 236.

32. S. B. 34, § 145.

tically this is too great a task when the examination must be by a considerable representation of the bar, a court busy with judicial duties, and finally by the legislature engaged in its manifold tasks. It was doubtless wise to decide to restrict the actual statutory revision to the general code. Many of the improvements therein will apply to procedural provisions contained elsewhere by the statutes. The extent of changes of this nature can be clarified by rule.³³ Further needed procedural changes outside the general code can await amendments and improvements at a later date.

However, the conservatism of the Civil Code is not confined to its limited scope, but is manifested also in the limited number and kind of procedural changes in the subject matter covered by the act. From the standpoint of procedural reform, the original proposals of the subcommittee were as progressive as any other American system—possibly the most progressive. They could not be said to have been radical and did not embody the more advanced features of the modern English procedure.³⁴ Unfortunately for the interest of thorough-going procedural improvement, the code as proposed by the subcommittee went through three processes of revision—by the main committee, the court, and the legislature respectively. In the process of these revisions certain improvements of a minor or formal nature were made in the original proposals. Far out-weighting these improvements were the amendments which totally or partially eliminated devices which would expedite and simplify Missouri procedure. To give an idea of the extent of this process of rejection of modern procedural devices, a catalogue of the more important eliminations follows, with some brief comment thereon.

PROVISIONS ELIMINATED BY MAIN COMMITTEE

(1) *Provision that pleadings subsequent to the petition and other papers may be served by mail.*³⁵ This is a common sense procedure as shown by the fact that this vehicle is used by the government and business men with regard to the transmissal of documents of the utmost importance. It is also used frequently by lawyers in delivering pleadings, but if challenged, does not constitute legal service of the paper. This provision was eliminated from the code because it was thought that some lawyers would falsely deny

33. See *infra* text at notes 228 to 236.

34. *E.g.* the provision of Order 25. Rules 1-4 in Annual Practice (1939) permitting any point of law to be raised in the responsive pleading.

35. Plan II, art. 1, § 5 (1940); Amendments to Plan II, p. 1; S. B. 34, § 5(b). *Cf.* Fed. Rules Civ. Proc., Rule 5(b) permitting service of papers by mail.

receipt of the paper. This is indeed a sad, though probably true, observation; but this sort of subterfuge could be exposed if repeated more than once and disciplinary action taken accordingly. The reflection upon the ethical standards of the bar is unfortunate enough but the rejection of a simple and inexpensive method of delivery of papers on that account is indeed a philosophy of despair.

(2) *Provision that a partnership or other unincorporated association may sue or be sued in its common name.*³⁶

(3) *Provision that failure to make proof of service does not affect the validity of the service.*³⁷

(4) *Provision that the signature of an attorney to a pleading constitutes a certificate that he has read the pleading, that to the best of his knowledge there is good ground to support it, that it is not interposed for delay, and subjecting attorneys to disciplinary action for wilful violation.*³⁸ This is no more than a statement of recognized principles of a lawyer's obligation.³⁹ Attorneys who have had considerable experience under the Federal Rules have informed the writer that a like provision in the Rules has done much to discourage the assertion of unwarranted claims and defenses.⁴⁰ This elimination by the main committee is hard to understand. Surely they could not have believed that an attorney should be free to file a pleading knowing that he had no ground to support it. Possibly the thought was that ethical principles have no place in the code, a point of view almost as unfortunate. If ethical principles are to be observed in daily practice they should not be relegated to the canons of ethics, or to addresses before law students or on the feast days of the bar. Nowhere are legal ethics of greater importance than in the process of litigation, and nowhere is there a more appropriate place for enunciation of those principles than in the code which provides the rules under which litigation is to be conducted.

36. Plan II, art. 2, § 2; Amendments to Plan II, p. 2. Cf. Fed. Rules Civ. Proc., Rule 17(b); *Mayes v. United Garment Workers*, 320 Mo. 10, 6 S. W. (2d) 333 (1928) holding a similar provision invalid as being not germane to the title of the legislative act.

37. Plan II, art. 5, § 8(a); Amendments to Plan II, p. 4; S. B. 34, § 30(a). Cf. Fed. Rules Civ. Proc., Rule 4(g).

38. Plan II, art. 6, §§ 3, 8, 11; Amendments to Plan II, p. 5; S. B. 34 §§ 34, 39, 42. Cf. Fed. Rules Civ. Proc., Rules 11, 8(b), 8(e)(2).

39. Committee on Professional Ethics, Association of the Bar of the City of New York, Pamphlet No. III, Question 85 (1930); Missouri Supreme Court Rule 35 (22).

40. See also *Report, Committee on Expediting Trials and Appeals*, 10 Mo. B. J. 165 (1939).

(5) *Provisions that actions started in a court lacking jurisdiction or venue requirements should be transferred to the proper court rather than dismissed, and that only the judge, and not the venue, be changed when the objection is to the judge alone.*⁴¹ All these provisions have been in force in other states,⁴² and the latter has been the statutory provision in Missouri in criminal cases.⁴³ They are so obviously direct and sensible in their application that their rejection cannot be supported on any rational basis. They fell with the committee's elimination of the entire new article on Change of Court or Judge to supplant the present article on Change of Venue. The latter was retained upon the ground that change of venue matters were not a serious trouble-spot in the existing procedure—a philosophy which underlay much of the action of the main committee.

(6) *Almost the entire deposition procedure of the Federal Rules.*⁴⁴ It is true that the existing Missouri provisions regarding depositions are, in the main, satisfactory, and this is particularly so regarding the use of depositions as a discovery device. Indeed with regard to the taking of depositions before answer, the Missouri provision,⁴⁵ which permits depositions to be taken as soon as the suit is filed,⁴⁶ seems superior to the Federal Rule, which permits depositions before answer only by leave of court.⁴⁷ If change had been made in this one regard and the Federal Rules provisions followed otherwise, there would have been virtual uniformity in taking depositions for actions in both state and federal courts with the marked advantages flowing from that uniformity. The committee did preserve three of the deposition features of the Federal Rules which the state procedure lacked. These were the provisions for the production of documents at the taking of depositions, for the termination or limitation of the examination, and for submitting the deposition to witnesses for signature.⁴⁸

(7) *Provisions relative to payment of expenses of proof by an attorney who unreasonably refuses to grant discovery.*⁴⁹ It will be noted that the committee adopted the main features of the Federal Rules regarding discovery

41. Plan II, art. 7, §§ 1, 2, 13-17; Amendments to Plan II, p. 6.

42. CAL. CODE CIV. PROC., § 396.

43. MO. REV. STAT. (1939) § 4040.

44. Completion Draft, art. 8 which supplanted the more limited provisions in art. 8 of the original Plan II; Amendments to Plan II, pp. 7-9.

45. MO. REV. STAT. (1939) § 1917 *et seq.*

46. State *ex rel.* Methudy v. Killoren, 229 S. W. 1097 (Mo. App. 1921).

47. Fed. Rules Civ. Proc., Rule 26(a); *cf. id.*, Rule 27(a).

48. See *infra* notes 120, 140.

49. Completion Draft, pp. 10-11, § 12(a); Amendments to Plan II, p. 8; S. B. 34, § 89(a). *Cf.* Fed. Rules Civ. Proc., Rule 37(a).

aside from deposition procedure, in lieu of the provisions of Article 12 of Chapter 6 of the Revised Statutes. Certain changes were made from the Federal Rules. The party might be obliged to pay the cost of proving a fact which he should have admitted, but no penalty is imposed upon the attorney who directs this course of conduct. The result is practical immunity of attorneys from ethical obligation, and a lack of teeth in the discovery procedure.

(8) *Provision requiring demand for jury trial within ten days after issue joined, under penalty of waiver of jury.*⁵⁰ This measure is included in the Federal Rules and a number of states have similar provisions. The committee rejected it upon the theory that it was undemocratic and would be used to deprive a party of his constitutional rights. It has not worked out so in the federal courts nor in the state courts which have this procedure. Trial courts there have been quite willing to allow a late demand where the case was based on negligence or some other type of action peculiarly fitted for jury trial.⁵¹ The provision has been instrumental in shortening the jury calendar. However, perhaps its greatest utility comes in cases where both legal and equitable issues are presented by the pleadings. The procedure brings up in advance of trial the matter of what, if any, issues are triable by jury. A careful consideration can be made of these points if due demand for jury is made; if no demand is made the chance for reversible error is obviated by virtue of the waiver which follows from failure to demand a jury.

(9) *Provision that the argument to the jury should precede the court's charge.*⁵² This would have promoted justice inasmuch as the arguments of partisan counsel would be followed by the impartial charge of the court. Distrust of trial judges and the desire of counsel to dominate trial proceedings has doubtless led to the rule which is now in force in Missouri and surrounding states.⁵³ It is sometimes claimed in the defense of the latter practice that it permits counsel to argue the case upon the basis of the charge given; that if the instructions come after the argument counsel can-

50. Plan II, art. 9, § 8; Amendments to plan II, p. 9; S. B. 34, § 98. Cf. Fed. Rules Civ. Proc., Rule 38.

51. Peterson v. Southern Pacific Co., 31 F. Supp. 29 (S. D. Cal. 1940); Gunther v. H. W. Gossard., 27 F. Supp. 995 (S. D. N. Y. 1939).

52. Plan II, art. 9, § 14(a); Amendments to Plan II, p. 10; S. B. 34, § 105(a). Cf. Fed. Rules Civ. Proc., Rule 51. Doubt may arise under S. B. 34 § 105(a) as to whether the charge should precede the argument. Cf. MO. REV. STAT. (1939) § 1118.

53. See ZANE, THE STORY OF LAW (1927), 394.

not forecast what the instruction will be. No practical difficulty is encountered in those jurisdictions following the majority rule; this is particularly so under provision of the Federal Rules that prior to the argument the court shall inform counsel of the instructions to be given; indeed a somewhat similar provision is included in the new code.⁵⁴

(10) *Provision that a plaintiff may not dismiss his action after answer without consent of the defendant, or leave of court.*⁵⁵ Instead of this, the committee retained in effect the present Missouri provision⁵⁶ allowing dismissal at any time until the case is finally submitted to the jury, though the limitation was added that after one such dismissal, a second dismissal of right could not come after the jury was impanelled. This addition to the present rule does little to alleviate the marked disparity between the plaintiff and the defendant in choice of the time and place of trial. The plaintiff has not only the original choice within the limits of the statute of limitations and the venue statutes but also can have a second choice after he has heard all the evidence in the case. He can have a third, fourth and indefinite number of choices, provided he exercises these before the jury is sworn. Of course, in some cases a plaintiff having a good case may fail to show it at the trial through no fault of his own. It seems protection enough to allow him to dismiss and try again only when permitted by the court. A defendant's only remedy in a similar situation is to seek a continuance. It seems unfair to permit such inequality between plaintiff and defendant.

(11) *Special verdicts and special interrogatories.*⁵⁷

54. Fed. Rules Civ. Proc., Rule 51, S. B. 34, § 105(a). See *infra* text following note 115 and note 191.

55. Plan II, art. 9, § 10(a); Amendments to Plan II, p. 9; S. B. 34, § 99(a). Cf. Fed. Rules Civ. Proc., Rule 41(a).

56. MO. REV. STAT. (1939) § 1111. A slight amendment to § 1110 relative to dismissal of suits in vacation was passed by the 1943 legislature. Mo. Laws (1943) p. 397. Inasmuch as this amendment was approved prior to the date of approval of the Civil Code, there is doubt as to whether it applies after the Civil Code goes into effect. The same problem arises as to Mo. Laws (1943) p. 399 which amended § 1225, which is also repealed by the Civil Code.

57. Plan II, art. 9, §§ 15, 16; Amendments to Plan II, p. 10. Provisions for special verdicts and special interrogatories were inserted in Proposed Civil Code of Civil Procedure for the State of Missouri (1941) p. 53, as an alternative for the existing statutory provisions. Provisions for special verdicts were included in the draft of the code as finally submitted to the court. See Final Report of the Missouri Supreme Court Committee on Civil Procedure (1942) art. 13, § 16. However, special verdicts were eliminated by the legislature. See S. B. 34, §§ 106-111. See *infra* note 116.

(12) *Provision that motion for directed verdict shall state the specific grounds therefor.*⁵⁸

(13) *Provision that ten days be allowed for appellant to designate portions of record to be included in the transcript on appeal.*⁵⁹ The committee's amendment allowed thirty days for this purpose.

The main committee originally eliminated summary judgment procedure in the process of rejecting the entire new judgment article,⁶⁰ but this device was reinserted before final report to the court.⁶¹ Provision for special verdicts, though not for special interrogatories, was also reinserted largely as the result of discussion following the inclusion of these measures as alternative proposals in the printed version distributed to the members of the bar.⁶² Certain other changes were also made before final submission of the report to the court. Appeal by special leave of the appellate court was restored.⁶³ It was also provided that if motion for new trial was not passed on within sixty days it should be deemed denied for all purposes.⁶⁴

CHANGES MADE BY COURT

Due doubtless in part to the fact that two members of the court took part in suggesting final amendments to the committee, the court made few changes in the draft of the code as finally submitted to the court. Most of these were of a minor or formal nature. In addition, the court eliminated the abolition of the requirement of consistency in pleading,⁶⁵ and the abolition of the necessity of motion for new trial for the purpose of review.⁶⁶ The writer doubts the wisdom of the elimination of these two simplifications in civil procedure; moreover, these eliminations give rise to troublesome questions of interpretation of the code.⁶⁷

The code suggested by the court to the legislature was thus very nearly

58. Plan II, art. 9, § 17; Amendments to Plan II, p. 10; S. B. 34, § 112. Cf. Fed. Rules Civ. Proc., Rule 50(a). See *infra* notes 114, 115 and text following note 191.

59. Plan II, art. 12, § 11(a); Amendments to Plan II, p. 12. Cf. S. B. 34, § 135(a). Fed. Rules Civ. Proc., Rule 75(a) requires the designation to be made "promptly" after the appeal is taken.

60. Completion Draft, art 13, § 5; Amendments to Plan II, p. 13.

61. Final Report of the Missouri Supreme Court Committee on Civil Procedure (1942) art. 10. See text *supra*, following note 28.

62. See *supra* note 57.

63. *Supra* note 61, art. 17, § 7.

64. *Supra* note 61, art. 16, § 4.

65. Cf. *supra* note 61, art. 5, § 11 with original Senate Bill No. 34, § 42.

66. *Supra* note 61, art. 16, § 6. See also *id.*, art 17, § 17(a); cf. original Senate Bill No. 34, § 144(a).

67. See *infra* text at notes 170, 171 and at 198 to 200.

like the code as proposed in the committee's final report. The court, however, placed the measure in bill form by adding a title, a repealing clause, and a final provision with reference to the effect of the act upon criminal procedure. In translating the code into bill form the court eliminated the division into articles and also the headings of the various sections and subsections. These eliminations may have made more difficult the consideration of the bill by the legislature and may have led to some of the amendments which will cause trouble in the application of the code. The section headings contained in the 1943 session laws were supplied by the Secretary of State and differ from those used in the final committee report.

CHANGES MADE BY GENERAL ASSEMBLY

Senate Bill No. 34, as originally introduced, was almost identical with the measure recommended by the court. Amendments by the score were made thereafter by the legislature so that the committee substitute bill, the perfected bill, and the final bill were each further and further away from the court's recommendation. It would serve no purpose to set forth this process of retrogression step by step; it is enough to list the more important changes made in the General Assembly, regardless of the stage at which they were made.⁶⁸

(1) *Elimination of grant of authority to the court to suggest forms of pleadings, instructions and other proceedings.*⁶⁹ There can be no doubt of the advantages which would have come from an official promulgation of forms.⁷⁰ The bar and the trial courts would have the advantage of knowing by illustration what the court regarded as a sufficient and proper form and would not be obliged to rely on decisions holding good or bad some marginal example. An approved form also gains in utility by being made available in a single collection of forms. Specifically, the court could illustrate its concept of the degree of particularity which the Civil Code requires of a pleading—a question especially acute because the code sometimes follows and sometimes departs from the Federal Rules provisions in this respect.⁷¹ Of even more importance, perhaps, is the opportunity which would have

68. The changes in this division are indicated by references to the draft appearing in the Final Report of the Missouri Supreme Court Committee on Civil Procedure (1942), hereinafter referred to as Report, and to Senate Bill No. 34 as finally enacted.

69. Report, art. 1, § 9(a); S. B. 34, § 10(a).

70. Palmer *Standardized Jury Instructions Succeed*, (1940) 23 J. AM. JUD. Soc. 177.

71. See *infra* text at notes 85 to 90 and at notes 166 to 169.

been offered for errorless trials if approved forms of instructions could have been offered.⁷² It is true that the original provision of Plan II did not require the court to promulgate forms, but the court would probably have done so under the moral pressure which would have resulted from the permissive provision.

(2) *Omission of the short and simple Federal Rules provision relative to suits by and against infants and incompetent parties and restoration of the twelve sections of the present article on infants as parties.*⁷³ This change is typical of the action of the legislature in opposition to the principle of uniformity when there is no reason for diversity. The original proposal seems to contain everything that is necessary to provide on the subject. In one important respect at least, it is more inclusive than the old sections in that it covers incompetents while the old sections do not.

(3) *Elimination of provisions requiring approval of court for settlement of the claims to which an infant or incompetent person is a party, for the allowance of attorney's fees and expenses in such cases, and for payment of the proceeds to the natural guardian when the proceeds do not exceed \$500.00.*⁷⁴ Similar provisions exist in New York and Pennsylvania.⁷⁵ They have the advantage of protecting persons who are not *sui juris*, and also of dispensing with the necessity of a guardianship of property when the amount is trifling, thus facilitating settlements. Objections to these provisions were made upon the ground that there was no method for obtaining approval of expenses in advance of their being incurred,⁷⁶ and because of fear of a conflict between the jurisdiction of the circuit and probate courts.⁷⁷ Instead of facing these issues and, if necessary, providing amendments to clear up the objections, the legislature took the easy way out and eliminated the provisions entirely. Procedural improvement does not spring from such faint-hearted methods.

72. It has been found that 40% of the reversals in civil cases are due, at least in part, to errors in instructions. (1936) 13 K. C. BAR BULL. No. 10., p. 11

73. Report, art. 2, § 2; S. B. 34, § 1, retaining MO. REV. STAT. (1939) §§ 859 to 870. It should be noticed that § 869, in providing for neglect to procure appointment of guardian after the first day of the term at which defendant is bound to appear, relates to a practice which has no application under the new code. See S. B. 34, §§ 58, 65.

74. Report, art. 2, § 3.

75. New York Civil Practice Act, § 980(a), Rule 294; Pennsylvania Rules of Civil Procedure, Rule 2039 in 332 Pa. lxxxviii.

76. *Supra* note 27 at 5.

77. This objection was made by the committee of the Kansas City Bar Association at the hearings of the Senate Judiciary Committee.

(4) *Elimination of provision for service of process upon infants or incompetent persons who have no guardian or curator by delivering a copy to the person having charge of the infant or incompetent person.*⁷⁸ As a result of this change service on these persons is had in the same method as service upon those who are *sui juris*. Thus, service upon a two year old child playing in his sandpile is perfectly good though the summons never comes to the attention of any responsible person. Possibly the court might grant relief in such a case though the code does not authorize it. At any rate the code should not facilitate such abuses, and the new provisions seem to do so even more than the former procedure under which there was no particular statutory provision relative to serving persons not *sui juris*.⁷⁹ From the last three paragraphs, it can be seen that the position of infants and incompetent persons is not improved under the new code.

(5) *Retention of the coroner to serve process when the sheriff is disqualified.*⁸⁰ This, of course, is in accord with the old English history of the office of coroner, but it is not in accord with the modern tendency to abolish the office and set up one of medical examiner.⁸¹

(6) *Elimination of the provision abolishing the conclusiveness of the sheriff's return.*⁸² Here again Missouri retains the historical outlook of the English law of centuries ago, in spite of the fact that in almost all other states the return is no longer conclusive.⁸³ Thus, in Missouri if the sheriff files a return showing good service, the falsity of the return cannot be shown in the action and the defendant must seek his remedy in a suit against the officer for false return.⁸⁴ Perhaps the sheriff or his bondsmen can then recover from the plaintiff. Such circuity of action with recovery doubtful at each stage has nothing to recommend it. Of course, a purchaser relying upon the

78. Report, art. 4, § 5(b)(2); S. B. 34, § 27(a).

79. See MO. REV. STAT. (1939) § 880; Fischer v. Siekmann, 125 Mo. 165, 28 S.W. 435 (1894).

80. S. B. 34, § 26; cf. Report, art. 4, § 4; MO. REV. STAT. (1939) §§ 13144, 13145.

81. See WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION (1929) 163-173. Press reports show that abolition of the coroner and establishment of the medical examiner is being urged upon the present Missouri Constitutional Convention.

82. Report, art. 4, § 8(a); S. B. 34, § 30. See *infra* text at 162, 163 and following.

83. Sunderland, *The Sheriff's Return* (1916) 16 COL. L. REV. 281; RESTATEMENT, JUDGMENTS (1942) § 12, comments b, c.

84. Newcomb v. New York Central & H. R. R. 182 Mo. 687, 81 S.W. 1069 (1904).

sheriff's return should be protected but the eliminated provision did that in express terms.

(7) *The retention of the requirement that the petition must make a statement "of the facts."*⁸⁵ The term "facts" in connection with pleading is not used in the Federal Rules, nor in the new code as submitted by the court.⁸⁶ This was not upon the theory that plaintiff need not state the elements of his claim, but in order to dispense with the technical and bothersome distinction, which is purely one of degree, between "evidence," "ultimate facts," and "conclusions of law"—a controversy which occupies more of the Missouri appellate courts' attention than any other pleading question.⁸⁷ It is high time to recognize the impossibility of stating the facts "just as they really are," and that it would be unprofitable to do so even if it were possible.⁸⁸ Pleadings serve the function of notifying the opposite party of the general nature of the claim and defense, of steering the case in the way it should go, and of indicating what has been decided in the case, but they have not been successful for uncovering the opponent's evidence or the detailed particulars of his case or defense.⁸⁹ The retention of the word "facts" indicates a legislative intent to retain the old code philosophy as to pleading.⁹⁰

(8) *Change of answer date from twenty to thirty days after service of the petition.*⁹¹ While even the thirty day period is shorter than the average under the existing practice, it will be twice as long as the present minimum time.⁹² This does not seem appropriate in a code designed to expedite procedure. Of course there may be exceptional cases where even thirty days is not time enough but an extension of time can be obtained in such cases under other provisions of the code.⁹³

(9) *Elimination of application for change of venue from the matters which may be consolidated with motions and which must be raised with*

85. S. B. 34, § 36.

86. Fed. Rules Civ. Proc., Rule 8(a); Report, art. 5, § 5.

87. See 23 Mo. Dig. Cum. Ann. Pocket Part (1943) tit. Pleading, §§ 8-11.

88. Cook, *Statement of Fact in Code Pleading* (1921) 21 COL. L. REV. 416; Cook, *'Facts' and Statements of Facts* (1937) 4 U. CHI. L. REV. 233; Wheaton, *Manner of Stating Cause of Action* (1935) 20 CORN. L. Q. 185.

89. Clark, *Simplified Pleading in JUDICIAL ADMINISTRATION MONOGRAPHS*, Series A, No. 18, pp. 10-12, 19-20.

90. See MO. REV. STAT. (1939) § 916. See, however, *infra* text at notes 166 to 169.

91. Report, art. 5, § 27; S. B. 34, § 58.

92. See MO. REV. STAT. (1939) § 921.

93. S. B. 34, § 6(b). Cf. MO. REV. STAT. (1939) § 942 where a narrower provision for extension of time is found.

*other motions under penalty of waiver.*⁹⁴ The philosophy of the motion procedure in the new code is that all objections which can be then asserted should be raised at one time. It was the plan of the draft submitted by the court that application for change of venue should be included in this list. True, if the application were based upon objection to the judge, he should not decide other matters raised by the motion. That would doubtless be implied and could have been made express in the code. The elimination of the application for change of venue from this list seems to make that matter in effect a separate motion, thus retaining in part the string of successive objections which we have under the existing procedure.⁹⁵

(10) *Elimination of summary judgment procedure.*⁹⁶ This is a device employed in a number of states, as well as in England and in the federal courts, to give speedy judgment without trial where the plaintiff's claim or defendant's defense is clearly without merit.⁹⁷ Through affidavits, depositions, *etc.*, it often appears that, while a party's pleadings indicate merit in his position, there is really no merit whatsoever. Summary judgment procedure, with adequate safeguards against trying a case on conflicting affidavits and other abuses, effectively and promptly disposes of these cases. The elimination of this procedure from the code may have been based upon distrust of trial courts. True, a judge might grant a summary judgment in an improper case, but he can also direct a verdict in an improper case. The remedy in both situations is the same—by appeal. Perhaps, after all, the objection to the procedure was really based upon the professional antipathy to anything which results in expedition. It may be remarked in this connection that most of the English reforms such as summary judgment originated through the efforts of laymen to inject a common sense attitude into court procedure.⁹⁸ American lawyers also may well harken to criticisms of laymen as to the expense and delays caused by traditional legal procedure.

(11) *Elimination of the permissive counterclaim allowing defendant to assert any claim which he has against plaintiff.*⁹⁹ Apparently this was eliminated because it was thought that the rule might result in a single trial of

94. Report, art. 5, § 30(3); S. B. 34 § 61(3).

95. See, however, *infra* text at notes 179-181 and following.

96. Report, art. 10. Cf. Fed. Rules Civ. Proc., Rule 56.

97. See Clark, *Summary Judgments* in JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 5.

98. See Sunderland, *The English Struggle for Procedural Reform* (1926) 39 HARV. L. REV. 725.

99. Report, art. 6, § 2.

several claims of unrelated and diverse natures. Yet, under the new code a plaintiff may assert all claims which he has against a defendant in the same action, and the court may order separate trial of any counterclaim.¹⁰⁰ Trial convenience should be the test of what claims can be litigated in the same case; it is not apparent why it should make any difference whether the parties are reversed as to some of the claims asserted. However, the fact that the legislature did not see fit to adopt the broad rule of permissive counterclaim is not the really important objection to this omission. The vital thing is that unless the counterclaim arises out of the same transaction or occurrence as the plaintiff's claim, where the defendant *must* assert the counterclaim under penalty of waiver, the defendant apparently has no right to counterclaim at all. This arises out of the fact that counterclaim and set-off are purely statutory,¹⁰¹ and the compulsory counterclaim¹⁰² is the only one provided by the code as finally enacted. This leads to the absurd result that when defendant is sued upon a note, he cannot counterclaim upon an unrelated note which he has against the plaintiff. That the legislature never intended this result is apparent, but this result seems to follow unless Section 37, which allows defendant to *join* as many claims as he has against the plaintiff, applies to this problem. From its position in the code, it is evident that the latter section is intended only as a rule permitting joinder of several counterclaims and assumes that the code provides elsewhere what may be asserted as a counterclaim. However, construction of Section 37 so as to permit the assertion of any claim against the plaintiff as a counterclaim would serve a useful purpose and may well be the pragmatic solution.

(12) *Elimination of the provision that amendments of claims arising out of the same conduct, transaction or occurrence set forth in the original pleading, relate back to the date of the original pleading.*¹⁰³ This is a sensible rule and is of major importance when the Statute of Limitations has run before the amendment is made. It is no more liberal than some courts have announced in absence of statute or court rule.¹⁰⁴ What is the effect of this elimination? Does it mean that amendment may never relate back? Does it preserve the present Missouri practice as to relation back, which is some-

100. S. B. 34, §§ 37, 97(b).

101. *Frowein v. Calvird & Lewis*, 75 Mo. App. 567 (1898); *Fricke v. Fuetterer*, 220 Mo. App. 623, 288 S.W. 1000 (1926).

102. S. B. 34, § 73.

103. Report, art. 7, § 3.

104. See Comment (1939) 4 Mo. L. REV. 49.

what less liberal? Is the court authorized to promulgate a substatory rule (possibly the very provision eliminated) to clarify the situation? No one can say with any degree of assurance until the court has spoken.

(13) *Elimination of provisions for request for admission of general facts.*¹⁰⁵ The amendment which brings this about is the limitation that the request for admission must pertain to documents. This means that when the matter of fact does not relate to documents, the party must rely on the deposition procedure or the sanctionless pre-trial conference. As a result of this amendment and limitations as to the penalty for failure to make discovery,¹⁰⁶ the provisions for discovery are not signally broader nor better than under the existing procedure.

(14) *Retention of the existing provision for a continuance when an attorney in the case is a member of the legislature.*¹⁰⁷ While the presence in the legislature of principal counsel engaged prior to the legislative session should be, and under general provisions¹⁰⁸ of the code would be, ground for a continuance, the broad provisions of this section offer many opportunities for abuse. There have been instances of defendants, already represented by principal counsel, engaging an attorney-legislator for the sole purpose of obtaining a continuance. At least one trial court in the state has placed limitations on the sweeping provisions of the law.¹⁰⁹ The legislature did alter the existing law by providing that the trial might take place if the session of the legislature were recessed for twenty days or more. This guards against some abuses of the privilege granted by the present law, but the possibility of others remains as before. The provision may be also subject to the technical objection that it lies partly outside the title of the act¹¹⁰ since the provision provides for continuances in criminal as well as civil cases.

(15) *Elimination of broad principles of consolidation of actions for trial and retention of the present narrow provision for consolidation only when the demands are liquidated and the parties identical.*¹¹¹

105. Cf. Report, art. 12, § 4(a) with S. B. 34, § 88(a).

106. See *supra* text following note 49.

107. S. B. 34, § 96. See MO. REV. STAT. (1939) § 1089.

108. S. B. 34, § 92.

109. See Recent Cases (1937) 2 MO. L. REV. 530.

110. See also S. B. 34, §§ 1, 2, 145.

111. S. B. 34, § 97(a). See MO. REV. STAT. (1939) § 1094. Cf. Report, art. 13, § 7(a); Fed. Rules Civ. Proc., Rule 42(a).

(16) *Provision that plaintiff may take one involuntary nonsuit.*¹¹² The involuntary nonsuit procedure is unique in Missouri and permits a plaintiff to appeal from a judgment which has resulted from his own dismissal and allows him to commence another action on the same cause if he loses the appeal. The entire practice has been seriously criticized and it has been suggested that the court which originated the procedure should strike it down.¹¹³ However, the situation is now worse than before because the code gives the privilege of one involuntary nonsuit, and no longer does the matter rest within the control of the court to overrule the decisions which originated the present practice.

(17) *Elimination of the requirement of specific objections to instructions before the same are given in order to complain thereafter of the instructions given.*¹¹⁴ Instructions have proved to be the most prolific source of error in the trial of jury cases.¹¹⁵ Under the existing procedure and under the new code, a party need not object to instructions at or prior to the time that they are given. He has days and weeks to study up the adjudged cases, though he could not, or at least did not, point out the objection at the trial. The new code gives the party an opportunity to object to instructions before they are given, but this does not reach the seat of the difficulty, for there is no penalty for failure to object. Undoubtedly, the practice will continue as before, unless the court, either by rule or decision, in effect reinserts the requirement of specific objections to instructions.

(18) *Elimination of provisions for special verdicts.*¹¹⁶

(19) *The preservation of the bill of exceptions.*¹¹⁷ This is a retrogressive step because it apparently continues the archaic distinction between the record proper and the proceedings at the trial with all the fruitless technicalities which have sprung from that distinction.¹¹⁸ In this connection it

112. S. B. 34, § 99(b). Cf. Report, art. 13, § 9(b).

113. Heitz, *Voluntary and Involuntary Nonsuits in Missouri* (1940) 5 Mo. L. REV. 131.

114. S. B. 34, § 105(a); cf. Report, art. 13, § 15; Fed. Rules Civ. Proc., Rule 51.

115. See *supra* note 72.

116. See *supra* note 57; Hyde, *Fact Finding by Special Verdict* (1941) 24 J. AM. JUD. SOC. 144; Lipscomb, *Special Verdicts under the Federal Rules* (1940) 25 WASH. U. L. Q. 185; Sunderland, *Verdicts, General and Special* (1920) 29 YALE L. J. 253; McCormick, *Jury Verdicts upon Special Questions in Civil Cases* in JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 8.

117. S. B. 34, § 135(a). Cf. Report, art. 17, §§ 1, 12.

118. See Hyde, *Origin and Development of Missouri Appellate Procedure* (1937) 2 Mo. L. REV. 281; Stone, *The Scope of Review and Record on Appeal* in JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 16.

is important to notice that exceptions are abolished¹¹⁹ but the bill of exceptions is preserved. Doubtless the profession will find some way out of this anomaly, but there will be confusion until some ingenious theory is worked out.

(20) *Elimination of the provision for termination or limitation of examination upon the taking of depositions.*¹²⁰ This provision was designed to prevent well-known abuses, and its omission is regrettable.

These are not all the substantial changes made by the legislature but they are the principal ones. It is true that many lawyers would not agree that all the changes and eliminations made by the legislature or by the committee were unfortunate. However, it is believed that anyone who believes that a change in court procedure is necessary to keep up with the demands of modern life and to compete with encroachments of non-judicial tribunals would be in favor of the original version in practically all of these cases. The particular measures failed for various reasons, some because they were thought to operate unduly to the advantage of plaintiffs or of defendants, others because they were not understood, still others because of disinclination to grant power to the courts or relinquish legislative authority, and doubtless others simply because of a spirit of resistance to change. For one cause or another the great majority of substantial improvements of the original Plan II were eliminated from the Civil Code as enacted.

ACCOMPLISHMENTS OF NEW CODE¹²¹

What then is left of procedural improvement after so many of the features of the original plan have been eliminated? After the foregoing catalogue of eliminations the gains naturally cannot be impressive. Two provisions are of major importance: the elimination of terms of court as measures of time for pleadings, trials, motions for new trials and appeals, *etc.*,¹²² and the requirement that all objections to pleadings shall be raised at one time.¹²³ Of real but of somewhat less importance are: provision for service by registered mail in cases where service might formerly be by publication;¹²⁴ pre-trial

119. S. B. 34, § 122.

120. Report, p. 80, § 1937(b); Fed. Rules Civ. Proc., Rule 30(d).

121. See generally Carr, *Modernized Civil Code of Missouri* (1944) 9 Mo. L. Rev. 1.

122. S. B. 34, §§ 6(c), 7, 9, 22, 58, 65, 91, 116, 129, 130(a), 135(a).

123. *Id.*, § 66.

124. *Id.*, § 28.

conference, optional with the trial court, to eliminate unnecessary issues and otherwise expedite trials;¹²⁵ provision for taking a verdict and entering judgment contrary thereto upon motion for directed verdict, thus preserving the verdict if one should not be directed;¹²⁶ improved procedure for the trial and review of non-jury cases;¹²⁷ elimination of the requirement of the printing of the record on appeal.¹²⁸

Of less utility, largely because they will apply in only a limited number of cases are: broader rules of joinder of parties and claims;¹²⁹ express provisions for class suits and their extension to legal actions;¹³⁰ provisions for bringing in third parties liable over to the defendant or to the plaintiff;¹³¹ express and broader rules for interpleader¹³² and intervention;¹³³ simpler rules for substitution of parties upon death, *etc.*;¹³⁴ validation of trials of issues outside the pleading when tried by consent of the parties;¹³⁵ somewhat broader rules of discovery;¹³⁶ abolition of writs of error¹³⁷ and improved rules for appellate practice,¹³⁸ except the rules regarding the making up of the record;¹³⁹ provisions for requiring the production of documents upon the taking of depositions.¹⁴⁰

The new code contains other new measures which are of comparatively minor importance.¹⁴¹ Then too there are many cases where the Missouri rule will be stated in the terms of the Federal Rules but many of the advantages of uniformity were taken away by capricious and needless tinkering in the course of the committee-court-legislature hurdles. Indeed, it may even be somewhat of a nuisance to determine when one should and when one should not go to decisions under the Federal Rules for guidance in the new Missouri practice. On the side of substance, most of the important

125. *Id.*, § 84.

126. *Id.*, § 113.

127. *Id.*, § 114.

128. *Id.*, § 135(b). Cf. MO. REV. STAT. (1939) § 1197. See *infra* text at notes 208 to 210.

129. S. B. 34, §§ 16, 37.

130. *Id.*, § 19.

131. *Id.*, § 20.

132. *Id.*, § 18.

133. *Id.*, § 21.

134. *Id.*, § 22.

135. *Id.*, § 82.

136. *Id.*, §§ 85-89.

137. *Id.*, § 125.

138. *Id.*, §§ 129-134, 136-140.

139. *Id.*, § 135. See *infra* text before and after notes 208-210.

140. *Id.*, § 142.

141. *E.g. id.*, § 99, limiting voluntary and involuntary nonsuits after the first.

changes made by the new code could have been accomplished by a dozen amendments¹⁴² to the existing code leaving the more comprehensive treatment await a time more propitious to procedural reform. Such a plan probably would have avoided most of the difficulties which are enumerated in the following pages .

UNCERTAINTIES OF NEW CODE

The foregoing matters should be of interest to every one who has at heart the future of government by law. However, the immediate concern of the practicing lawyer and the court busy in the performance of every day duties will not be so much with the procedural devices which have been omitted from or included in the code as with the actual operation of the act as passed. The code as originally drafted, and as finally submitted to the court, had internal coherence in that the various parts were synchronized with each other. True, every section was not self-explanatory so that a practitioner—particularly one familiar only with the present state practice—who runs might read. True also, that some sections were general in phraseology and were designed to indicate flexibility so as to permit both counsel and court to exercise discretion. These “uncertainties” were those of the Federal Rules. For most practical purposes they had been resolved by what had been said, written, and held in connection with the Federal Rules. Practitioners whose work had brought them into the federal courts were already familiar with them, and adequate sources of information would be open to all the bench and bar.

Unfortunately the legislature in the course of making eliminations and changes in the plan did not seem to consider the effect of particular changes on the code as a whole. One can detect the determined—not to say irate—pen of the legislator bent on striking out this or inserting that. The immediate purpose of these changes is generally apparent, but there is often obscurity as to the legislative intent with reference to provisions with which the amended sections were dovetailed. While some of these instances may present no practical difficulties, all of them may be regarded as unfortunate, for lack of a consistent theoretical basis is an objection to a procedural system, independent of particular problems. Moreover, many of the legislative changes do inject difficulties into the practice, and until these dif-

142. Plan I was such a scheme, though it is interesting to notice that about half of its parallel provisions were eliminated from Plan II.

facilities are resolved by rule or reported decision some of the commonest steps in litigation must be conducted upon the basis of guess work and make-shift to the harassment of bench and bar and to the prejudice of client's substantive rights. The present division of this paper is devoted to a discussion of the particular uncertainties of procedure which inhere in the Civil Code. They will be set forth in the order in which they appear in the code. Some of them are of no great moment and the solution of others may be drawn from the language or spirit of the code. The list has been compiled as the result of an armchair contemplation. Doubtless lawyers faced with particular problems will detect other difficulties as soon as the code goes into operation.

(1) *Service of pleadings and other papers.* For no apparent reason the legislature recast the wording of Subsection 5(a).¹⁴³ As this subsection now reads every pleading subsequent to the original petition must be served upon each of the parties affected thereby, bringing it into partial conflict with Subsection 5(c) which provides that where there are an unusually large number of defendants the court may order that the pleading of defendants and replies thereto need not be served between defendants. Situations calling for resolution of this conflict will not often arise and probably the specific provision of Subsection 5(c) will be deemed to prevail over the general language of Subsection 5(a). However, the amendment is illustrative of legislative tinkering with the clear provisions of the original draft, without consideration of other parts of the code.

A more serious related matter arises in connection with Subsection 5(d) which provides that after the petition all papers required to be served shall be filed before service or within five days thereafter.¹⁴⁴ The matter was originally put in this fashion with the idea that the code would provide specifically for the time for service and make the time for filing dependent on the time of service. The situation could have been reversed, by providing specifically for the time of filing the various papers and generally for time of service dependent on time of filing. Apparently this is the method which the legislature preferred for in various subsequent sections of the code pertaining to the time for pleadings, motions, *etc.*, the word "filing" was

143. Section numbers in the text hereafter are to S. B. 34, except where otherwise noted.

144. The original version was the same except that it provided for filing within a reasonable time instead of five days. Report, art. 1, § 4(d); see Fed. Rules Civ. Proc., Rule 5(d).

inserted in the place of service.¹⁴⁵ However, no corresponding change was made in Subsection 5(d). As a result the code provides specific times for the filing of various papers, and provides generally that the time of filing shall be before service or within five days thereafter but it does not tell when or whether a paper should be served. This of course is not a vital matter. It can be clarified by rule, and perhaps can be solved without rule by filing and serving simultaneously,¹⁴⁶ but persons dealing with a code have the right to expect that the code should be explicit and clear as to such routine matters.

(2) *Time within which judgment may be altered by the court.* Under the common law rule which now prevails in Missouri the trial court may alter the judgment at any time during the term at which it was rendered but not generally thereafter.¹⁴⁷ Subsection 6(c) deals with the effect of expiration of the term. The original version would have permitted judgments to be altered within the period during which the court could have granted new trial of its own initiative.¹⁴⁸ The concluding language was "in any civil action which has been pending before it." The legislature amended this so as to read "in any civil action . . . which is pending before it."¹⁴⁹ This change of phraseology gives rise to the problem of whether the common law rule still governs the time within which judgments may be altered, whether there is no limit to the time for such alterations, or whether the amended provision for granting of new trial of the court's own initiative within thirty days indicates the period within which the judge is deemed to hold the judgment in his breast. Until the court has spoken no one can be sure.¹⁵⁰

(3) *Suits in representative capacity.* Section 11 is very nearly the Federal Rules version of the real party in interest provision. However, after declaring that an executor, administrator, *etc.*, may sue in his own name, the words "in such representative capacity" have been inserted. These words

145. S. B. 34, §§ 20, 58, 65, 81 (filed and served), 116, 118, 120. Cf. *id.*, §§ 6(d), 75, 85 where service is also mentioned.

146. See Carr, *Modernized Civil Code of Missouri* (1944) 9 Mo. L. Rev. 1, text at note 8.

147. State *ex rel.* Maple v. Mulloy, 322 Mo. 281, 15 S. W. (2d) 809 (1929). Cf. Mo. REV. STAT. (1939) §§ 1247-1250, 1266, 1267.

148. Report, art. 1, § 5(c); *id.*, art. 16, § 5.

149. S. B. 34, § 6(c).

150. There is the additional difficulty that the legislature enlarged the time within which the court could grant new trial of its own initiative from 10 to 30 days. S. B. 34, § 119. This may result in inconvenience because appeal must be taken within ten days. *Id.*, § 129. See *infra* text at notes 202, 203 and following.

are not in the present Missouri "real party in interest" statute,¹⁵¹ nor in any other code so far as the writer is aware. No one has ever supposed that any real party in interest statute gave the representative a personal beneficial interest. The insertion of these words causes confusion because executors and administrators do not always sue in a representative capacity, as in case of action upon contracts made by them, for personalty converted from them, and upon judgments recovered by them.¹⁵² The difficulty goes deeper than the mere question of whether actions in such cases should be prosecuted by plaintiff "in a representative capacity." A grave question arises as to whether a foreign representative can hereafter sue at all in such cases. He may do so under the existing law on the theory that he sues as an individual.¹⁵³ Probably he will be permitted to do so under the new code, but if so, it is hard to explain the added words. This insertion is an illustration of amendments which are pointless for any purpose and which display a lack of complete understanding of the existing law.

(4) *Motions to drop and add parties.* Subsection 17(b) provides that such motions may be made as provided in Section 65 and if so made the provisions of Section 65 as to consolidation of motions and waiver of objection apply. Both references to Section 65 are obviously erroneous; the first should be to Section 61 and the second to Section 66. Are such clerical errors to render the subsection meaningless, or are they to be corrected in the course of interpretation? More important ramifications with reference to this section also arise as in connection with the general provisions regarding time for motions.¹⁵⁴

(5) *Substitution of parties because of death after final judgment and before appeal.* Subsection 22(a) is a simplified provision for substitution of parties on death and will stand in lieu of the complicated and technical provisions now existing with reference to revivor. Part (1) of this subsection permits substitution generally upon motion of either party. Part (3) pro-

151. Mo. REV. STAT. (1939) §§ 849, 850.

152. *Thomas v. Relfe*, 9 Mo. 377 (1845); *Hall v. Harrison*, 21 Mo. 227 (1855); *Smith v. Monks*, 55 Mo. 106 (1874); *Rittenhouse v. Ammerman*, 64 Mo. 197 (1876). Apparently, in Missouri action in such cases may also be brought in a representative capacity. *Rector's Executors v. Langham*, 1 Mo. 568 (1825); *Mosman v. Bender*, 80 Mo. 579 (1883). See generally 2 WOERNER, ADMINISTRATION (3rd. ed. 1923) § 303.

153. *Abbott v. Miller*, 10 Mo. 141 (1846); *Hall v. Harrison*, 21 Mo. 227 (1855); *Tittman v. Thornton*, 107 Mo. 500, 17 S.W. 979 (1891); see *Richardson v. Busch*, 198 Mo. 174, 187-188, 95 S.W. 894, 897-898 (1906). See generally RESTATEMENT, CONFLICT OF LAWS (1934) §§ 483-508.

154. See *infra* text following note 181.

vides for dismissal as to the deceased party if substitution is not made within one year after death. In the original version it covered only the cases where death occurred prior to final judgment, or after appeal.¹⁵⁵ The theory was that if there was final judgment but no appeal, substitution would have to be had before further steps such as execution or subsequent appeal were taken, that these steps would have to be taken within the ordinary time¹⁵⁶ required by law in cases generally, and that there was no need for any provision for dismissal or the like in this situation. However, the legislature thought differently and provided that if death occurs after final judgment and before appeal, the action should be dismissed if substitution were not made within one year. Provision for *dismissal* of an action after final judgment is an anomaly of nomenclature, if not a theoretical impossibility. Regardless of this factor, was it intended to get rid of a final judgment as to the deceased party after one year merely because of failure to substitute a representative? Often execution is not taken on a judgment for considerable time. What good is accomplished by nullifying a final judgment because of death without substitution? The utility of substitution or revivor is applicable to pending actions and appeals and not to dormant judgments.

The insertion of this provision is fraught with still further difficulty. The one year within which substitution is required, and hence apparently permitted, will give rise to the claim that appeal may be taken after substitution at any time within one year in case of death of either party. This interpretation is not a necessary one and furthermore conflicts with Section 129 which provides that notice of appeal shall be filed within ten days after judgment. The automatic extension of time to appeal by reason of death would be extremely undesirable, though death would undoubtedly often be ground for allowing an appeal by leave of the appellate court within six months under Section 130. It should also be noticed that the time within which one must move for new trial or take an appeal cannot be extended by the court under Subsection 6(b). Probably all these factors will combine to lead to a denial of a general right to appeal within one year in case of death of a party. Still there is doubt as matters now stand.

(6) *Commencement of action.* In the original version it was simply declared that action is commenced by filing the petition in the office of the

155. Report, art. 2, § 12(a)(3).

156. Unless extended under Report, art. 1, § 5(b) which is repeated in S. B. 34, § 6(b).

clerk,¹⁵⁷ who in the next section is thereupon required to issue a summons forthwith and deliver it for service. Apparently the legislature mistrusted the simplicity of this provision for it inserted in lieu of the first section, the present Missouri statute¹⁵⁸ relative to commencement of actions, under which it has been held that if the plaintiff directs the clerk not to issue a summons, the action is not commenced so as to stop the running of the Statute of Limitations.¹⁵⁹ However, the next section commanding the clerk to issue a summons on filing of the petition remains substantially as in the original version of the new code. This gives rise to doubt as to whether the "suing out of process" which is necessary under the terms of the present section inserted by the legislature has any meaning. Probably the construction of that section will be continued under the new code but the matter is not clear. This situation illustrates the incongruity which may arise by slapping a section of the Missouri statutes into the body of the Federal Rules provisions. Even if practical difficulties do not arise at once, incongruities of concept and phraseology do. The old section which is inserted is also subject to the objection of being beyond the title of the new code so far as it applied to courts not of record.

(7) *Proof of service by mail.* Subsection 30(b) originally provided that proof of service by mail should be by certificate of the clerk that he had mailed a copy of the summons and petition. To this the legislature added "and by the return registered mail receipt . . . which shall be filed as a paper in the particular lawsuit." Of course there is no doubt as to the propriety of filing such receipt and indeed of requiring the filing if the receipt were returned. However, the question will arise under this added provision, whether or not a receipt signed by the defendant addressed is a requirement for service, and whether or not defendant must receive the mailed notice to effect good service. The section¹⁶⁰ providing for service by mail does not require that the defendant receive the summons, and similar statutes elsewhere have been interpreted not to require actual receipt.¹⁶¹ The legislative addition to the manner of proof of service throw doubt upon this matter which cannot be resolved without a judicial determination.

157. Report, art. 4, § 1. Cf. Fed. Rules Civ. Proc., Rule 3.

158. MO. REV. STAT. (1939) § 876; S. B. 34, § 23.

159. *White v. Reed*, 60 Mo. App. 380 (1894).

160. S. B. 34, § 28.

161. See *in re Rowley's Will*, 114 Misc. 375, 186 N. Y. Supp. 656 (1921); *Simonton v. Simonton*, 40 Idaho 751, 236 Pac. 863, 42. A. L. R. 1363 (1925); *Hazard v. Hazard*, 205 Ill. App. 562 (1917).

(8) *Conclusiveness of sheriff's return.* The legislature eliminated the portions of Section 30 which would have permitted impeachment of the sheriff's return except as to persons who have changed their position in reliance upon the return.¹⁶² Apparently it was not noticed that Section 31 permits the court at any time in its discretion to allow amendment of the process or the return. Section 31 is broader in its terms than the existing statute¹⁶³ regarding amendments of the return. The amendment may be at any time and apparently upon the motion of any person; the only limitation is that the amendment should not prejudice the rights of the party against whom the process issued, a provision which would relate principally to amendment of the process rather than the return. The effect of Section 31 may be to nullify in effect our common law rule forbidding impeachment of the return, which rule has been abandoned in most states, but this is not certain. Quite evidently it was *intended* to preserve the Missouri rule forbidding impeachment of the return. The question is, however, has this been done in the light of the retention of the broad provision for amendment of the return? This situation presents an interesting problem as to whether the court in deciding the matter or in framing a substatutory rule upon the subject will consider the known views of legislators taking an active part in the amendment of the code bill, or will refer only to the cold remnants which were enacted into law.

(9) *The permissive reply.* Section 32, relative to required pleadings, follows generally Federal Rule 7(a). A reply is required in case of a counterclaim and also if the court orders a reply. The Federal Rule declares that no further pleadings shall be *permitted*, while Section 32 says that none shall be *required*. The General Assembly is not responsible for this change, it having been made at the stage following discussions of Plan II by the bar.¹⁶⁴ The thought behind the change is that a plaintiff should be permitted to file a reply if he wishes to do so. However, a plaintiff has no reason to file an unrequired reply (unless perchance the reply could be regarded as an amendment to the petition) because the filing of the reply would not enlarge the proofs which the plaintiff could introduce.¹⁶⁵ Defendant might obtain an advantage from a reply but he cannot require it save in the two

162. See *supra* text at notes 82 to 84.

163. MO. REV. STAT. (1939) §§ 971, 974, 984. See State *ex rel.* Brown v. Stewart, 313 Mo. 1, 281 S.W. 768 (1925).

164. Cf. Plan II, art. 6, § 1 with Report, art. 5, § 1.

165. S. B. 34, § 41.

excepted cases. Under the wording of Section 32 pleadings may go on indefinitely if the parties desire. This is a situation not apt to happen but if it did it would be hard to tell when the pleadings are closed within the meaning of Section 68 relative to motion for judgment on the pleadings, or when issue is joined within the meaning of Section 91 relative to putting cases on the trial docket.

(10) *Necessity of pleading "facts."* It has already been noticed¹⁶⁶ that the legislature substituted the word "facts" for "claim" in specifying the requisites for a pleading of a claim for relief. It would be regrettable enough if this resulted in the preservation of the old fruitless technicalities of pleading. However, the situation is worse than that, for it is not at all clear from the whole code what the legislature intended in this regard. Other sections¹⁶⁷ of the code retain the Federal Rules language of statement of claim, instead of statement of facts. Moreover, Section 63 in providing for a motion for more definite statement declares that the latter is only to enable the moving party to prepare his responsive pleading or prepare generally for trial when a responsive pleading is not required.¹⁶⁸ Finally the Federal Rules provision regarding pleading defenses is retained¹⁶⁹ and nothing is said therein about pleading facts. Is more specific pleading required in the petition than in the answer? It is particularly unfortunate in this connection that the court's authority to promulgate forms of pleading was eliminated from the code; court forms might, as a practical matter, solve the problem. As the result of the change of a single word we are plunged into new difficulties with regard to the manner of pleading. The old procedure in this respect would have been preferable to a garbled version of the Federal Rules provision.

(11) *Consistency of pleading.* The court struck from Section 42 the words "regardless of consistency" in the provision allowing a party to state as many claims and defenses as he has, and the legislature followed the court's version in this respect.¹⁷⁰ If these words had been permitted to remain it would have been clear that inconsistency of claims and defenses would be no objection to a pleading. This is as it should be, because a

166. *Supra* text at notes 85 to 90.

167. S. B. 34, §§ 42, 43, 62, 66, 67, 72.

168. *Cf.* Carr, *Modernized Civil Code of Missouri* (1944) 9 Mo. L. Rev. 1, text following notes 36 and 63.

169. S. B. 34, § 40.

170. *Cf.* Report, art. 5, § 11 with S. B. 34, § 42. See Carr, *Modernized Civil Code of Missouri* (1944) 9 Mo. L. Rev. 1, text at note 43.

pleader cannot and never expects to prove both of two inconsistent facts or to recover upon both of two inconsistent claims. Inconsistent pleading indicates doubt as to which the pleader will be able to establish. In general he can avoid the effect of his doubt by the use of alternative or hypothetical pleading which the section specifically allows. Elimination of these words does not forbid inconsistent pleading. There is enough left in Section 42 and in other sections of the new code to leave the matter unsettled and the fact that the rule against inconsistent pleading has not been carried to its logical extreme in the existing practice¹⁷¹ complicates the problem. As a result the bench and bar will be plagued with controversies over a purely formal matter and the situation may never be entirely clarified, as it has not been under more than 90 years of the present code.

(12) *Allegations of capacity of parties.* Following the Federal Rules, the original version of Section 45 provided that it is not necessary to allege the capacity of a party.¹⁷² The legislature altered the phraseology so as to read that it shall be sufficient to aver the ultimate fact of the capacity of a party. This leaves it uncertain whether it will be necessary to allege the capacity of a party. *Arguendo* perhaps it will be, but there has been no general requirement that capacity be alleged directly under the existing practice.¹⁷³ The new language on top of the old practice leaves one more question in doubt.

(13) *Allegations of time and place.* Section 51 of the original bill was stricken by the legislature.¹⁷⁴ It provided that for the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter. This was a statement of the existing rule, at least as regards the raising of the Statute of Limitations by demurrer.¹⁷⁵ It is not probable that the legislature intended that allegations of the time should not be regarded as material for the purpose of raising the objection of failure to state a claim by motion under Section 62. Still it may be some time before the rule is absolutely clear.

(14) *Judicial notice of foreign law.* Subsection 54(b) originally provided that the court should take judicial notice of the law of another state

171. Thus the general denial and contributory negligence, though they seem inconsistent, may be pleaded together. See *Klienlein v. Foskin*, 321 Mo. 887, 13 S.W. (2d) 648 (1929); note (1927) 35 MO. BULL. L. SER. 35.

172. Report, art. 5, § 14.

173. CLARK, (1928) CODE PLEADING, 222-225.

174. Report, art. 5, § 20.

175. *Burrus v. Cook*, 215 Mo. 496, 114 S.W. 1065 (1908).

when that law was pleaded.¹⁷⁶ The legislature changed the word "pleaded" to "relied on." The latter is a broader term and the legislature's version appears to be a more liberal provision. Difficulty arises, however, in the ambiguity of the words "relied on." When is the foreign law "relied on"? Must the pleading say expressly that it is relied on? Is it enough, or is it necessary, that the pleading disclose that the foreign law is applicable under conflict of law principles? Must the foreign law be expressly pleaded in order to be judicially noticed? Literally it would seem that it need not be pleaded; but if so, is not this placing an undue burden on busy trial courts which usually do not have the sources of foreign law readily at hand?

(15) *Time for answer in case of service by mail.* The original version of Section 58 required answer within twenty days after service by mailing, service being deemed complete three days after mailing.¹⁷⁷ The legislature changed the general answer date from twenty to thirty days, and in the case of service by mail required that the answer should be made within thirty days after filing of the return registered mail receipt. This raises again the ambiguity as to whether the defendant must receive the summons or petition or whether the proper mailing constitutes the service.¹⁷⁸ Independent of this it is awkward to have the answer date dependent upon the filing of the return receipt. A defendant so served will usually be a non-resident of the state and it seems inconvenient to require him to ascertain when, if ever, the receipt was filed in order to determine the time within which he should answer.

(16) *Application for change of venue as postponing the answer date.* In Section 61 the legislature struck out application for change of venue from the list of objections and other matters which might be raised by motion though the same did not appear on the face of the pleading.¹⁷⁹ Section 58 provides that motions under Section 61 postpone the answer date. With application for change of venue stricken from Section 61, it is open to some question whether such application postpones the answer date. It obviously should, but there is nothing in the retained change of venue article or in the new sections of the code which so declares.¹⁸⁰

(17) *Extent of consolidation and waiver of objections.* Under the orig-

176. Report, art. 5, § 23(b). Cf. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT, in 9 U. L. A. (1942) 269.

177. Report, art. 5, § 27.

178. See *supra* text at notes 160, 161.

179. Cf. Report, art. 5, § 30(3) with S. B. 34, § 61(3).

180. See *supra* text at notes 94 to 95.

inal version of Section 66 the provisions for consolidation and waiver of objection applied by its terms only to the objections under the pleading article and hence only to the motions in Sections 61, 62, 63, 64.¹⁸¹ The words "under this article" were stricken by the legislature, because the bill in legislative form was not divided into articles. However, no other restrictive words were inserted in their place. As a result, Section 66 by its terms applies to any motion then available to the party. Of course the motions commonly made at the trial are of necessity excluded but motions relative to parties and applications for change of venue are not. The party objection in particular presents a problem, for Section 17 is framed upon the theory that the motion may be made at other times. Here is an inconsistency between sections of the code which may give trouble. In Sections 65 and 69 relative to the time and hearing of motions, the legislature likewise struck out the words "under this article" and inserted nothing in their place. There is a similar lack of clarity as to what motions these sections apply, though no serious problem is perceived with reference to these sections.

(18) *Elimination of permissive counterclaim.* This matter has already been discussed;¹⁸² if it is not clarified an intolerable situation will be presented.

(19) *Elimination of provision for relation back of amendments.* This matter also has received attention in a prior division of this article.¹⁸³ If the Federal Rules provision was deemed too liberal, the proposed provision might have been recast. Its elimination leaves in doubt when, if at all, amendments will be deemed to relate back. A battle-ground is left without any guide as to the principles to be applied; it may be many years before these are determined.

(20) *Trial of issues by direction of the court.* Section 82, following the wording of Federal Rule 15(b), provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if amended. In the version submitted by the court the words "or by direction of the court" were included with cases of trial by express or implied consent.¹⁸⁴ These added words were stricken by the legislature. Their purpose was to cover the situation where a party objected to evidence as being outside the issues, and the court, not deeming the objection mate-

181. Report, art. 5, § 35.

182. See *supra* text at notes 100-102.

183. See *supra* text at notes 103-104.

184. Report, art. 7, § 2.

rial, did not order an amendment though he would and could have done so if the matter had been pressed.¹⁸⁵ Possibly the trial of such issues may not be error even under the wording which remains, but it is apt to be years before a complete philosophy as to this problem is attained through decision.

(21) *Place of pre-trial conference.* In Section 84 the legislature in providing for permissive pre-trial conference added the words "in the county where the case is pending."¹⁸⁶ The problem is raised as to whether the requirement is jurisdictional, or may be waived. Surely the parties should be permitted to hold the conference outside the county by consent. That might be a reasonable construction of Section 84, if it were not for the fact that Section 70 permits proceedings except trials to be held outside the county and further provides that no hearing except one *ex parte* shall be conducted outside the county without the consent of all parties. The words inserted in Section 84 suggest that the pre-trial conference was not intended to come within the general provision of Section 70 and that the parties may not waive the provisions as to the place of the pre-trial conference. Probably the legislature did not have in mind the provisions of Section 70 in making the amendment to Section 84. Its lack of attention to other provisions of the code here, as elsewhere, causes uncertainty.

(22) *Person upon whom interrogatories may be served.* In Section 85 the legislature added "partner" to the list of "officer, director or managing agent" upon whom written interrogatories might be served.¹⁸⁷ This addition was unnecessary since a "partner" would be a party and hence within the preceding general designation of "any adverse party." The addition does no harm by itself, but in Subsection 89(b) and 89(d) the legislature also changed the designation of agents by providing that if "an officer or general manager" refuses to make discovery certain consequences shall follow.¹⁸⁸ This is somewhat confusing and even may give rise to controversy as to what persons can make admissions for a corporate party. Whatever result is desired, the list of officials in Sections 85 and 89 should have been identical.

(23) *Advisory jury and jury trial by consent.* The original version of Subsection 98(c) permitted the trial court to order an advisory jury in any non-jury case, and to provide for jury trial in any non-jury cases by consent

185. See Clark, *Simplified Pleading in JUDICIAL ADMINISTRATION MONOGRAPHS*, Series A, No. 18, p. 21.

186. Cf. Report, art. 7, § 5.

187. Cf. Report, art. 12, § 1.

188. Cf. Report, art. 12, § 5(b)(d).

of the parties except in actions against the state.¹⁸⁹ The legislature struck out all reference to the advisory jury and garbled the remaining language so as to permit jury trial by consent in actions against the state. It is now silent as to other actions. The writer cannot understand the purpose of this change. Is it to be inferred that advisory jury is not permitted?¹⁹⁰ Cannot the parties secure jury trial by consent in non-jury cases where the state is not a party? The answers must lie in the general law as to consent and waiver of procedural matters; they are not to be found in the Civil Code.

(24) *Objections to instructions.* The last sentence of Subsection 105(a) in its original version provided that no party shall thereafter complain of the giving or refusing of an instruction unless he made specific objection before the jury retired.¹⁹¹ This sentence was stricken by the legislature but it left the provision to the effect that the court shall afford opportunity for examination of the instructions prior to their being given and for making objection out of hearing of the jury. This provision which was permitted to remain, together with Section 122 as to objections and Subsection 140(a) as to errors considered on appeal, could well be construed so as to require an objection prior to the giving of the instruction. If so, how specific must this objection be? Is an omnibus objection to the entire charge a sufficient objection for this purpose? No man can make a safe prophecy as to these important questions until the court has spoken.

(25) *Grounds of motion for new trial.* The original version said nothing of the grounds for new trial.¹⁹² The theory of this was that the common law grounds for motion for new trial would prevail, that these were well understood and that any legislative attempt to enumerate them would be unprofitable and perhaps impossible. The legislature inserted a provision in Section 115 that new trial might be granted for the reason for which they had heretofore been granted. This would seem to continue the common law on the subject as modified by existing statutes. However, all the statutes relative to new trials were repealed by the code.¹⁹³ Are the repealed statutes part of the law of new trials under the new code? Specifically the problem is presented as to whether the old section¹⁹⁴ relative to new trial for failure of proof, with the technical distinction between variance and failure of

189. Report, art. 13, § 8(c).

190. See *Walther v. Cape Girardeau*, 166 Mo. App. 467, 149 S. W. 36 (1912).

191. Report, art. 13, § 15(a). See *supra* text at notes 114-115 and following.

192. See Report, art. 16, § 1.

193. S. B. 34, § 1.

194. MO. REV. STAT. (1939) § 1167.

proof, is in effect preserved.¹⁹⁵ To maintain the latter distinction would be contrary to the entire spirit of the new code. The legislature also inserted in Section 115 a provision to the effect that only one new trial should be allowed upon the ground that the verdict is against the weight of the evidence. This is similar, in effect, to the present statutory rule,¹⁹⁶ but it is not identical. Hence there is a question as to whether it would ever be permissible to refer to the present statute or not in order to determine whether a second new trial may or may not be granted.

(26) *Form of motion for new trial.* The code is entirely silent as to whether the motion for new trial must be specific. The legislature added a provision to Section 119 that every order for new trial shall specify the ground or grounds thereof, but there is nothing in the provision as to new trials as to the nature of the motion. Does Subsection 60(a), which is found with the provisions relative to motions at the pleading stage and which requires the grounds to be set forth with particularity, apply to motions for new trial? Again,¹⁹⁷ Sections 122 and 140 are relevant, but not decisive, and the matter is in doubt.

(27) *Necessity of motion for new trial.* The problem discussed above would not have been of great importance under the original version which contained a section declaring that motion for new trial should not be necessary to obtain review of a judgment as to any objection raised at the trial.¹⁹⁸ This section was stricken by the court, which at the same time inserted a provision requiring motion for new trial for purposes of review.¹⁹⁹ The legislature struck out the latter provision²⁰⁰ but did not reinsert the provision making the motion unnecessary. This creates a most serious ambiguity as to a most common question. Some pioneering lawyer will doubtless give the court an opportunity to decide the matter but until then it will not be known whether and when a motion for new trial is necessary for purpose of review.

(28) *Time of entering judgment.* Section 116 provides that if a timely motion for new trial is filed, the judgment is not final until disposition of the motion. The legislature inserted a provision in this section to the effect

195. See *Ingwerson v. Chicago & Alton Ry.*, 205 Mo. 328, 103 S.W. 1143 (1907); *Peters v. McDonough*, 327 Mo. 487, 37 S.W. (2d) 530 (1931).

196. MO. REV. STAT. (1939) § 1169.

197. See *supra* text following note 191.

198. Report, art. 16, § 6.

199. See original Senate Bill No. 34, § 144(a).

200. S. B. 34, § 140(a).

that judgment shall be entered as of the day of the verdict. No reason is apparent for this insertion, and there is bound to be confusion between the actual date of the entry, the date judgment is deemed to be entered, and the date at which the judgment becomes final.²⁰¹

(29) *Time of granting new trial on the court's own initiative.* The original version of Section 119 provided that a trial court might grant new trial of its own initiative within ten days after judgment, or, if a motion for new trial was made upon another ground, at any time before the motion was passed on.²⁰² The legislature amended the section so as to permit the court to grant new trial of its own initiative at any time within thirty days after entry of judgment.²⁰³ As the time for appeal is ten days, a trial court may apparently grant motion for new trial after appeal is taken. There is nothing impossible about that, and indeed Section 137 contemplates that the action is not transferred to the appellate court until the transcript on appeal is filed with that court. However, in so far as possible all matters should be disposed of in the trial court before the time for appeal, and Section 119 does not do this.

(30) *Preservation of bill of exceptions.* While Section 122 provides that exceptions are unnecessary and that it is sufficient to make proper objections, the legislature eliminated the section²⁰⁴ which abolished the bill of exceptions and its distinction from the record proper. Furthermore the legislature provided in Subsection 135(a) for the transcript of the record "including the bill of exceptions." The anomaly of a bill of exceptions without exceptions is a bothersome, if not a vital, difficulty.²⁰⁵ Apparently this is the common law bill of exceptions, though perhaps the procedure may be altered by rule. The anomaly cuts deeper. Is the distinction between the record proper and the bill of exceptions preserved under the code? If so, what is in the record proper, bearing in mind that demurrer has been abolished? This may be material as to whether motion for new trial is necessary to review a ruling on motion to dismiss at the pleading stage.²⁰⁶ What, if any, other motions at the pleading stage are parts of the record proper? The whole matter is up in the air, in contrast with the plain provisions of

201. See S. B. 34, § 119 which provides for the granting of new trial on the court's own initiative "not later than 30 days after entry of judgment."

202. Report, art. 16, § 5.

203. S. B. 34, § 119.

204. Report, art. 17, § 1.

205. See *supra* text at notes 117-119.

206. See HOUTS, MISSOURI PLEADING AND PRACTICE (1936) §§ 535-539.

the omitted section abolishing the bill of exceptions and the distinction between the record proper and the bill of exceptions, and of the original section which provided a simple and clear method of preparing the record on appeal.²⁰⁷ The matter is further complicated by reason of the fact that revised Section 135 uses the expression "transcript of the record" apparently in the same sense as the expression "transcript on appeal" is used in the surrounding sections. What will the appellant call his appeal papers under this double nomenclature?

(31) *Methods of preparing the record or transcript on appeal.* Doubt arises as to whether there are two or three methods of preparing the data for the appellate court's decision. First, there is the bill of exceptions method indicated by the first part of Subsections 135(a). Second, Subsection 135(a) also indicates that an abbreviated or partial transcript of the evidence may be agreed upon by the parties instead of the bill of exceptions. It is not clear whether the latter is the same method described in Section 136, which is more complete in its terms and different in its phraseology and nomenclature. Apparently this is another example of a case where the legislature in its amending process overlooked another section which covered the matter fully.

The existing statute forbids the appellate courts from making any rule requiring any part of the record to be printed but grants power to require printing of abstracts of the record.²⁰⁸ In no uncertain terms the new code provides that appellate courts shall have no power to require parties to print the transcript of the record including the bill of exceptions or to print abstracts thereof.²⁰⁹ It is interesting to speculate as to whether a rule may provide for the printing in the appendix of the brief the parts of the record upon which the party relies, a system which has worked so well in the Circuit Court of Appeals of the Fourth Circuit.²¹⁰

The provisions for making up the record on appeal are scanty and not nearly as complete as under the existing procedure, the Federal Rules, or the plans submitted by the court. Probably this deficiency will be supplied by court rules under Subsection 10(b), though there is a little hitch here because the legislature eliminated from the specific subjects for rule-making in Subsection 139(a) the matter of preparation of the record on appeal.

207. Report, art. 17, § 12; cf. Fed. Rules Civ. Proc., Rule 75.

208. MO. REV. STAT. (1939) § 1197.

209. S. B. 34, § 135(b).

210. Dean, *Transcript of Record*, in 2 FED. RULES Dec. 27 (1943); Dean, *Fourth Circuit Rule 10 Reduces Brief Printing Costs* (1943) 26 J. AM. JUD. Soc. 148

(32) *Effect on criminal procedure.* This is a problem to be considered independently after the difficulties with reference to civil procedure have been resolved. Revision of criminal procedure was outside the general scope of the original proposal. The legislature emphasized the idea that criminal rules were not changed by expressly declaring that the code does not apply to procedure in criminal cases "except to the extent that its provisions or any of them are now or hereafter may be made applicable by statute."²¹¹ The section continues by declaring that if it shall occur that inadvertently the act may change procedure in criminal cases, the court is directed immediately to promulgate a rule restoring the provisions of the criminal procedure to the end that the latter shall not be changed except by legislative act passed for that specific purpose. Just what does this section mean in the light of the facts that in the past some of the sections as to criminal procedure have expressly incorporated the corresponding rule of civil procedure, and that some of the repealed sections in the general civil code or elsewhere by their terms or by construction apply to both civil and criminal cases?

For example, Section 1202²¹² provides that writs of error shall be brought within one year in any case whether civil or criminal. This section was expressly repealed by the Civil Code.²¹³ Is this a case in which the code may "inadvertently" change the practice in criminal case, and therefore a situation where the court is directed to restore the provision by rule? The matter is complicated by the provisions of Subsection 10(a) which declares that rules shall not "be contrary to or inconsistent with the laws in force for the time being." Is the setting up of a repealed statute by rule contrary to the law in force for the time being? If so, something like the problem of *renvoi* is presented between these two statutes, and the question is, with which section should the court finally stop in its decision as to whether a rule should be framed to cover the situation. Although not expressly relating to criminal cases, there are a number of other sections in the repealed articles with reference to appeals and writs of error which do, or at least may, relate to criminal procedure and concerning which the same problem is presented.²¹⁴

Another variant of the same problem is presented by Section 4084²¹⁵ which provided that exceptions may be made as in civil cases and that bills

211. S. B. 34, § 145.

212. MO. REV. STAT. (1939).

213. S. B. 34, § 1.

214. *E.g.* MO. REV. STAT. (1939) § 1229. See *State v. Ruck*, 194 Mo. 416, 428, 92 S. W. 706, 709 (1905).

215. MO. REV. STAT. (1939).

of exceptions should be settled, *etc.*, as now allowed by law in civil cases. All the sections with regard to these matters have been repealed by the Civil Code,²¹⁶ and in addition exceptions have been expressly abolished therein.²¹⁷ Another case in this category is Section 4147²¹⁸ providing that when an appeal or writ of error does not operate as a stay, the transcript shall be made out, *etc.*, as in civil cases. In both of these situations the additional problem is presented as to whether the reference statutes refer to the new or the old civil procedure. Ordinarily such provisions are deemed to refer to the new²¹⁹—which in itself presents still another problem since the new provisions as to these subjects are scanty or non-existent. Yet Section 145 by its terms seems to prevent the ordinary construction of reference statutes in the case of criminal procedure statutes, whereupon the same problem as that mentioned in the previous paragraph is presented.

There seems to be no particular difficulty in the cases of Section 4130²²⁰ declaring that appeals in criminal cases are allowed only at the term at which judgment is entered, and such as Sections 3949, 4005, and 4143²²¹ containing provisions regarding demurrers and dilatory pleas in criminal cases. These provisions are not changed by the Civil Code, though the corresponding procedure in civil cases is changed.

A problem is presented as to whether the provisions of Section 9 which declares that terms of court continue until the opening of the next term affects criminal cases. By itself the section seems of general application, and it will be extremely inconvenient for the term to continue for the purpose of civil cases and be terminated as to criminal cases. However, limitations of the title and the preliminary sections of the Civil Code, and particularly of Section 145, point in the opposite direction. The same difficulty is presented with reference to the making up of the trial docket. Does Section 91 apply only to making up the docket in civil cases and leave in force as to criminal cases the statutory method prescribed by Sections 1993 to 1995,²²² which has been obsolete in many circuits for many years?

216. S. B. 34, § 1. The sections in question are §§ 1174-1183.

217. S. B. 34, § 122.

218. MO. REV. STAT. (1939).

219. *Gaston v. Lamkin*, 115 Mo. 20, 21 S.W. 1100 (1893); *St. Louis v. Gunning Co.*, 138 Mo. 347, 39 S.W. 788 (1897); *State v. Rogers*, 253 Mo. 399, 161 S.W. 770 (1913); *Bowser v. Garwitz*, 185 Mo. App. 420, 170 S.W. 927 (1914).

220. MO. REV. STAT. (1939).

221. *Ibid.*

222. *Ibid.*

There are two other sort of uncertainties in connection with the Civil Code, though neither the legislature, nor indeed anyone else, can be charged with responsibility therefor. The first are the sort of uncertainties which inhere in the Federal Rules. It is inevitable that even the most carefully constructed new code should present some problems of interpretation. This was true of the New York Code adopted in Missouri in 1849. Such a succinct body of rules as the Federal Rules would naturally cause some question in the minds of those unfamiliar with them. Fortunately, the Federal Rules are generally well understood by lawyers who practice in the federal courts. For the sake of those lawyers unfamiliar with those rules and as to subjects in the Civil Code not covered by the Federal Rules, there might well be brief explanations or annotations attached to certain sections of the Civil Code. While these supplements might be supplied unofficially by persons familiar with the code, there would be marked advantage of quasi-official annotations or even official explanations in the form of substatory rules.

To illustrate uncertainties of this sort we may consider Section 61 providing for ten different grounds of motion which may be raised though the objection or matter does not appear from the pleadings. The section nowhere states what relief the moving party should request in any of the motions made upon the enumerated grounds. The same is true with reference to the motions provided for in Section 62 for failure to state a legal claim or defense. For failure to state a claim and in certain other cases a motion to dismiss the action is clearly proper. This would not apply to motions to fail to state a defense in the answer, or for security for costs, or probably for some other kinds of motions. The point is that the motion should ask for appropriate relief dependent both on the generic grounds and the situation in a particular case. Certain discretion should exist in framing the prayer of the motion, which might ask for relief in the alternative, or for dismissal only if other conditions are not met.²²³

At any rate the old demurrer practice should not be retained, wherein (except in the case of withdrawal or amendment) final judgment followed if any ground of the demurrer was established. This is made very clear under the new code as to party objections, for Section 17 provides for motion to drop or add parties, thus remedying the objection to the suit without the waste motion attached to the old demurrer process on the same ground.²²⁴

223. See S. B. 34, § 35.

224. Practically all party objections are grounds of demurrer under Mo. REV. STAT. (1939) § 922.

Motions on the ground of party objections are separately provided for only because they should be permissible at any stage by bringing in proper parties and striking out improper ones whenever the trial is not delayed thereby. While the motions enumerated in Section 61 must be made at a particular time they should be capable of similar directness in result, coupled with flexibility, both in the form and the prayer of the motion. Bearing in mind that the code provides that "no technical forms of pleading or motions are required,"²²⁵ that "pleadings shall be so construed as to do substantial justice,"²²⁶ and that the entire code "shall be construed to secure the just, speedy, and inexpensive determination of every action,"²²⁷ there should be no difficulty with the succinct code provisions relative to motions. "Uncertainties" of this nature do not constitute a defect; instead the broad language has been used intentionally in the code to provide a direct, flexible and non-technical procedural system.

The other sort of uncertainty is that connected with the statutory provisions with reference to civil procedure, which fall outside of the repealed articles of the General Code of Civil Procedure. In both the unrepealed articles of the General Code and scattered elsewhere throughout the statutes there are many specific provisions which are framed upon the existing practice, which is altered by the Civil Code. The largest number of them are concerned with terms of court,²²⁸ but others involve demurrer,²²⁹ pleas in abatement,²³⁰ set-offs,²³¹ nonsuits,²³² motions in arrest,²³³ exceptions,²³⁴ and writs of error,²³⁵ all of which are abolished by the Civil Code. The presence of this problem has always been in the minds of those responsible for the original draft. Thus, it was provided that the court might harmonize discordant provisions of the statutes by rule, though the legislature limited this to statutes relating to civil procedure.²³⁶

Another source of regret, though going only to the matter of form, is the lack of uniformity in manner of expression resulting from the legislative

225. S. B. 34, § 35.

226. *Id.*, § 57.

227. *Id.*, § 2.

228. *E.g.*, MO. REV. STAT. (1939) §§ 341, 869, 6443, 8477.

229. *E.g.*, *id.* §§ 1250, 1252, 1265, 1777.

230. *E.g.*, *id.* §§ 1478, 1479.

231. *E.g.*, *id.* §§ 1449, 2745.

232. *E.g.*, *id.* § 1026.

233. *E.g.*, *id.* § 6437.

234. *E.g.*, *id.* §§ 1508, 6437, 8478.

235. *E.g.*, *id.* §§ 270, 7017.

236. Report, art. 1, § 9(b); S. B. 34 § 10(b).

amendments. As presented to the legislature the entire code adopted the succinct style of the Federal Rules. Amendments added by the legislature, however, generally used the verbose form of legislation prevalent in the nineteenth century, regardless of whether the amendment adopted the existing statutory rule,²³⁷ or made some new provision.²³⁸ Perhaps this is a nicety which will cause little difficulty. It is even possible that the lack of uniformity in form may serve as a positive guide to construction by distinguishing the parts within the original plan from those added in the amending process.

JUDICIAL RULE-MAKING UNDER NEW CODE

The 1938 report of the American Bar Association's Committee on Judicial Administration named judicial rule-making first in the list of means of improving judicial machinery.²³⁹ It is generally recognized that procedural improvement on any comprehensive basis must find its main hope in such a system.²⁴⁰ Courts are in closer touch with legal machinery and with demands of the bar than the legislature. They are in constant session and have the time to consider changes in procedure. They are qualified to pass on the desirability of rules and they can secure the necessary assistance to do the work. Above all, they are responsible for the administration of justice and hence should be able to regulate the processes of that administration.²⁴¹

While the new code is the result of negation of general judicial rule-making, both the main committee and the legislature recognized the desirability, and indeed the necessity, of some sort of rule-making. The committee included a provision that rules might be promulgated to resolve conflicts in

237. S. B. 34, §§ 23, 96, 106-111.

238. S. B. 34, §§ 26, 135(a).

239. 63 A. B. A. REP. 530 (1938).

240. See Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 13 MO. BULL., L. SER. 3; Hyde, *From Common Law Rules to Rules at Court* (1937) 22 WASH. U. L. Q. 187; Hyde, *Observation on English Experience in Regulation of Practice and Procedure by Court Rules* (1938) 9 MO. B. J. 44; Sunderland, *Rules of Court Governing Practice and Procedure* (1938); 9 MO. B. J. 198; Wheaton, *Courts and the Rule-Making Powers* (1936) 1 MO. L. REV. 261; Wheaton, *Procedural Improvements and the Rule-Making Power of Our Courts* (1936) 22 A. B. A. J. 642; Note (1938) 23 WASH. U. L. Q. 412, 421; *Report, Committee on Amendments, Judiciary, and Procedure* (1938) 9 MO. B. J. 216; *Report, Committee on Expediting Trials and Appeals* (1940) 11 MO. B. J. 183; Harris, *The Rule-Making Power in JUDICIAL ADMINISTRATION MONOGRAPHS*, Series A, No. 1.

241. See generally *supra* note 240. The arguments pro and con for rule-making are set forth in PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION, being vol. 9 of the publication of New York State Constitutional Convention Committee (1938) 733, 741-744.

the code itself and between the code and other statutes.²⁴² The legislature adopted this measure except that it authorized rule-making only to alter statutes on civil procedure.²⁴³ It is to the credit of both of these bodies that they recognized the possibility of such conflicts, though they did not comb the code for the defects, apparently in the belief that the court would repair any failings which might lurk in their work. At any rate a number of discoverable defects exist, and as to these a perfecting gloss of rules is expected.

It is easy enough to say, let the court fix up the code by rule, but this is a general desideratum within the bounds of which there might be anything from a full set of rules rivaling the Civil Code itself in bulk and reinstating the devices which the legislature eliminated, down to a small number of rules designed to deal only with the most obvious and pressing difficulties, keeping well within the bounds of what the legislators would have desired if they had ever thought of the particular difficulties. Whether the court follows one or the other of these courses or adopts some position midway between the two extremes will depend upon its attitude toward judicial rule-making, as well as its sense of responsibility for the procedure in force in the judicial system of which it is the highest tribunal.

Several possibilities regarding rule-making under the code remain to be explored. First there is rule-making under the express terms of the code itself. By far the most important provisions are found in Section 10.

(1) *Substatutory*²⁴⁴ rule-making for all courts.

Subsection (a) of Section 10 expressly authorizes the supreme court to make rules of procedure for all courts of the state as to matters not inconsistent with the laws for the time being. There is little doubt of the constitutionality of this provision.²⁴⁵ Any trial or appellate court, even in absence of statute, has authority to promulgate rules for cases pending before it, provided the rules are not inconsistent with higher authority.²⁴⁶

242. Report, art. 1, § 9(b).

243. S. B. 34, § 10(b).

244. See generally Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 22 WASH. U. L. Q. 459, for an excellent analysis of the subject of rule-making and the application of a clear terminology.

245. *Story v. Livingston*, 13 Pet. (38 U. S.) 363 (1839); *State ex rel. Ross v. Call*, 39 Fla. 504, 22 So. 748 (1897); *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1922), *aff'd* 235 N. Y. 534, 139 N. E. 724 (1923).

246. See cases collected in Caruthers, *Administration of Justice in Missouri* (1941) 12 Mo. B. J. 3, 9.

The highest court of the state perhaps has authority, in absence of statute, to promulgate substatory rules binding upon the lower tribunals.²⁴⁷ When a statute gives this right, we must look to the constitution to find anything to prevent the court from exercising this sort of rule-making. Nothing in the Missouri Constitution curtails the granting of such a power to the supreme court.²⁴⁸ The only limitation upon Section 10(a) seems to be another provision²⁴⁹ within the code itself, giving to the appellate courts, which of course include the courts of appeals, power to make rules concerning the form of briefs, certain other matters regarding appeal papers, and the placing of cases upon the docket. Within the limits envisioned by this provision it seems that the particular language prevails over the general language of Section 10 so that each court of appeals may make its own rules as to matters enumerated.

The really important problem concerning Subsection 10(a) is, how far the rules may go without being inconsistent "with the laws for the time being"? One problem is whether the word "laws" includes principles reached by court decision as well as those enacted by statute. It is submitted that common law rules are not within the phrase.²⁵⁰ There is no indication of a desire to freeze the present non-statutory law of procedure, or to prevent its change by any other method than legislation or court decision. Then too there is at least one school of thought that professes the doctrine that all possible questions are governed by legal principles though they may not yet be decided, announced, or discovered.²⁵¹ If this philosophy were adopted

247. *People v. Callopy*, 358 Ill. 11, 192 N.E. 634 (1934); *cf. State v. Roy*, 40 N. M. 397, 420-423, 60 P. (2d) 646, 660-662, 110 A. L. R. 1, 20-22 (1936). But see *Smith v. Valentine*, 19 Minn. 452 (1872-3); *Jones v. Boykin*, 185 Ga. 606, 196 S.E. 900 (1938) (convention of judges); *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938) (same).

248. *Cf.* article VI, § 27 providing that the judges of the Circuit Court of St. Louis County may sit in general term for the purpose of making rules of court.

249. S. B. 34, § 139.

250. Superficially the celebrated decision of *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938) might be cited against this contention but the absence of a federal general common law is a sufficient ground of distinction. Then, too, the words "in force" suggest legislation and they are not contained in the federal rule of decision law. In addition the Missouri Supreme Court can undoubtedly change the common law of procedure by decision and to attempt to prevent the court from doing the same by rule is but to prolong the agony of obsolete case law. Finally to include decisions in "laws" would practically nullify the provision of the first sentence with reference to power to direct the form of writs and process.

251. See criticism of this doctrine in GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 218-240.

and "laws" were deemed to include non-statutory rules there would be no opportunity whatever for substatutory rule-making under Subsection 10(a), though perhaps the true principle might be "announced" by rule.

Assuming that "laws" as used in this section do not include non-statutory law, it remains to be seen what kind of rules would be consistent with the laws for the time being. It would unduly lengthen this article to discuss even briefly whether each of the deficiencies²⁵² already enumerated could be remedied under the provisions of Subsection 10(a). Surely some could not. Examples of this category include such matters as abolishing involuntary nonsuits and permitting special verdicts, for the code contains express provisions allowing one involuntary nonsuit²⁵³ and requiring general verdicts.²⁵⁴ In contrast with the latter it would seem that the court could authorize special interrogatories to accompany the general verdict because the code nowhere forbids special interrogatories. For the same reason it would seem that the court could reinsert the provisions for summary judgment,²⁵⁵ and for permissive counterclaims,²⁵⁶ though these were stricken from the code by the General Assembly. It is true that it would be known from what happened that such rules would be contrary to the wishes of some of the legislators; still they would come within the powers which the legislature actually granted to the court under Subsection 10(a). Nothing remaining in the code prevents the court from announcing forms of pleadings and instructions by rule.²⁵⁷ An even stronger case could be made for a rule requiring specific objections to instructions since the legislature, by retaining the provision for allowing counsel to object before the court's charge, has paved the way for such a rule.²⁵⁸ The court might even enact by rule some of the procedural devices which were eliminated by the main committee,²⁵⁹ and which were therefore not included in the final report to the court, or in the court's recommendation to the legislature. Of course, if the "laws" men-

252. See *supra* notes 35 to 120.

253. S. B. 34, § 99(b).

254. S. B. 34, § 106 says the verdict may be general or special but § 107 requires general verdict in all cases brought for the recovery of money or specific real or personal property.

255. See *supra* text at notes 96-98. Rules for summary judgment procedure were sustained upon the basis of substatutory rule-making in accordance with statutory authority in *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1922) *aff'd* 235 N. Y. 534, 139 N. E. 724 (1923).

256. See *supra* text at notes 99 to 102.

257. See *supra* text at notes 69 to 72.

258. See *supra* text at notes 114 to 115, 191.

259. See *supra* text at notes 35 to 59.

tioned in Subsection 10(a) include common law rules, the court's power to announce new rules as to matters now covered by decision would be severely limited. Under this construction rule-making under this subsection would be restricted to matters of minutiae not covered by statute or decision.

(2) *Harmonizing rules.*

Subsection 10(b) authorizes the court to promulgate rules to harmonize discordant or inconsistent rules in the code itself, or between the provisions of the code and the statutes relating to civil procedure. The constitutional question²⁶⁰ under (1) above applies here, but there is the additional problem as to whether a statute may authorize the court to supplant existing statutes by rules of court. The decisions in other jurisdictions make it plain that such a statute is valid, the rationale of these decisions being that the matter is partly judicial even if the legislature also has power to frame rules of procedure.²⁶¹

Naturally if there is an inconsistency between existing statutes and the provisions of the code, the latter must prevail. On account of the predominance of later statutes over earlier ones, this would be true without Subsection 10(b), but that provision also gives the court power to clarify the matter by rule. Such rules will avoid annoying and complicated problems of construction and reconciliation of separate statutes. The most frequent specie of inconsistency between the code and the existing statutes are the provisions relative to terms of court in connection with general procedure not changed by the code and with various special proceedings scattered throughout the statutes. There will also remain on the statute books various sections relative to demurrers, pleas in abatement, set-offs, nonsuits, motions in arrest, exceptions, and writs of error, which devices, at least in name, are abolished by the code. These inconsistencies²⁶² and other of like nature might be handled by the court in various ways. First, the court might not promulgate any rules whatever, leaving the matters to be worked out by the ordinary principles of reconciliation between earlier and later statutes

260. See *supra* text at notes 245 to 248.

261. *Burney v. Lee*, 59 Ariz. 360, 129 P. (2d) 308 (1942); *State v. Roy*, 40 N. M. 397, 60 P. (2d) 646, 110 A. L. R. 1 (1936); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928); *In re Constitutionality of Section 251.18 Wisconsin Statutes*, 204 Wis. 501, 236 N.W. 717 (1931). As to the large number of jurisdictions which have such legislation, see Harris, *The Rule-Making Power*, in JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 1, 6-10, 12, 21-22.

262. See *supra* text at notes 228 to 235.

on the same subject. While Subsection 10(b) merely gives the court power, and does not purport to require the court, to promulgate harmonizing rules, there is every reason why the court should do so. Conceivably the court might enact a separate rule with respect to every inconsistent old section and in effect rewrite them. Principally on account of term of court provisions, rules of this nature would bulk large and entail much labor in the framing and the use of the rules. The remaining possibility seems best: the enactment of a few general rules to cover the various types of situations, announcing the way in which the court believes that the code affects existing statutes which have not been expressly repealed. Under this plan a re-phrasing of the conflicting statutes could await the next general revision of the statutes.

A number of instances of discord within the code itself have already been noted.²⁶³ Apparently here the court is not limited to accepting the version of any of the conflicting sections but a new provision can be made by rule which will prevail under the authority of Subsection 10(b). While a general attitude toward rule-making under the authority of Section 10 will doubtless be manifested by the court, each case, or at least each type of case, will present a separate problem. Detailed consideration is necessary even if the power is exercised sparingly.

(3) *General superstatutory rule-making.*

There is a broader aspect of judicial rule-making than is presented by Section 10, namely the question of whether the court has power under the constitution to promulgate rules of procedure which would abrogate or enlarge the statutory procedure. Dean Wigmore asserted the thesis in no uncertain terms that the framing of rules of procedure is not a legislative function at all but rather a judicial function, and that statutory procedural codes are utterly unconstitutional.²⁶⁴ Other writers²⁶⁵ have not agreed with Wigmore and the actual holdings in few, if any, cases support him.²⁶⁶ Surely the many courts recognizing and enforcing legislative codes have not shown an inclination to subscribe to his doctrine.²⁶⁷ The Missouri Constitution

263. See *supra* text at notes 143 to 210.

264. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally* (1928) 23 ILL. L. REV. 276, reprinted (1936) 20 J. AM. JUD. SOC. 159.

265. Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 23 WASH. U. L. Q. 459; Hibsichman, *The Power to Regulate Court Procedure* (1937) 71 U. S. L. REV. 618; Harris, *The Rule-Making Power in JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No.1, passim.*

266. See *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931).

267. See *Clark v. Austin*, 340 Mo. 467, 488, 101 S.W. (2d) 977, 988 (1937).

contains provisions²⁶⁸ indicating that procedure framing is a proper legislative function, though it does not indicate that its authority is exclusive, nor that there are not limitations to legislative activity in this field.

While article III of the Missouri Constitution on its face may indicate that the legislative, executive and judicial functions of government are distinct and mutually exclusive, it is well recognized that certain activities be in the twilight zone may be exercised by more than one of the branches.²⁶⁹ Procedural rule-making is a case of this category. The propriety of legislation as to procedure is recognized both in the constitution itself and by the court's enforcement of legislative provisions for more than a century. Inherent limitations upon legislative authority in this particular field have not been adjudged in any Missouri case. However, decisions in the analogous fields of admission to the bar, bar discipline, and the practice of law by laymen are extremely suggestive of the solution of the present problem.

Thus in *Clark v. Austin*²⁷⁰ Chief Justice Ellison, speaking for a majority of the court, says:

"But in addition to their exclusive power to determine justiciable controversies and the constitutionality of statutes involved therein, they [the courts] have . . . 'another special interest.' It is the inherent power to protect their own existence and functioning as constitutional courts, which includes the right to regulate the practice of law. They can make rules on that subject when there are no statutes, or supplementing statutes and imposing additional regulations. And they can strike down as unconstitutionally usurping judicial power, any statute unreasonably encroaching upon, and therefore frustrating their right to protect themselves."

In that case the court had before it the question of whether respondents, laymen, were engaged in the unlawful practice of law by appearing before the Public Service Commission in a representative capacity. The majority opinion mentions statutes regulating court procedure but only to the effect that the legislature may enter this field and that the matter is not exclusively judicial. No reason is suggested why statutes governing procedure

268. Art. IV, § 53(4), (17), (18), (30) (forbidding special legislation); Art. VI, § 35 (requiring uniform probate practice).

269. See *Rhodes v. Bill*, 230 Mo. 138, 150, 130 S.W. 465, 468 (1910); *In re Birmingham Drainage District*, 274 Mo. 140, 150, 202 S.W. 404, 406 (1918).

270. 340 Mo. 467, 496, 101 S.W. (2d) 977, 994 (1937). For a careful analysis of the opinions in this case, see Howard, *Control of Unauthorized Practice before Administrative Tribunals in Missouri* (1937) 2 Mo. L. REV. 313.

may not be struck down as frustrating the court's power. Indeed the very mention²⁷¹ of such statutes in the opinion suggests that they may.

The Missouri Supreme Court in 1934 announced rules of court which increased the statutory requirements for admission to the bar²⁷² and rules governing the conduct of the bar.²⁷³ The court did not fail to act with reference to rules governing personnel though it had not acted before. The motivation which gave rise to the court's action was no academic or theoretical argument as to the limitations upon the legislative and judicial prerogatives. It was rather a wide-spread discontentment manifested in the press, among laymen, and within the bar itself with the personnel and conduct of some members of the bar and others who assumed their functions. These complaints and the causes underlying them did not increase the powers of the court but gave rise to the court's assertion of its power to nullify legislation which thwarted the court's power to regulate and purify the judicial household.

Not only is there analogy from the legal standpoint between the regulation of the bar and of procedural rules, but there is analogy between the fact situations giving occasion for the assertion of judicial authority. In spite of better standards of legal education and of a bar membership with stricter ethical standards, the courts have not held their rightful place in the settlement of disputes. Even before the war litigation had fallen off.²⁷⁴ The continued rise of administrative tribunals, and of the settlement of disputes through arbitration and trade associations, together with the stark abandonment of claims which cannot be collected without suit, indicate popular dissatisfaction with judicial machinery. With increasing frequency people fail to seek their legal remedies which the courts are supposed to provide. If this tendency is not curtailed, the civil action may become as obsolete as the presentment of the grand jury, the writ of privilege, or some of the other ancient procedures which have fallen into disuse.

Procedural rule-making is a proper function of the courts. The fact

271. See *supra* note 267. See also Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 145 Fla. 223, 199 So. 57 (1940); *Burney v. Lee*, 59 Ariz. 360, 129 P. (2d) 308 (1942).

272. 334 Mo. appendix, p. xvii.

273. *Id.*, at p. vii.

274. Figures for the Missouri courts of appeals show that between 1932 and 1942 there was a falling off of something like forty per cent in cases filed. See *Report, Special Committee to Make Survey and Report on Appellate Courts* (1943) 14 Mo. B. J. 253, 257-258. See generally, Seacat, *The Problem of Decreasing Litigation* (1940) 8 K. C. L. REV. 135.

that it may be delegated to the courts by legislation is proof of that.²⁷⁵ The Civil Code itself purports to give some superstatutory power to the courts.²⁷⁶ However, the fact that rule-making is, in part at least, judicial does not mean that all legislative attempts to regulate it are invalid. Only when the legislative rule frustrates the court in the administration of justice should the court abrogate the rule.

When does a legislative rule or code of procedure frustrate the administration of justice? Surely it does so when the statutes in question drive claimants from the courts, or leave them in such a disgusted frame of mind that they will not again resort to the law. How bad does a rule or a code have to be before it will have appreciable effect along this line? This of course depends upon the time and place. The Missouri code of 1849 was such an improvement upon the pre-existing common law that it could not be said to have that effect. It was in accord with best legal thought of the day and with the horse and buggy stage of society. Since then there has been stupendous change and advance in the society which the law serves. The spirit of a highly competitive commerce and industry demands the same degree of efficiency in its legal services as it does in its own internal affairs of management. The same is true of labor and other organized groups. All these, and individuals as well, are used to convenience and speed in transportation, communication and affairs in general. Naturally they believe that the law should keep up with the other phases of life. A business which uses the mails for the transmissal of its own communications and resorts to conferences with its employees and associates as a means of determining what issues if any exist between them will demand that lawyers and courts use the same sort of devices in their work.

In a nutshell the only system of procedure which will not frustrate the administration of justice in this day and age is *the most efficient system that can be devised*. Otherwise the public will suffer, and suffering, will not resort to the courts, and the settlement of disputes will in large measure be taken out of judicial hands.

Of course, the matter is one of degree. If the court accepts the doctrine that legislation regarding procedure can be struck down as frustrating the judicial power and that new rules may be announced by the court, it might choose to proceed cautiously. It might, for example, put back into the code

275. See *supra* note 261.

276. See *supra* text from not 261 to note 263.

only a few of the provisions emasculated by the legislature and which could not be remedied under the terms of Section 10. It might go further and consider the code proposed and the code enacted as units—the first well-knit, consistent, and progressive, the second a mangled, self-contradictory system with many modern procedural devices entirely lacking. This philosophy would lead to a promulgation of the plan substantially as suggested by the court to the legislature. Indeed the court could go still further and enact many of the rules and cover much of the ground which the committee appointed by the court excluded from the code. This could be done without stultification for it is well known that in the preparation of the draft the committee was greatly influenced by a desire to offer a plan of which the legislature would approve. This factor doubtless also influenced the court in its recommendation of the committee's plan. The attempt on the part of the court to procure a superior procedure without clash with a coordinate branch of the government having failed, there is no occasion for the court to proceed along the same cautious lines as it did with reference to a plan for the improvement of civil procedure through court recommended legislation.

This is no denial of the principle of democratic government, being closest to the people, should have the ultimate voice in policy-making. Neither of these precepts are thought to be violated by the judicial power to declare legislation unconstitutional, nor by the more recently asserted power to set up rules exceeding the statutory requirements for admission to the bar and the practice of law. Conceding the undoubted fact that legislators, and particularly lawyer-legislators, regard procedure-framing as part of their legislative prerogative, it may be open to question as to how much their position is asserted because of desire to control the subject-matter as a symbol of power and how much it is asserted in the public interest. This is an imponderable element and it would be unprofitable to do any more than suggest the possibility. However, it can be asserted much more confidently that the people blame the courts rather than legislature for the expense, delays, and uncertainties of legislation. At any rate it is perfectly clear that these factors do affect and threaten the functioning of the judicial branch. Accordingly that branch should decide what provisions for procedure must be made in order that citizens will freely resort to the courts for settlement of their disputes. To take any other position would be to admit that the legislature is something more, and the courts something less, than coordinate branches of government.

Surely no public uprising will result from the court's assertion of this power. Legislators may temporarily feel piqued but they would soon become reconciled to the reasonableness of the position. Indeed once the step had been taken the legislature would probably find real comfort in being relieved of a function for which it is not fitted and has not done well. The lawmaking branch could then confine itself to their ever-increasing business which cannot be said to lie in the twilight zone of governmental powers.

A CONSTITUTIONAL SOLUTION

While these words are being written a constitutional convention is in session at Jefferson City. What that convention does may determine the future of the administration of justice in Missouri for fifty years or more. The convention has it in its power to settle the question of the authority and responsibility of procedural rule-making by vesting these in the supreme court. Several states already have such constitutional provisions.²⁷⁷

The judiciary article proposed by the Missouri 1922-1923 Constitutional Convention contained provision for judicial rule-making but this was made subject to legislative annulment or amendment or new rule created in lieu thereof by the legislature by special law limited to that purpose.²⁷⁸ The joint committees of the judiciary and the Missouri Bar Association have recommended a similar provision to the present convention, except that authorization for a new rule by legislative enactment was eliminated from the joint committees' proposal though the power of legislative amendment was retained.²⁷⁹ This sort of provision *may* be better than none, though it opens the door to the same sort of tinkering that happened in the case of the Civil Code. No reason is apparent why the legislature, which so emasculated a draft which it had invited the court to make, would accord a set of rules under constitutional authority with any different sort of treatment. Only gubernatorial veto under the proposed constitutional amendment lessens the chance for the sort of legislative muddling which took place in the enactment of the Civil Code.

Indeed such constitutional legislative control over judicial rule-making may lead to worse consequences than the legislative derangement of the court's proposals for the new code. While it would probably not be contended that under this constitutional proposal special legislative bills de-

277. MD. CONST., Art. 4, § 18; MICH., CONST., Art. VI, § 5; WASH. CONST., Art. 4, § 24.

278. See Mo. Manual (1923-1924) p. 531, § 25.

279. Proposal No. 21 in the 1943 Constitutional Convention of Missouri, § 25.

signed to amend court rules would not be subject to the provision of due process or other express constitutional limitations, the judicial power to control the legislature's frustration of the administration of justice by special bills as to procedure would apparently be non-existent. It would not seem permissible for the court to nullify by rule the legislature's amendments to the court rules. It is doubtful whether the legislature could amend one of its own amendments to judicial rules, since the proposed constitutional provision seems to contemplate judicial initiation of new procedure provisions and legislative action only with regard to judicial rules. It would thus appear that after the court had established a set of rules, the legislature "by amendment" could reenact the pre-existing code (or another of its own making) which would then be incapable of being altered by either court or legislature. In case of legislative repeal without amendment of a judicial rule it would be problematical whether the former statute or rule is re-established, the common law is restored, or an absence of law results. Of course it is freely admitted that the proposed constitutional provisions might receive—with a little straining—a more fortunate and more definite interpretation than indicated above. Enough has been said, however, to demonstrate the unsatisfactory and questionable character of the new proposal.

It is true that the act of Congress which authorized the supreme court to prescribe rules for civil actions in the district courts provided that in case the court united the rules for cases at law and in equity, the united rules should not take effect until they should be reported to Congress at the beginning of a regular session and until the close of such session.²⁸⁰ The rules were presented to Congress but while thoroughly considered in committee they were not in any respect amended or repealed. This is quite a different attitude from that which the Missouri General Assembly took toward the suggestions of the court as to the Civil Code. Furthermore, the act of Congress contemplated action only at the session at which the rules are reported. The proposed constitutional provision is unlimited as to time and legislative amendment or repeal could come at any subsequent session.

There is no basis in the court's recent decisions as to procedural matters, nor in its suggestions for the new Civil Code, to cast any doubt upon the court's superior judgment in this field. Experience with the enactment of the code has shown that the desirability of a check upon the court's power is far outweighed by the undesirable results which follow from a legislative

280. 28 U. S. C. A. §§ 723(b), 723(c) (1934).

check. Difficulty will be encountered with the operation of the new code; indeed that would have been true to some extent even if the court's suggestions had been fully accepted. Who will bear the responsibility for the difficulties? There will probably be finger-pointing at both bodies, but the real blame should be attached to the method which produced the Civil Code. Only by complete and unhampered judicial rule-making can responsibility be fixed and best results obtained for the conduct of litigation in our courts. While much progress can be made by curative rules under express authority of the new code and by rules under the court's non-frustrating power, a constitutional provision for general superstatutory rule-making is the best method of preserving the courts for litigants and litigants for the courts.