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The Montana Rules of Civil Procedure

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The Montana Rules of Civil Procedure

By **DAVID R. MASON**

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The Montana Rules of Civil Procedure

By **DAVID R. MASON***

I. INTRODUCTION

The first day of January, 1962, will always be a significant date in the development of Montana law because a new system of procedure patterned after the Federal Rules of Civil Procedure¹ became operative to govern practice before the district courts of Montana. The Montana Rules of Civil Procedure are designed to aid the exercise of jurisdiction in cases having substantial contacts with Montana, speed up court processes, and facilitate the decision of cases on their merits. The rules govern all suits of a civil nature with the exception of special statutory proceedings excluded by Rule 81, and in addition the discovery procedures apply to proceedings in probate.² They are applicable not only to actions commenced after their effective date, but so far as feasible, and to the extent that they do not work an injustice, they also govern proceedings in actions pending in Montana district courts of January 1, 1962.³

It is the purpose of this article to evaluate some of the available materials on the Federal Rules and to discuss salient features of the Montana Rules and particularly points at which the new procedure departs from the old.

In one particular, namely, Rule 4 with respect to the service of process, the Federal Rules did not provide a system for Montana. In certain particulars there have been departures from the Federal Rules; in some instances existing Montana statutes or practices have been retained in preference to adopting the Federal Rules. Illustrations⁴ are the Rules with respect to the pleading of statutes,⁵ dismissals of actions,⁶ examination of witnesses,⁷ service of subpoenas,⁸ examination and selection of jurors,⁹ instructions to juries,¹⁰ findings by the court,¹¹ and summary judgment.¹²

Nevertheless, the basic pattern of the Federal Rules has been retained. These Rules were built upon the foundation of the Field Code of 1848,

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¹The Montana Rules of Civil Procedure are not rules of court; they were enacted into law by the legislature and can only be changed by legislation. Laws of Mont. 1955, ch. 255, §§ 9, 10. However, they will be referred to as the Montana Rules in accordance with the legislative terminology (Rule 85) and often in contradistinction to superseded code provisions or code practice. A parallel citation table will be found *infra*, page 61, giving for each Montana Rule the corresponding section number in Title 93, Revised Codes of Montana, 1947. The Federal Rules of Civil Procedure will often be referred to merely as the Federal Rules.

²Rule 1.

³Rules 1 and 86(a).

⁴The commission note to each rule used as an illustration indicates the departure from or adherence to the Federal Rules.

⁵Rule 9(d).

⁶Rule 41.

⁷Rule 43(b).

⁸Rule 45(c).

⁹Rule 47.

¹⁰Rule 51.

¹¹Rule 52.

¹²Rule 56.

which has afforded the basis for practice in the district courts of Montana since territorial days, but they effect five basic and significant improvements. First, pleadings are simplified and de-emphasized. Second, separate preliminary steps in the trial of a law suit are avoided and dilatory mechanisms eliminated. Third, provisions with respect to joinder of causes and parties are freed from inflexible restrictions that really do not promote trial convenience. Fourth, processes by which facts may be discovered before trial are greatly liberalized. And fifth, provision is made for pre-trial conferences, designed to facilitate getting to the merits of controversies.

II. SOME MATERIALS ON THE FEDERAL RULES¹³

Perhaps the first question which will occur to attorneys who have not practiced extensively in federal district courts is this: where may one go for materials on the Federal Rules, which have now become relevant to interpretation of Montana procedure? A great deal of such material has accumulated over the period of twenty-three years since the Federal Rules became effective, and it is not believed that any useful purpose would be subserved by an attempt at a complete bibliography. All that will be attempted here is to indicate where the text of the Federal Rules and decisions construing them may be found, to describe the principal index books to these decisions,¹⁴ to briefly appraise specialized treatises and other publications, and to cite a few articles which the writer would recommend.¹⁵

A. PUBLICATIONS IN GENERAL USE CONTAINING THE TEXT OF THE FEDERAL RULES

A practitioner in the Montana district courts will sometimes wish to compare the text of the Federal Rules with that of the Montana Rules. There are a number of sources, one or some of which will be available to and in use by nearly every Montana lawyer, which carry the text of the Federal Rules. Volume 308 of the official *United States Reports* contains the Rules as originally adopted, and volume 335 contains the amendments of 1948. Also the unofficial *Lawyers' Edition* carries the original Rules in volume 82 and 1948 amendments in volume 91.¹⁶ Of course, the fact that the original Rules and the Amendments are in separate volumes detracts from the value of these reports as reference works; and volume 17 of the *United States Supreme Court Digest* (West Publishing Co.) and also volume 17 of the *Digest of United States Supreme Court Reports* (Lawyers Co-op. Publishing Co., 1959) carry the text of the Federal Rules as amended. However, none of these publications contains the Notes of the Advisory Committee on the Rules, which are frequently valuable aids to an understanding of the Rules.

¹³Miss Gwendolyn Folsom, while in her former position as Research Assistant, Montana State University School of Law, rendered valuable aid to the writer by collecting and sorting materials and citations to materials dealing with the Federal Rules.

¹⁴According to *Corpus Juris Secundum*, as of 1960 there were nearly 45,000 judicial determinations under the Federal Rules. 35A C.J.S., page v.

¹⁵A rather extensive review of publications, other than articles in law reviews and bar association journals, is found in Fowler, *Available Research Materials on the Federal Rules of Civil Procedure*, 9 ALA. L. REV. 259 (1956-57).

¹⁶The unofficial Supreme Court Reporter carries the 1948 amendments in Vol. 66.

Other source materials which contain the text of the Federal Rules as amended and also the Notes of the Advisory Committee are of greater value. The *United States Code* sets out the Rules in the Appendix to Title 28 (1958 edition), and in 1960 there was completed a six volume compilation of the Federal Rules of Civil Procedure portion of the *United States Code Annotated*. Also *Federal Code Annotated* in 1952 published a volume devoted to the Rules of various federal courts, and included the Federal Rules of Civil Procedure.

B. REPORTS OF DECISIONS

There are a few decisions of the Supreme Court of the United States, which can be found in the official and unofficial reports of the decisions of that court, and there are some decisions of United States courts of appeal, which are reported in *Federal Reporter, Second Series*, interpreting the Rules. However, most of the decisions on the Federal Rules are those of the United States district courts. Only selected decisions of these district courts are reported in *Federal Supplement*, and West Publishing Company has published another set of reports, *Federal Rules Decisions*, which reports the many district court decisions that have been designated for inclusion in *Federal Rules Decisions* rather than in *Federal Supplement* because of their special importance in the construction of the Federal Rules.¹⁷ Consequently, one of the reports of the decisions of the Supreme Court of the United States, *Federal Reporter, Second Series*, *Federal Supplement*, and the *Federal Rules Decisions* are needed to obtain a complete coverage of all federal decisions interpreting, construing and applying the Federal Rules. Of course, state cases dealing with state rules of civil procedure patterned after the Federal Rules are to be found in the regional Reporters of the *National Reporter System*.

C. PUBLICATIONS IN GENERAL USE AFFORDING INDICES TO DECISIONS

Citators, digests and encyclopedias which are in general use afford access to decisions of courts interpreting the Federal Rules and state rules patterned after the Federal Rules. *Shepard's Federal Reporter Citations* contains a division entitled "Rules of Civil Procedure, United States District Courts," and cites federal cases under each Rule number. Volume 17 of *United States Supreme Court Digest* (West Publishing Co.) should also be placed in this category, since it merely cites decisions of the Supreme Court of the United States.

There are several digests. After the adoption of the Federal Rules a new topic, "Federal Civil Procedure," was added to the key number system of the *American Digest System*, which covers procedure before the United States District courts. The same topic is also contained in the *Montana Digest* and the *Montana and Pacific Digest*. *Modern Federal*

¹⁷There is no duplication of cases reported in *Federal Supplement* and *Federal Rules Decisions*. Volume 1 of *Federal Rules Decisions* contains the original Rules as they became effective in 1938; volume 5 contains the Advisory Committee Report of Proposed Amendments; and Volume 6 contains the text of the 1948 amendments. *Federal Rules Decisions* also contains numerous articles, speeches and discussions of the Federal Rules of Civil Procedure, and since 1946 it has contained decisions on the Federal Rules of Criminal Procedure. As of this writing the set consists of 26 volumes.

Practice Digest (West Publishing Co.) has 4 volumes devoted to a digest of federal cases since 1939 under the key number system of analysis.¹⁸ But there are other digests which have the advantage of having the cases keyed to individual Rule numbers.¹⁹ The *United States Code Annotated* contains comprehensive annotations under each Rule, covering not only decisions of the federal courts but also those of state courts and opinions of the Attorney General of the United States, construing and applying the Rules; and the six volumes of Title 28 which cover the Federal Rules of Civil Procedure may be purchased separately.²⁰ Also the Rule volume of the *Federal Code Annotated* includes under each rule annotations to the decisions of federal courts. Again the *Digest of United States Supreme Court Reports* (volume 17, Lawyers Co-op. Publishing Co., 1959), in addition to case notes, contains citations to annotations in *American Law Reports* and *American Law Reports, Second Series*.

Encyclopedias not only contain text materials but also afford indices to the primary authority of decisions. In 1960, *Corpus Juris Secundum* published volumes 35A and 35B under the title "Federal Civil Procedure." *American Jurisprudence* still prints applicable materials under the title "Pleading," but the General Index has a heading "Federal Rules of Civil Procedure." Neither of these works is keyed to individual Rule numbers.²¹

D. SPECIALIZED PUBLICATIONS

As has been noted, *Federal Rules Decisions* is needed for a complete coverage of decisions of the United States district courts construing and applying the Federal Rules. In addition, there are specialized treatises, services, digests and form books devoted entirely or partially to the Federal Rules of Civil Procedure, with which the bench and bar should be familiar.²²

There are two comprehensive and outstanding treatises. *Barron and Holtzoff, Federal Practice and Procedure with Forms* (Rules edition, Wright revision), is concise, well indexed, and a useful guide to relevant authorities. Approximately two-thirds of it is devoted to the Federal Rules of Civil Procedure. The balance is concerned with federal jurisdiction and federal criminal procedure. One volume is devoted to forms, one to tables of cases and statutes, and one to a general index.²³ This

¹⁸The *Federal Digest* is the repository of the case digests for the period prior to 1939.

¹⁹References to the Digest Key Numbers are contained in "Library References" under each Montana Rule in the pamphlet *Montana Rules of Civil Procedure* published by West Publishing Co., St. Paul, Minn., 1961 (\$4.00).

²⁰The price is \$10.00 per volume.

²¹Reference to *Corpus Juris Secundum* section numbers are contained in "Library References" under each Montana Rule in the pamphlet *Montana Rules of Civil Procedure* published by West Publishing Co. (1961).

²²Some specialized works have been omitted from discussion because of the relatively small proportion devoted to civil procedure.

²³St. Paul, Minn.; West Publishing Co.; Brooklyn, N. Y.; E. Thompson Co., 1950-51 (\$170). Montana lawyers have had their attention directed to this work through the Federal Rules Tables in the pamphlet containing the Proposed Montana Rules of Civil Procedure prepared by the Montana Civil Rules Commission which was distributed to members of the bar in April, 1960, and in the pamphlet containing the Montana Rules as enacted into law, both published by West Publishing Co. These tables, prepared by the publisher, key the Montana Rules to the Federal Rules and to sections of BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, containing expositions of the Federal Rules. The second of these pamphlets also contains under each Rule a "Library Reference" to BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE.

work, prepared by eminent authors,²⁴ first appeared in 1950. The volumes dealing with the Federal Rules of Civil Procedure have been revised by Charles Alan Wright,²⁵ and it is kept to date with pocket parts.

Moore's Federal Practice (second edition)²⁶ is in eight volumes. One volume is devoted to an index, one to federal jurisdiction, and the remaining six are devoted to the Federal Rules of Civil Procedure. The work first appeared in 1948, but the Rules division of the work was not completed until 1957.²⁷ Portions of it have been recompiled, and it is kept to date with annual cumulative supplements. It employs a compression-type loose-leaf binder which permits the addition of the supplemental materials and recom compilations without the looseness of pages associated with ordinary loose-leaf binders, and the removal of chapter units for separate use.

The author is a distinguished authority and not unknown in Montana.²⁸ He was well equipped to produce an outstanding work, since he served as adviser and draftsman in formulating the original Federal Rules in 1938 and the subsequent amendments while a member of the United States Supreme Court Advisory Committee on the Rules of Civil Procedure.

The analysis and synthesis of materials is excellent, and the discussions and criticisms of the law are valuable.

A treatise containing a scholarly treatment of pre-trial procedure was written in 1950 by Harry D. Nims²⁹ and published in one volume. This book, *Pre-Trial*,³⁰ discusses the nature of pre-trial, how it is used and problems involved in its use, and contains judicial comments on pre-trial. An appendix contains minutes of pre-trial hearings, pre-trial rules, specimen orders, minutes and statements prepared during or at the close of pre-trial hearings, and a bibliography.

Bender's Federal Practice Manual (1956 Reprint)³¹ is a one volume work in the compression-type loose-leaf binder, originally published in 1948. There have been recom compilations of the various portions, and it is kept up to date with supplements. It covers not only the Federal Rules of Civil Procedure but also the Federal Rules of Criminal Procedure and current Court Rules of individual federal courts, and contains selected annotations and citations to *Moore's Federal Practice* (second edition) and *Bender's Federal Practice Forms*. It is useful primarily as a fast desk book.

For the trial lawyer whose frequent appearance in federal and Montana district courts justifies the expenditure, *Federal Rules Service, Second*

²⁴The late William W. Barron served as Chief of the Revision Staff for Title 28, U.S. Code. The Honorable Alexander Holtzoff is United States District Judge of the District of Columbia.

²⁵Professor of Law, Texas University School of Law, member of the United States Supreme Court Advisory Committee on Rules of Civil Procedure.

²⁶Albany, N. Y.; Matthew Bender & Co., 1948 (\$175).

²⁷Paradoxically, volume 1, which is on federal jurisdiction, was completed last.

²⁸He received a B.S. degree from Montana State College in 1924, was admitted to practice in Montana in 1937 and is a member of the Montana Bar Association. He is Sterling Professor of Law, Yale Law School, and a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

²⁹Member, New York Bar.

³⁰New York, N.Y.; Baker, Voorhis & Co., Inc., 1950 (\$5.75). The original plan of the author was to publish this book as one of the handbooks of the Committee on Continuing Education for Lawyers of the American Law Institute, but this was given up because of the length of the book. The text is about 200 pages in length; the appendix somewhat over 100 pages.

³¹Albany, N.Y., Matthew Bender & Co., Inc., (\$25).

*Series*⁸² is available. This is a loose-leaf biweekly reporting service, reporting all current opinions construing the Federal Rules.⁸³ Bound volumes⁸⁴ reporting opinions beginning in July, 1958, are available to subscribers to the current service. The annual subscription charge⁸⁵ includes any bound volume published during the subscription period.

Federal Rules Digest (second edition)⁸⁶ contains citations to *Federal Rules Service* and is a suitable companion work for it. It is a four-volume work which was published in 1955, equipped with pockets to take care of periodic cumulative supplementation. It contains the text of the Federal Rules, digests of all federal decisions interpreting the Federal Rules, and references to leading law review articles, comments and notes.

The practitioner may feel the need of forms in addition to the official forms in the appendix to the Montana Rules.⁸⁷ *Bender's Federal Practice Forms*,⁸⁸ by Louis R. Frumer, affords a comprehensive source. This five-volume work, in compression-type loose-leaf binders, furnishes practice forms authorized or suggested by the United States Code, with supporting annotations and citations to *Moore's Federal Practice*. Approximately three and one-half of the five volumes are keyed to the Federal Rules. Frumer completed this work in 1955 but portions have been recompiled and it is kept up to date with supplements. Also, there is *West's Federal Forms*.⁸⁹ This is an eight-volume work, completed in 1953 and kept to date with pocket supplements. It contains annotated forms not only for practice in United States district courts but also other federal courts. Three of the eight volumes are devoted to the Federal Rules of Civil Procedure.⁹⁰

The writer believes that members of the Montana bench and bar should have available, at least until such time as the Supreme Court of Montana has rendered a considerable body of decisions interpreting and applying the Montana Rules, not only *Federal Rules Decisions* but also either *Barron and Holtzoff, Federal Practice and Procedure with Forms* (Rules edition, Wright revision) or *Moore's Federal Practice* (Second edition). In addition, at least unless more general digests are available, *Federal Rules Digest* is recommended. The other specialized publications would be of greater interest to the attorney who finds himself in frequent contact with the federal courts.

⁸²Chicago, Ill.; Callaghan & Co.

⁸³It also contains editorial comments.

⁸⁴As of the date of this writing there are three bound volumes, available at \$10 each. Also, at last report the publishers were able to supply vols. 11-25 of the first series, reporting opinions from 1948 through June 1958, at \$10 per volume.

⁸⁵The annual subscription charge is \$120.

⁸⁶Chicago, Ill.; Callaghan & Co. (\$60); \$10 for pocket parts as issued.

⁸⁷Included in the appendix of official forms are summons, various complaints, motion to dismiss, answers, counterclaim for interpleader, summons and third party complaint, motion to intervene as defendant, motion for production and inspection, and request for admission.

⁸⁸Albany, N.Y., Matthew Bender & Co., Inc. (\$120). Combined price for MOORE'S FEDERAL PRACTICE and BENDER'S FEDERAL PRACTICE FORMS is \$250.

⁸⁹St. Paul, Minn., West Publishing Co. (\$120). Combined price for BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, and WEST'S FEDERAL FORMS is \$230.

⁹⁰A cross-reference table affords ready reference to forms under Rule number.

E. SOME WORTHWHILE ARTICLES⁴¹

The selection of articles in bar association journals, law reviews and *Federal Rules Decisions* in sufficiently limited numbers to be of some use is fraught with dangers of significant omissions resultant not only from limitations in the scope of the writer's reading but also by his subjective appraisals of worth. The writer makes no pretense of having read all articles dealing with the Federal Rules and he is aware that others probably would make different selections. It is with this admission and admonition that the following articles are cited.

1. *General Articles*

In 1938 the Honorable John J. Parker delivered a simply written address⁴² which is good reading for one who has had no experience with the Federal Rules. It does not contain a detailed technical discussion of the Federal Rules, but it does point out the broad outlines of practice under the Rules and demonstrates the ease with which an ordinary case may be handled under them.

A much more extended and detailed treatment is contained in a series of lectures in 1940 by the Honorable Alexander Holtzoff.⁴³ The first five sections⁴⁴ are significant in relation to the Montana Rules and include a treatment of pleadings, parties, discovery, and procedures at trial. Only the subject of pre-trial procedure is superficially treated.⁴⁵ At the end of each lecture Judge Holtzoff⁴⁶ entertained questions from the floor, and these questions and his answers are set forth at the end of each section of the article. Of course, these lectures ante-dated the amendments to the Federal Rules, but in 1954 Judge Holtzoff published an article entitled, "A Judge Looks at the Rules After Fifteen Years."⁴⁷ This article stands by itself as a good summary of the salient features of the Rules and the amendments. Together with the Boston lectures it affords an excellent general coverage of the Federal Rules.

Of the many other general articles which have been written a 1952 study by the Honorable Leon R. Yankwich deserves special mention.⁴⁸ A

⁴¹There are two works previously referred to which contain citations to articles. BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE WITH FORMS* (Rules ed., Wright rev.), volume 3A, supplemented in pocket part, contains a bibliography of articles in bar association journals and law reviews, indexed by author, subject and periodical. *FEDERAL RULES DECISIONS*, in volume 20 (1958) contains an index to articles in volumes 1-20, and an index in individual volumes covers current articles in bar association journals and law reviews. *THE INDEX TO LEGAL PERIODICALS* (New York, H. W. Wilson Co., 1908 to date) indexes all leading articles, notes, case comments, and book reviews published in the principal American, British, and British Colonial periodicals.

⁴²*Handling a Case Under the New Federal Rules*, 24 A.B.A.J. 793, 857 (1938), address before the Virginia State Bar Association.

⁴³*Practice Under the Federal Rules of Civil Procedure*, 20 BOSTON U. L. REV. 179 (1940).

⁴⁴They cover somewhat over 100 pages.

⁴⁵Judge Holtzoff said of Federal Rule 16 that to dilate this subject at length would be "like carrying coals to Newcastle, for Boston is almost as much the home of pre-trial procedure as it is the home of baked beans." 20 BOSTON U. L. REV. at 200.

⁴⁶Mr. Holtzoff has been United States District Judge for the District of Columbia since 1945.

⁴⁷15 F.R.D. 155 (1954).

⁴⁸*Chief Characteristics of Federal Trial Practice in Civil Cases*, 12 F.R.D. 269 (1952), being a study which afforded the basis for a lecture by the Chief Judge of the United States District Court, Southern California, delivered at a meeting of the Nevada State Bar Association.

good basic coverage is preceded by a Table of Contents and supported by numerous citations to treatises, articles and cases.

2. *Articles on Specific Subjects*

a. Pleadings, Motions and Parties

A good comparison of the first 25 Federal Rules with the common law and code systems is contained in an article by Bernard C. Gavit written in 1939.⁴⁹ The purpose and philosophy of the Federal Rules is considered in a concise treatment of the form of allegations, motions, answers and parties, but without attempt at exhaustive citations of authorities.

A detailed discussion of devices for joinder of claims, counterclaims, cross-claims and parties, under Federal Rules 13 to 24, compared with code practice, is contained in an article by Charles Alan Wright, published in 1952.⁵⁰

b. Summary Judgment

The Honorable Charles E. Clark,⁵¹ in an article written in 1952, treats generally the vital characteristics of summary judgment procedure, its history, and its position under the Federal Rules as an important adjunct of discovery and as a part of the series of devices designed for the swift uncovering of the merits of controversies.⁵²

A well annotated discussion of summary judgments under Federal Rule 56 is contained in an article written in 1953 by Mac Asbill and Willis B. Snell.⁵³ The article considers not only the issue of what is a disputable fact but also how a party shows that an issue of fact exists.⁵⁴

c. Discovery

Of the many excellent articles on discovery under the Federal Rules it is believed that three will suffice to give an insight into these important mechanisms. An early article by the Honorable Alexander Holtzoff contains a good general discussion of the various discovery instruments.⁵⁵ An excellent treatment oriented to the important decision of the Supreme Court of the United States in *Hickman v. Taylor*,⁵⁶ involving protection of the work product of the lawyer, was written by Charles R. Taine in 1950.⁵⁷

⁴⁹*The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 435 (1939). Mr. Gavit was Dean of the Indiana University School of Law.

⁵⁰*Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580. This article was one based on materials presented at an Institute on the new Minnesota Rules and is one of several in a symposium.

⁵¹United States Circuit Judge, Second Circuit; formerly Reporter and Member of Advisory Committee on Rules of Civil Procedure, Supreme Court of the United States; Member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

⁵²*The Summary Judgment*, 36 MINN. L. REV. 567, in symposium.

⁵³Members, District of Columbia Bar.

⁵⁴*Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143 (1953). In reading this article, one should keep in mind that the Montana Rule departs from the Federal Rule by providing that affidavits shall not be considered for any purpose on motion for summary judgment.

⁵⁵*Instruments of Discovery Under the Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1941).

⁵⁶329 U.S. 495 (1947).

⁵⁷*Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026 (1950).

And a good investigative study of the use of discovery devices during thirteen years of their use in federal courts was written in 1951 by William H. Speck.⁶⁸

d. Pre-Trial Procedure

Of the many articles on pre-trial procedure under Federal Rule 16, one by the Honorable Alfred P. Murrah⁶⁹ deserves special mention. This article, published in 1954, was prepared by Judge Murrah as Chairman of the Pre-Trial Committee of the Judicial Conference of the United States. Although it was prepared for the benefit of newly appointed federal judges, it is also valuable to members of the bar. It is a brief but clear discussion of the purposes of pre-trial procedure and its techniques. Appended to it are samples of notices and orders and a bibliography briefly indicating the contents of books, articles and demonstrations.⁷⁰

Procedures in the trial of protracted cases was the subject of a Report of the Judicial Conference Study Group, which was adopted by the Judicial Conference of the United States in March, 1960.⁷¹ This is a Handbook intended to serve as a guide to judges and lawyers. It is a compendium of ideas and suggestions of able judges and trial counsel.

e. Masters

The proper use of masters under Federal Rule 53 as an aid to courts in the exercise of their jurisdiction, in both non-jury and jury cases, and limitations upon reference are discussed in an article published in 1958 by the Honorable Irving R. Kaufman.⁷²

3. Articles on State Rules

At the conclusion of this limited list of articles, it may be useful to refer to comparisons made in other states of newly adopted state Rules patterned after the Federal Rules with prior state practice similar to that which has existed in Montana.⁷³ Professor Frank J. Trelease⁷⁴ in 1958 discussed the principal changes made in the Wyoming practice by the adoption of Rules patterned after the Federal Rules.⁷⁵ Professor Charles L. Crum⁷⁶ in 1957 made a similar comparison, with illustrations, of the North Dakota practice.⁷⁷

⁶⁸*The Use of Discovery in the United States District Courts*, 60 YALE L.J. 1132. This article was based on information gathered by the Administrative Office of the United States Courts.

⁶⁹United States Circuit Judge, Tenth Circuit; chairman of the Judicial Conference Study Group on Protracted Litigation.

⁷⁰*Pre-Trial Procedure, a Statement of its Essentials*, 14 F.R.D. 417 (1954).

⁷¹As adopted the report is entitled *Handbook of Recommended Procedure for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

⁷²United States District Judge for the Southern District of New York. *Masters in the Federal Courts; Rule 53*, 58 COLUM. L. REV. 452 (1958), in symposium.

⁷³Of course, some differences exist in the procedure of states which may be said to have adopted the Field Code of 1848.

⁷⁴Dean and Professor of Law, University of Wyoming School of Law. Wyoming in 1869 adopted the system of procedure inaugurated by the Field Code.

⁷⁵*Wyoming Practice*, 12 WYO. L. REV. 203 (1958), in symposium.

⁷⁶Associate Professor of Law, North Dakota University School of Law. North Dakota in 1862 adopted the system of procedure inaugurated by the Field Code.

⁷⁷*Summary of North Dakota Rules of Civil Procedure*, 33 N. DAK. L. REV. 287 (1957). This is a reprint of a booklet issued in connection with the 1957 North Dakota State Bar Convention.

III. PROCESS AND SERVICE

A. JURISDICTION AND ORIGINAL PROCESS

In dealing with persons subject to the jurisdiction of Montana district courts, and process and service of process, one encounters diverse problems. Provisions of the code and of the Federal Rules furnish a pattern for the form of process and its service in general. However, as to persons subject to jurisdiction and service to make an expanded personal jurisdiction effective such provisions are inadequate. The code provisions are geared to much more limited concepts of personal jurisdiction than exist today; and the Federal Rules are not fitted to state requirements, because federal courts do not have the problems which state courts have, resultant from the fact that each state is a member of a union of equal sovereign states. Consequently, in drafting Montana Rule 4, the pattern was furnished in part by drafts of the Uniform Extra-Territorial Process Act and recent legislation in other states, particularly Illinois, Texas and Wisconsin.⁶⁸

1. Expanded Personal Jurisdiction

Subdivision B of Montana Rule 4 provides not only that all persons, resident or non-resident, found within the state are subject to the jurisdiction of the courts of this state, but also that all persons, even though not found within the state, are subject to such jurisdiction in specified cases. As is stated in the Commission Note to Proposed Rule:

This rule expands the exercise of personal jurisdiction over non-residents in cases having substantial contacts with Montana. It is in accord with a trend that began more than thirty years ago with the non-resident motorist acts.⁶⁹ The constitutional basis for such expanded jurisdiction is afforded by such decisions of the Supreme Court of the United States as *International Shoe Co. v. Washington*, 66 S.Ct. 154, 326 U.S. 310 (1945), and *McGee v. International Life Ins. Co.*, 78 S.Ct. 199, 355 U.S. 220 (1957). In these decisions the Court departed materially from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877), although, as was pointed out in *Hanson v. Denckla*, 78 S.Ct. 1228, 357 U.S. 235, 251 (1958), the rule of *Pennoyer v. Neff* has not wholly disappeared. Under the new and flexible standard of due process a state may exercise personal jurisdiction whenever the relation between it and the particular litigation sued upon makes it reasonable for the state to try the particular case. In such an inquiry importance attaches to what the defendant has caused to be done in the forum state.

The jurisdictional acts prescribed by subdivision B(1)(a) through (f) of Montana Rule 4 include the commission of any act which results in the accrual within this state of a tort action; the ownership, use, or possession of any property situated in the state; and the transaction of business within the state, including contracting to insure a subject within this state, entering into a contract for personal service or materials to be furnished within the state, acting as officer of a corporation organized under the

⁶⁸Supplement to the October, 1959, WISCONSIN BAR BULLETIN contains an excellent review of authorities and analysis of the Wisconsin statute effective July 1, 1960, written by Professor G. W. Foster, Jr., of the University of Wisconsin Law School.

⁶⁹REVISED CODES OF MONTANA, 1947, §§ 53-201 to -206. (Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.)

laws of this state or having its principal place of business here, and acting as executor or administrator of any local estate. Some of these would satisfy older concepts of personal jurisdiction based upon consent, presence or doing business within the state. Others would not satisfy such territorial limitations, but would seem to satisfy the more recent requirements of a contact which has a substantial connection with the state.

In order to afford effective means of acquiring jurisdiction in these cases which are "subject to jurisdiction" it is necessary to enlarge the old methods of serving process. States no longer are hampered by a rule that process has no validity beyond the territorial limits of the state wherein it is issued. The question under more recent decisions of the Supreme Court of the United States is not whether there has been service within the state, but rather whether there has been a process which provides adequate and reasonable notice.⁷⁰ Accordingly, subdivision D(3) of the Montana Rule provides that: "Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. . . ." Such service is not complete until the expiration of 20 days after the date of service,⁷¹ thus extending the time for answer to 40 days after service⁷² and affording ample opportunity to appear and defend. Except for service upon the Montana Secretary of State in those cases where an agent to receive service of process cannot be served within Montana,⁷³ older methods of substituted service which do not guarantee that the defendant receive actual notice of the litigation, such as leaving at the defendant's abode or service by publication, are not contemplated in actions *in personam*. The Rule contains no provision at all for service by leaving at the defendant's place of abode, and subdivision D(5)(a) permits service by publication only in actions *in rem* or *quasi in rem*.

2. The Summons

Subdivision C of Rule 4 requires the clerk of court to issue summons. As under the Federal Rule, he is directed to issue it "forthwith" upon the filing of the complaint.⁷⁴ The form of summons specified by Rule 4C(2) and Official Form 1 is substantially the same as that provided by the code provision which is superseded.⁷⁵ While under Rule 4D(7) summons may be amended in the discretion of the court, Official Form 1 should be followed to avoid all questions with respect to its validity.

3. Manner of Service

a. Personal Service

Summons and complaint must be served together, as under code practice,⁷⁶ and the manner of making personal service is spelled out in detail

⁷⁰McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Travelers Health Assn. v. Virginia, 339 U.S. 643 (1950); Milliken v. Meyer, 311 U.S. 457 (1940).

⁷¹Rule 4D(5)(g).

⁷²Rule 12(a).

⁷³Rule 4D(6).

⁷⁴R.C.M., 1947, § 93-3002, providing, *inter alia*, that the plaintiff may have summons issued at any time within one year after the complaint is filed, has not been superseded or repealed.

⁷⁵R.C.M. 1947, § 93-3003.

⁷⁶Rule 4D(2).

in eight subdivisions of Rule 4D(2). Each of the subdivisions deals with a different type of defendant, as follows: (a) an individual other than an infant or incompetent person; (b) a minor over the age of 14 years; (c) a minor under the age of 14 years; (d) a person adjudged of unsound mind or an incompetent for whom a guardian has been appointed; (e) a domestic corporation, partnership or unincorporated association; (f) a foreign corporation, partnership or unincorporated association; (g) a political subdivision of the state and its agencies; and (h) the state and its agencies. More particularity is contained in the Rule than in the code provisions, and strict compliance with the provisions of the Rule should assure valid service.

b. Service by Publication

The manner of service by publication is prescribed by Rule 4D(5), and follows the familiar pattern of the code. However, the Rule requires publication only three successive weeks, rather than four as required by the code; and service is not complete until 20 days after the last publication, rather than on the date of the last publication as under the code.⁷⁷ This may not control special statutory proceedings since Rule 81(a) excepts such proceedings insofar as they are inconsistent or in conflict with the procedure prescribed by the Rules. Thus it would seem that the provisions for publication for four successive weeks in suits to quiet title⁷⁸ should be followed.

c. Service on the Secretary of State

"Unless otherwise provided by statute," service on the Montana Secretary of State is permitted in accordance with the provisions of subdivision D(6) of Montana Rule 4 whenever the Secretary has been appointed, or is deemed to have been appointed as agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana. The Rule does not specify when the Secretary shall be deemed to have been appointed such agent; that is left for other legislation. The code provisions, which require a foreign corporation, before doing business in the state, to designate a citizen of this state as agent upon whom service of process may be made in actions arising within this state, and which provide for service upon the Secretary of State under prescribed circumstances where the designated agent cannot be found, continue in effect.⁷⁹

The procedures for substituted service on the Secretary of State under the code and under the Rule are similar, but there are differences in detail. For instance, the affidavit required under the code, but not under the Rule, must contain a statement that the plaintiff has a good cause of action on the merits; and the affidavit required by the Rule, but not by the code, must state the residence and last known post office address of the person to be served. The code, by virtue of a 1961 amendment,⁸⁰ requires payment to the Secretary of a fee of \$5, whereas the fee specified by the Rule is \$3. Under the code, but not under the Rule, the clerk of court must make an order directing service on the Secretary. The code does not

⁷⁷ R.C.M. 1947, § 93-3014. A defendant has 20 days after the completion of service of process to serve his answer. Rule 12(a).

⁷⁸ R.C.M. 1947, § 93-6208.

⁷⁹ R.C.M. 1947, §§ 15-1701, 15-1702, 93-3008, 93-3009, 93-3010, 93-3011.

⁸⁰ Laws of Mont. 1961, ch. 117, § 17.

specify who shall make service on the Secretary, but the Rule requires service by the sheriff of Lewis and Clark County. The code requires that the papers be sent by registered mail to the person to be served; the Rule permits them to be sent either by registered or certified mail. Under the code a return receipt is required, which must be attached to the Secretary's certificate of mailing. Under the Rule no return receipt is required if the Secretary is advised by the postal authorities that delivery was refused, thus avoiding a question which exists under the code provision as to the validity of service where a defendant refuses to accept the registered letter containing the process.⁸¹

Since provisions for substituted service unknown to the common law are involved, there must be substantial compliance with the provisions of the code or Rule,⁸² whichever is applicable. Consequently, it is of prime importance to observe the differences in the procedure.

4. Proof of Service

The provisions of Rule 4 for proof of service⁸³ are similar to the code provisions⁸⁴ although when personal service is made by a person other than the sheriff or person designated by law the requirements for the affidavit of service are tightened somewhat. It is expressly required that such affidavit state that the person so serving is of legal age, the date and place of service, and that the person making the service knew the person served to be the person named in the papers served and the person intended to be served.⁸⁵ Within the discretion of the court, proof of service may be amended.⁸⁶

B. NOTIFICATION AND RECORDING OF PROGRESS OF ACTION

Provisions for notification by service and recording by filing with the court of the progress of an action, after jurisdiction over the parties has been obtained, is made by Rule 5. Subdivision (a) enumerates papers and pleadings subsequent to the original complaint which are required to be served, but the enumeration is not exhaustive. Thus, although not listed in Rule 5(a), affidavits in support of and in opposition to motions are required to be served by Rule 6(d), written interrogatories for the taking of depositions are required to be served by Rule 31(a), written interrogatories to be answered must be served as provided in Rule 33, and requests for admission must be served as provided in Rule 36(a).

Under Rule 5(a), a party who is in default for failure to appear is not entitled to notice of acts done or proceedings in an action, except that he must be served with pleadings asserting new or additional claims for re-

⁸¹The common law doctrine that statutes in derogation of the common law are to be strictly construed would render the service invalid under the code provisions, although a common sense interpretation of the statute would seem to lead to a contrary result. *Dwyer v. Shalck*, 232 App. Div. 780, 248 N.Y.S. 355 (1931) held the service invalid. *Wax v. Van Marter*, 124 Pa. Super. 573, 189 Atl. 537 (1937) held it valid. The matter is commented upon in 85 U. PA. L. REV. 739 (1936).

⁸²*Hinton v. Staunton*, 124 Mont. 534, 542, 228 P.2d 461 (1951); *West v. Capitol Trust & Savings Bank*, 113 Mont. 130, 142, 124 P.2d 572 (1942); *Rothrock v. Bauman*, 73 Mont. 401, 403, 236 Pac. 1077 (1925).

⁸³Rule 4D(8).

⁸⁴R.C.M. 1947, § 93-3018.

⁸⁵Rule 4D(9).

⁸⁶Rule 4D(7).

lief in the manner prescribed for the service of summons in Rule 4. But if a party has made an appearance, his subsequent default by failure to plead within the time prescribed by the Rules does not affect his right to notice; he is entitled to the same notice of acts done and proceedings taken as a party who has not defaulted.⁸⁷

Service may be made by any person, even by the party or his attorney, and the Montana Rule has added subdivision (f) requiring proof of service to be made by acknowledgment, affidavit, or, if service is made by a resident attorney, by certificate. The Rule provides that the proof of service shall be filed within 10 days after service, but "failure to make proof of service does not affect the validity of the service." It is the service which is essential, not the evidence of it.

The manner of making service is specified in subdivision (b) of Rule 5. If a party is represented by an attorney, service is required to be made upon the attorney unless the court orders service to be made on the party himself. Service may be made by delivering a copy to the party to be served, by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. "Delivery" is defined in detail, and includes leaving the copy at the office of the person to be served, as specified in the Rule.

Service is complete upon mailing; but Rule 6(e) provides that, when service is made by mail, 3 days shall be added to the prescribed period during which a party must do any act or take any proceeding that may be required.⁸⁸

C. COMPUTATION AND ENLARGEMENT OF TIME

Most of the provisions of Rule 6 with respect to time need little explanation. The Federal Rule has been changed by placing Saturday on the same basis as Sunday in the computation of time. Subdivision (b), providing for the enlargement of the time for doing acts, distinguishes between (1) enlargement upon request before expiration of the period originally prescribed or extended by previous order, and (2) enlargement made upon motion after the expiration of the specified period. In the first situation, the court may order the period enlarged with or without motion or notice.⁸⁹ In the second situation, the motion is required by Rule 7(b)(1) to be in writing unless made during a hearing or trial. The showing required for an enlargement is also different in the two situations; in the first, a party must show some cause; but in the second, he must show that the failure to act was the result of excusable neglect.

Although the propounders of the Federal Rules are not unanimous in their opinions, it has been held that, except where elsewhere expressly permitted, stipulations for extensions of time entered into by parties are not effective and binding without court approval.⁹⁰ However, Montana Rule

⁸⁷See also Rule 55(b) with respect to entry of judgment by default.

⁸⁸*Cf.* service upon the Secretary of State as agent for a defendant; such service is not complete until the Secretary receives a return receipt for the papers required to be mailed by him to the defendant, or advice that delivery was refused. Rule 4D(6).

⁸⁹Professor Moore suggests that except in cases of emergency it is advisable to follow the procedure prescribed in Rule 7(b)(1). 2 MOORE, FEDERAL PRACTICE ¶ 6.08, at 1481 (2d ed. 1948, 1960). Hereinafter, MOORE, FEDERAL PRACTICE (2d ed.) will be cited MOORE.

⁹⁰Orange Theatre Corp. v. Rayhertz Amusement Corp., 130 F.2d 185 (3d Cir. 1942).

55(c) has added a provision that any stipulation for extension of time between parties or their counsel, whether in writing or made verbally before the court, shall be effective to extend the time for serving and/or filing any appearance, motion, pleading or proceeding, according to the terms of such stipulation. Further, the Montana Rule provides that no default or default judgment shall be entered against any party except upon application of the opposing party; and, in case a party in default shall serve and file his appearance, motion, pleading or proceeding prior to application to the clerk for default, then such defaulting party shall not thereafter be considered in default as to that particular appearance, motion, pleading or proceeding.

The last clause of Rule 6(b) provides that the time stated in specified Rules cannot be enlarged even by court order, except to the extent and under the conditions stated in the specified Rule. This applies to the 10 day periods specified in Rule 50(b) to set aside a verdict and enter judgment, and to direct entry of judgment when a verdict has not been returned; in Rule 52(b) to amend findings and judgment after entry of judgment; and in Rule 59(b), (d), and (e) for service of motion for new trial, for the court to order a new trial of its own initiative, and for service of motion to alter or amend judgment. In addition it applies to the one-year period set by Rule 60(b) for a motion for relief from a judgment, order or proceeding on the first three grounds specified in that Rule.⁹¹ There may be some question as to the interpretation of this clause of Rule 6(b) in conjunction with Rule 55(c). But it would seem that default, in the sense in which that term is used in 55(c), is not involved in the situations included in the specific prohibitions in 6(b). Furthermore, it could hardly have been intended to permit extension by stipulation while prohibiting it by court order for cause shown. Finally, the specific prohibitions upon enlargement should control over the general provisions of 55(c).⁹²

IV. PLEADINGS

A. THE POSITION OF PLEADINGS IN THE PROCEDURAL SCHEME

If the Montana Rules governing pleadings are to be effective and accomplish their object, practitioners and judges must appreciate the place which pleadings occupy in the procedural plan of the new system.⁹³ These rules respecting pleadings have devolved from prior systems. The common law emphasized the purpose of pleadings to formulate an issue for trial. The codes of civil procedure required the pleading of facts, and the modern tendency has been to emphasize the purpose to notify adverse parties of the facts which will be relied upon at trial. Thus the Supreme Court of Montana has said:

⁹¹Montana Rule 6(b) does not incorporate the prohibitions of Federal Rule 6(b) upon the extension of time for (1) taking of action under Rule 25, because of the elimination from Montana Rule 25 of any specific time limitation, or (2) taking action under Rule 73(a) and (g), because there is no Montana Rule 73.

⁹²Although cannons of interpretation are needed tools of argument, "to make any cannon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the cannon." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Cannons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

⁹³For a good general summary of the purposes of pleadings, see CLARK, *CODE PLEADING* 54-58 (2d ed. 1947). Hereinafter, CLARK, *CODE PLEADING* (2d ed. 1947) will be cited CLARK.

"The object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and so it is that the allegations of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts."⁹⁴

The Montana Rules do not completely abandon these purposes, but less is expected of pleadings in the accomplishment of these purposes than has been expected under the code system.⁹⁵ This is manifest in the Montana Rules by the simple pleadings in the official Appendix of Forms,⁹⁶ by the expansion of devices for discovery of facts in advance of trial,⁹⁷ by the provision for pre-trial procedure,⁹⁸ and by the limitation on the number of pleadings.⁹⁹

Pleadings have been displaced from their position of prime importance,¹⁰⁰ and more effective means of accomplishing much of what has been expected of pleadings have been added.

B. FORMAL MATTERS

Rules 10 and 11 deal with the form and signing of pleadings. They need little explanation, since they conform substantially to previous statutes and practice.

Rule 10(b) with respect to separate paragraphing and separate counts avoids reference to "cause of action" by using the term "claim." This is also true of other Rules and is a matter which will be discussed in other connections. It has been said that "'claim' is essentially equivalent to the broad and realistic concept of 'cause of action.'"¹⁰¹

Rule 11 provides in part that: "Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." This continues in effect statutory provisions such as the requirement that restraining orders be granted only on affidavits, unless the complaint be positively verified.¹⁰² But further, section 93-3702, Revised Codes of Montana, 1947, providing that "all complaints, answers, and replies must be verified," with certain exceptions, has not been superseded or expressly repealed. This introduces doubt as to whether the purpose of Federal Rule 11 to do away with the requirement of verification other than in exceptional cases is accomplished. Consequently, the safer practice would seem to be to continue to verify pleadings as required by section 93-3702.¹⁰³

⁹⁴Ritchie v. Northern Pac. Ry. Co., 128 Mont. 218, 222, 272 P.2d 728 (1954).

⁹⁵History shows that pleadings have failed to accomplish what was expected of them. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943).

⁹⁶R.C.M. 1947, § 93-2711-6, Forms 2-14.

⁹⁷Rules 26 through 37.

⁹⁸Rule 16.

⁹⁹Compare R.C.M. 1947, § 93-3601 with Rule 7(a).

¹⁰⁰VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 18 (1952).

¹⁰¹2 MOORE ¶ 10.03, at 2005 (1948, 1960). The broad concept of "cause of action" is discussed, *infra*, pages 19-21.

¹⁰²R.C.M. 1947, § 93-4205.

¹⁰³The argument against continuing the requirement of sections 93-3702 in effect is that it makes verification the general rule rather than the exception as provided by Rule 11, and is contrary to the intent of the Federal Rule and to the purpose expressed in the enabling act under which the Montana Rules were prepared to make possible the adoption of the federal practice so far as "presently practicable." However, taken baldly and literally, Montana Rule 11 does continue section 93-3702

C. THE NUMBER OF PLEADINGS

Under the Rules pleadings are fewer and terminate earlier than under code practice. Code practice contemplates a three stage system of pleadings, consisting of a complaint, an answer, and a reply whenever new matter is alleged in the answer.¹⁰⁴ The Rules allow only two stages, unless the court in its discretion otherwise orders.¹⁰⁵ Under Rule 7(a) a reply is mandatory only when the answer contains a counterclaim denominated as such; and if there is a counterclaim, the reply is an answer to a claim. The theory is that fair notice of the plaintiff's claim and the defendant's defense is usually given by complaint and answer.¹⁰⁶ But the courts have had difficulty in determining whether or not an answer amounts to a counterclaim, and the courts have not all applied the same test in determining this question.¹⁰⁷ By confining mandatory replies to counterclaims *denominated as such*, the plaintiff is protected from the peril of correctly analyzing the defendant's answer to determine whether or not its allegations do amount to a counterclaim, and, since the court may order a reply in cases where it is not mandatory, there is no danger that the defendant will not be given adequate notice of the plaintiff's position. Actually the discretionary ordering of a reply has not been employed to any considerable extent in federal courts, and it has been said that this is as it should be, since the broad discovery provisions and the pre-trial conference under the Rules have relieved the pleadings of much of the burden of formulating issues.¹⁰⁸

D. CLAIMS FOR RELIEF

1. *Type of Pleading Envisaged*

Rule 8(a) requires that a pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁰⁹ This should be read in conjunction with subdivisions (e) and (f) of Rule 8, which require simple, concise and direct averments, but no technical forms, and that all pleadings be so construed as to do substantial justice. The Rule makes no reference to "facts" or "cause of action," terms which have caused confusion under the code requirement that the complaint contain "a statement of the facts constituting the cause of action, in ordinary and concise language."¹¹⁰

Facts are not such definite things as the codifiers apparently thought they were when the Field Code was drafted in 1848, and it has been said that "their ideal of pleading facts, as it has been worked out, has proved probably the most unsatisfactory part of their reform."¹¹¹ The difficulty

in effect; and it would seem contrary to a prime purpose of the Rules to litigate a question of this kind which has no real relation to the merits of the controversy. If it be desired to follow the federal practice, it would seem that section 93-3702 should not be repealed but rather amended to remove the generality of the requirement of verification, inasmuch as it provides the form which verifications shall take.

¹⁰⁴R.C.M. 1947, §§ 93-3103, -3201, -3401, -3601.

¹⁰⁵Blume, *The Scope of the Civil Action*, 42 MICH. L. REV. 257, 277 (1943).

¹⁰⁶2 MOORE ¶ 7.03, at 1508 (1948, 1960).

¹⁰⁷CLARK 694.

¹⁰⁸2 MOORE ¶ 7.03, at 1508 (1948, 1960).

¹⁰⁹This applies to counterclaims, cross-claims and third-party claims, as well as to original claims.

¹¹⁰R.C.M. 1947, § 93-3202.

¹¹¹CLARK 226.

is with the distinction between ultimate facts, which should be pleaded, and evidence on the one hand and conclusions on the other hand, neither of which should be pleaded. Thus, the Supreme Court of Montana has held that a denial that the price for goods "is now long past due and owing from defendants to the plaintiff" does not raise an issue of fact, because the allegation denied is a conclusion.¹¹³ Much time and money have been spent litigating questions of this kind, which have no significant relation to the merits of the controversies involved or whether the pleadings give fair notice of the cases relied upon by the pleaders.

Also, the phrase "cause of action" has led courts in some cases to a conceptual theory of rights that does not promote the dispatch of litigation on its merits or trial convenience. A case in point is presented where the same wrongful act injures plaintiff's person and property. In such a situation the Supreme Court of Montana has held that there are two causes of action,¹¹⁴ quoting with approval from a Wisconsin court as follows:

"The infallible test by which to determine whether a complaint states more than one cause of action is: Does it present more than one subject of action or primary right for adjudication?"¹¹⁴

Not all authorities have taken such a narrow technical position. Thirty three years ago Judge Clark defined a "cause of action" as an aggregate of operative facts giving rise to a right or rights which will be enforced by the courts, the number and extent of operative facts included within a single cause of action to be determined pragmatically mainly by considerations of trial convenience.¹¹⁵ Professor Toelle, in reviewing the matter a number of years ago, said of the Montana cases:¹¹⁶

Alexander v. Great Northern Railway Company,¹¹⁷ holding a complaint sustainable either under the employer's liability act or at common law, would seem to be commendably liberal . . . as also is the holding in *Clark v. Oregon Short Line Railway Company*¹¹⁸ . . . permitting a "perfecting" amendment after the statute of limitations had run (*i.e.*, addition of allegations as to defendant's legal capacity and plaintiff's ownership of the property alleged to have been injured).

Although the view of a cause of action as a group of operative facts as urged by Judge Clark has gained in favor, conflict and confusion con-

¹¹³Connelly Co. v. Schlueter Bros., 69 Mont. 65, 69, 220 Pac. 103 (1923).

¹¹³The rule followed in a majority of states is that there is only one cause of action in this situation. 2 MOORE ¶ 2.06, at 378 (1948, 1960).

¹¹⁴Lennon v. City of Butte, 67 Mont. 101, 107, 214 Pac. 1101 (1923). This case dealt with joinder of causes of action, a problem which is academic under Rule 18(a). However, the position of the court would require two suits in a situation where the parties and much of the evidence would be the same; and, of course, the question of splitting as related to res judicata remains under the Rules. As Judge Clark has said: "A rule leading to two law suits where one will accomplish the same results is not to be favored." CLARK 489. An approach "toward a cause of action as embracing an entire group of operative facts . . . should be utilized by the federal courts in the treatment of res judicata insofar as they are free to fashion the doctrine." 2 MOORE ¶ 2.06, at 378 (1948, 1960).

¹¹⁵CLARK, CODE PLEADING 75-87 (1928).

¹¹⁶Toelle, *Joinder of Actions—With Special Reference to the Montana and California Practice*, 18 CALIF. L. REV. 459, 477 (1930).

¹¹⁷51 Mont. 565, 154 Pac. 914, L.R.A. 1918E 852 (1916).

¹¹⁸38 Mont. 177, 99 Pac. 298 (1909).

tinues.¹¹⁹ By substituting the phrase "claim for relief," the Federal Rules avoided dragging this conflict into the federal system and adopted the broad pragmatic factual approach.¹²⁰ At the same time the Federal Rules avoided reference to "facts" and so voided controversy over the meaning of that term. As Professor Moore has said: "The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law."¹²¹ Efforts to revive the old code requirement that a complaint state facts sufficient to constitute a cause of action¹²² seem only to have strengthened the view that the Rule is desirable and adequately sets forth the characteristics of good pleading.¹²³

This federal system is not revolutionary. It continues to emphasize the notice-giving function of pleadings, but complexities are avoided, and the notice which is contemplated is of operative facts and not details which the opponent should know or ascertain for himself. The Rules envisage "the statement of circumstances, occurrences and events in support of the claim presented . . . [but] are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement."¹²⁴

The Montana Rules follow the federal pattern; and the appendix to the Montana Rules contains thirteen forms of complaint, following the corresponding federal forms with a minor exception,¹²⁵ which illustrate the purpose of the Rules to simplify pleadings without completely departing from past practice. Thus Montana Form 4 is a complaint for goods sold and delivered, and may be used where the action is for an agreed price or for the reasonable value of the goods. It is as follows:

Defendant owes plaintiff dollars for goods sold and delivered by plaintiff to defendant between June 1, 1959, and December 1, 1959.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

¹¹⁹The Supreme Court of Montana has continued to define "cause of action" in terms of "the right which a party has to institute a judicial proceeding." *Bergin v. Temple*, 111 Mont. 539, 545, 111 P.2d 286 (1941); *Lorang v. Flathead Commercial Co.*, 112 Mont. 146, 119 P.2d 273 (1941); *Galbreath v. Armstrong*, 121 Mont. 387, 395, 193 P.2d 630 (1948).

¹²⁰CLARK 146-48.

¹²¹2 MOORE ¶ 8.13, at 1647 (1948, 1960).

¹²²The Judicial Council of the Ninth Circuit has recommended such a change. 1A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 255, at 61 (1960). Hereinafter, BARRON AND HOLTZOFF FEDERAL PRACTICE AND PROCEDURE (Rules ed. and Wright rev.) will be cited BARRON AND HOLTZOFF. The June 1, 1960, Report of the Committee on Federal Rules of Civil Procedure for the Federal Judicial Conference for the Ninth Circuit continues to recommend return to the old code pleading requirement.

¹²³This was the conclusion of the Advisory Committee on Rules for Civil Procedure in its October, 1955, report, p. 19.

¹²⁴*Ibid.*

¹²⁵The Montana complaint for money lent, Form 5, contains an additional allegation that the amount of the debt which defendant owes "is now due." Of course, the jurisdictional allegations of the federal forms are omitted from the Montana forms. Also, forms of complaints for damages under the Merchant Marine Act (Federal Form 15), for infringement of patent (Federal Form 16), and for infringement of copyright and unfair competition (Federal Form 17), are inappropriate to Montana practice and are omitted from the Montana forms.

This form is substantially one of the common counts used at common law and appears to have been copied from a form used in Massachusetts.¹²⁶ It is, of course, a summary mode of pleading, but it has been almost universally upheld under the code system.¹²⁷ In Montana the Supreme Court has sustained a pleading only a little less general,¹²⁸ and has said: "If the phraseology of any common count is adequate in the particular case to bring the pleader within the code rule, then his pleading is sufficient."¹²⁹

Again, Montana Form 8, which is a complaint for negligence, alleges:

1. On June 1, 1959, in a public highway called State Street, in Helena, Montana, defendant negligently drove a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against defendant in the sum of dollars and costs.

This form is not just a claim for damages for defendant's negligence. Rather it isolates this accident from others by designating the time and place where it occurred and stating the type of accident. It is quite in accord with common law precedents and the better code cases,¹³⁰ and the Supreme Court of Montana has sustained the pleading of negligence with little, if any, greater detail.¹³¹

These are illustrations of what is sufficient to give fair notice of the elements of the plaintiff's claim.¹³² The inquiry is not whether "conclusions" or "facts" are stated, but whether the requirement of a "short and plain" statement has been met. However, neither the Rules nor the Forms are intended to state rigid formulae. Both are intended to leave a large measure of discretion to the trial court in developing pleadings to fit best the particular situation, and in the exercise of this discretion a certain amount of freedom should be accorded to any lawyer in determining the detail to be put into his pleading.¹³³

2. *Alternative and Hypothetical Pleadings*

The Rules take an advanced step with respect to alternative pleadings. Even at common law a pleader could state his case alternatively in different counts; under Montana code practice the position was taken that it was not necessary to use different counts,¹³⁴ but it was held that when allegations

¹²⁶2 CHITTY, TREATISE ON PLEADINGS 33-34 (16th ed. 1882).

¹²⁷CLARK 287.

¹²⁸DeMers v. O'Leary, 126 Mont. 528, 254 P.2d 1080 (1953).

¹²⁹Turo v. Passmore, 38 Mont. 544, 549, 100 Pac. 966 (1909).

¹³⁰CLARK 300-03.

¹³¹For instance, Manning v. Zeiler, 127 Mont. 248, 261 P.2d 807 (1953).

¹³²It has been said that the final test of a pleading is whether it sufficiently isolates the events in question from others to permit the application of res judicata to the final judgment entered. Clark, *Simplified Pleading*, 2 F.R.D. 456, 461 (1943).

¹³³CLARK 244; Clark, *Simplified Pleading*, 2 F.R.D., 456, 461 (1943).

¹³⁴McGrath v. Dubs, 127 Mont. 101, 257 P.2d 899 (1953).

were in the alternative in one count each allegation would have to be sufficient.¹³⁵ The Rules not only permit pleading in the alternative in a single count, but recognize that such a pleading is sufficient if one alternative is good.¹³⁶ No better notice is given merely because separate counts are used, and there seems to be no reason for holding that alternatives may be used as separate counts, without the necessity of each being sufficient, while holding otherwise when the averments are not separated.

A somewhat similar problem, involving the degree of certainty to be required of the pleader, is presented by hypothetical pleadings. If a pleader is not certain that a particular set of facts correctly states his claim, he may wish to frame his averments contingently. There seems to be no good reason not to permit this, if the pleader has truthfully stated his position and the pleading is sufficient to give his opponent notice of what he may seek to prove.¹³⁷ The Rules treat alternative and hypothetical pleadings together, and permit hypothetical pleading.¹³⁸

3. *Averments of Fraud, Mistake and Condition of the Mind*

Specific details have been required under the codes generally in allegations bringing defendant's morality into question. This applies when a defendant is charged with fraud.¹³⁹ The Montana Supreme Court has said:

"The employment of such extravagant terms as 'fraud,' and other words of like malign import, unaccompanied by a statement of fact upon which the charges of wrongdoing rest, is a useless waste of words."¹⁴⁰

Rule 9(b) continues this requirement as to fraud and also requires that error constituting an alleged mistake must be specifically indicated. The provision is that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

This, however, does not apply to averments of the condition of mind of a person, the Rule providing that "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The reason for this has been said to be that specific averment of condition of the mind is normally well-nigh impossible unless all the evidence bearing thereon is set out at length.¹⁴¹

E. RESPONSIVE PLEADINGS

1. *Simple Non-Technical Defenses Envisaged*

The philosophy which applies to pleadings setting forth claims also applies to pleadings stating defenses. Rule 8(b) provides that a party shall state his defenses in "short and plain terms"; and the requirements that averments be simple, concise, and direct, without technical forms,¹⁴² and that pleadings be so construed as to do substantial justice,¹⁴³ apply to defenses as well as to claims. Consequently, as is true with respect to a

¹³⁵Pollard v. Oregon Short Line R.R. Co., 92 Mont. 119, 127, 11 P.2d 271 (1932).

¹³⁶Rule 8(e) (2).

¹³⁷CLARK 257-58.

¹³⁸Rule 8(e) (2). There has been less tendency under the codes to relax the rule against hypothetical pleadings. CLARK 257.

¹³⁹CLARK 312.

¹⁴⁰Brandt v. McIntosh, 47 Mont. 70, 72, 130 Pac. 413 (1913).

¹⁴¹2 MOORE ¶ 9.03, at 1911 (1948, 1960).

¹⁴²Rule 8(e) (1).

¹⁴³Rule 8(f).

pleading setting forth a claim, the sufficiency of a pleading stating a defense should not be judged by inquiring whether it avers "facts" or "conclusions."¹⁴⁴ Further, the Rule permitting alternative and hypothetical averments,¹⁴⁵ and the Rule with respect to averments of fraud, mistake, and condition of the mind,¹⁴⁶ apply to defenses as well as claims. The question is whether the averment is definite enough to inform the plaintiff of the defense he must be prepared to meet.¹⁴⁷

2. Special Defenses

The Rules continue the Montana code rule¹⁴⁸ that "new matter," which in general comprehends the subject matter of pleas in abatement¹⁴⁹ and in confession and avoidance¹⁵⁰ at common law, must be affirmatively pleaded. Under Rule 8(c) any matter "constituting an avoidance or affirmative defense" should be affirmatively pleaded.¹⁵¹ But the Rule is framed to avoid litigation as to the character of particular defenses. Under the codes there has been some conflict as to the defenses of payment and estoppel, and considerable conflict as to the defenses of the statute of frauds, contributory negligence, assumption of risk, and fellow servant.¹⁵² Rule 8(c) includes these in an enumeration of nineteen defenses which must be affirmatively pleaded. Except for the statute of frauds, all of these and many of the other defenses which are enumerated have been held to be "new matter" to be specially pleaded under the Montana code.¹⁵³ But the

¹⁴⁴2 MOORE ¶ 8.20, at 1673 (1948, 1960).

¹⁴⁵Rule 8(e) (2).

¹⁴⁶Rule 9(b).

¹⁴⁷Sweeney v. Buffalo Courier Express, Inc., 35 F. Supp. 446, 447 (W.D. N.Y. 1940).

¹⁴⁸R.C.M. 1947, § 93-3401

¹⁴⁹In Clark v. Oregon Short Line Railroad Co., 29 Mont. 317, 319, 74 Pac. 734 (1903), it was held that misnomer should be specially pleaded, the court quoting from MAXWELL, CODE REMEDIES § 698, as follows: "All defenses which are analogous to the ancient pleas in abatement—that is, all which are based upon the same facts—are evidently new matter; they cannot be proved under the general denial, but must be specially pleaded." The defense that another action is pending is also "new matter" to be specially pleaded. Murray v. City of Butte, 51 Mont. 258, 262, 151 Pac. 1951 (1915).

¹⁵⁰CLARK 597. Downs v. Nihill, 87 Mont. 145, 151, 286 Pac. 410 (1930).

¹⁵¹By error, the Montana Rule uses the adjective "affirmative" rather than the adverb "affirmatively." However, the Commission Note to Proposed Rule shows that it was intended that the Montana Rule be identical with the Federal Rule, and the original Proposed Montana Rules of Civil Procedure prepared by the Montana Civil Rules Commission and distributed to the members of the Bar used the adverb. It is believed that no serious question is presented as to the intent to follow the Federal Rule.

¹⁵²CLARK 613-21.

¹⁵³*Accord and satisfaction*: Nelson v. Young, 70 Mont. 112, 224 Pac. 237 (1924). *Assumption of risk, contributory negligence, and fellow servant*: McCartan v. Park Butte Theater Co., 103 Mont. 342, 348, 62 P.2d 338 (1936); Mosher v. Sutton's New Theater Co., 48 Mont. 137, 146, 137 Pac. 534; Longpre v. Big Blackfoot Milling Co., 38 Mont. 99, 104, 99 Pac. 131 (1909). *Estoppel*: Middle States Oil Corp. v. Tanner-Jones Co., 73 Mont. 180, 183, 235 Pac. 770 (1925). *Failure of consideration*: See Jensen v. Franklin, 135 Mont. 341, 345, 340 P.2d 832 (1959). *Fraud*: Downs v. Nihill, 87 Mont. 145, 151, 286 Pac. 410 (1930). *Illegality*: Owens v. Davenport, 39 Mont. 555, 557, 104 Pac. 682 (1909). *Laches*: Brundy v. Canby, 50 Mont. 454, 474, 148 Pac. 315 (1915). But compare Lewis v. Bowman, 113 Mont. 68, 80, 121 P.2d 162 (1942), holding that a court of equity may of its own motion invoke the doctrine of laches even when not interposed as a defense, whenever it appears that the demand made is stale and that as a result of the delay in presenting the claim there has been such a change in the relation of the parties (such as death of one of the parties to the transaction) as to prejudice the rights of the defendant in making his defense. This seems to be an application of the principle that nothing can call a court of equity into activity but "conscience, good faith,

Montana Supreme Court has held that when a defendant by his answer puts in issue the making of the contract sued upon, he may avail himself of the statute of frauds without pleading it; although if he admits the making of the contract and relies upon other defenses, the statute of frauds must be specially pleaded.¹⁵⁴ The enumeration in Rule 8(c) appears to require the statute of frauds to be affirmatively pleaded in every case.

The code provision with respect to the manner of pleading the statute of limitations¹⁵⁵ is not superseded by the Rules, although Rule 8(c) does include this as one of the defenses to be pleaded affirmatively. Consequently, an answer pleading the statute of limitations is sufficient if it states generally that the action is barred by the provision of a specified section of the code.¹⁵⁶

However, the Rules require more detail in an answer raising the issues of capacity and performance or occurrence of conditions precedent than is generally required, although these defenses are to be pleaded as denials and not affirmatively. Rule 9(a) requires that one desiring to raise an issue as to the legal capacity of any party shall do so "by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." And Rule 9(c) requires that a denial of performance or occurrence of conditions precedent "be made specifically and with particularity."

F. PLEADING SPECIAL MATTERS

Rule 9 in effect is supplemental to Rules 7 and 8. Some of the provisions of Rule 9 governing the pleading of special matters have already been noted; there are others, designed to simplify procedure.

1. *Conditions Precedent*¹⁵⁷

The Montana Code permitting a general allegation of the performance of conditions precedent is limited to contracts and to conditions which a party is required to perform.¹⁵⁸ The Montana Rule is not so restricted. It relates to all actions and to the occurrence as well as the performance of

and reasonable diligence." *Sullivan v. Portland & Kennebec Railroad Co.*, 94 U.S. 806, 812 (1876), which would seem to be equally applicable under Rule 8(c). *License*: *Herlihy v. Donohue*, 52 Mont. 601, 608, 161 Pac. 164 (1916). *Payment*: *Olson v. McLean*, 132 Mont. 111, 115, 313, P.2d 1039 (1957). *Release*: *Betor v. Chevalier*, 121 Mont. 337, 344, 193 P.2d 374 (1948). *Waiver*: *Digen v. Schultz*, 65 Mont. 190, 196, 210 Pac. 1057 (1922). But compare "waiver" of property interest, which is admissible under a general denial in an action of conversion. *Swords v. Occident Elevator Co.*, 72 Mont. 189, 195, 232 Pac. 189 (1924).

¹⁵⁴*Bauer v. Monroe*, 117 Mont. 306, 310, 158 P.2d 485 (1945); *Mitchell v. Henderson*, 37 Mont. 515, 520, 97 Pac. 942 (1908); *Christiansen v. Aldrich*, 30 Mont. 446, 453, 76 Pac. 1007 (1904).

¹⁵⁵R.C.M. 1947, § 93-3810.

¹⁵⁶In the absence of statute it has been held that specific facts must be stated in pleading the statute of limitations. CLARK 615. Compare Federal Form 20, Fourth Defense: "The right of action set forth in the complaint did not accrue within six years next before the commencement of the action." The comparable Montana Form 16, Fourth Defense contains this language in addition to the averment that the action is barred by the provisions of a specified section of the Code. Thus the Montana Form appears to contain more than is essential under the statute. *Bahn v. Estate of Fritz*, 92 Mont. 84, 89, 10 P.2d 1061 (1932).

¹⁵⁷A good article on the subject is Prashker, *Pleading Performance of Conditions Precedent*, 13 ST. JOHN'S L. REV. 242 (1939).

¹⁵⁸R.C.M. 1947, § 93-3807; *Reichhold Chemicals, Inc. v. Wells*, 189 Misc. 188, 70 N.Y.S.2d 805 (1947).

conditions.¹⁵⁹ But as stated before, under the Montana Rule the adversary pleader is required to deny the performance or occurrence specifically and with particularity, whereas under the code a general denial of the allegation of performance is sufficient.¹⁶⁰

2. *Official Document, Act, Ordinance or Statute*

The first sentence of Montana Rule 9(d) is identical with the Federal Rule, and permits pleading that an official document or act¹⁶¹ complied with law, without the necessity of alleging the facts showing due compliance. But the Montana Rule goes beyond the Federal Rule and permits the pleading of an ordinance or regulation of a political subdivision of the state, or any special, local or private statute or the laws of another jurisdiction, by reference to its title and the date of its passage, or by its designation in the official or recognized compilation thereof.¹⁶²

3. *Judgment*

Under Rule 9(e) a judgment or decision of a court, tribunal, board or officer may be pleaded without setting forth matter showing jurisdiction to render it. It is sufficient to identify the court, board or officer rendering the judgment or decision, its date, the parties to the proceedings and in whose favor the judgment ran.¹⁶³ This is similar to the code provision, except that the strict requirement that it be stated that the judgment or decision was "duly given or made" is omitted.¹⁶⁴

4. *Special Damage*

Rule 9(g) states the well established doctrine that items of special damage must be specifically stated. This continues the distinction between general and special damage and does not alter the settled law.¹⁶⁵

G. COUNTERCLAIM AND CROSS-CLAIM

Nearly twenty years ago the Supreme Court of Montana recommended that the legislature consider consolidating the counterclaim¹⁶⁶ and cross-complaint¹⁶⁷ statutes of this state.¹⁶⁸ Rule 13 applies to the two types of claims, and liberalizes the law applicable to them. Under this rule a counterclaim is any claim against an opposing party, regardless of whether it is connected with the claim of the opposing party or is on contract. A cross-claim is a claim which a party has against a co-party, provided it arises

¹⁵⁹Rule 9(c).

¹⁶⁰1 MOORE, FEDERAL PRACTICE ¶ 9.03, at 590 (1938).

¹⁶¹An official act has been defined as an act done by an officer in his official capacity under color of and by virtue of his office. 1A BARRON AND HOLTZOFF § 305 n.69, at 234 (1960).

¹⁶²*Cf.* R.C.M. 1947, § 93-3811 (private statutes), and §§ 93-501-2 to -501-6 (proof of foreign law). And see Commission Note to Proposed Rule 9(d).

¹⁶³2 MOORE ¶ 9.06, at 1917 (1948, 1960); 1A BARRON AND HOLTZOFF § 307, at 235 (1960).

¹⁶⁴One relying on the statutory provision must strictly comply with its terms. 30 CALIF. L. REV. 482, 485 (1942). Under what is now R.C.M. 1947, § 93-3806, it has been held that it is insufficient to say that a judgment was "rendered." *Harmon v. Comstock Horse and Cattle Co.*, 9 Mont. 243, 23 Pac. 470 (1890).

¹⁶⁵2 MOORE ¶ 9.06, at 1921 (1948, 1960).

¹⁶⁶R.C.M. 1947, §§ 93-3402, 93-3403.

¹⁶⁷R.C.M. 1947, § 93-3415.

¹⁶⁸*Pioneer Engineering Works, Inc. v. McConnell*, 113 Mont. 392, 397, 130 P.2d 685, 132 P.2d 160 (1942).

out of the transaction or occurrence that is the subject matter of the original action or a counterclaim, or relates to any property that is the subject matter of the original action.¹⁶⁹ The distinction between counterclaims and cross-claims is important because of the requirement of subdivision (a) with respect to compulsory counterclaims. Any claim which a defendant has against a plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim *must* be pleaded, if (1) it is a claim which the defendant has at the time of serving his pleading, (2) does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, and (3) was not the subject of another pending action at the time the action was commenced. On the other hand, the pleading of cross-claims is governed by subdivision (g) and is never compulsory.

The Rule sanctions the practice of free counterclaim by placing no restriction on the type of counterclaim which a party is permitted to plead, and by providing in subdivision (c) that a counterclaim need not diminish or defeat the recovery sought by the opposing party.¹⁷⁰ Further, restrictions upon the time when the counterclaim must be in existence are removed.¹⁷¹ The time when the counterclaim is served is controlling, not the time when the action is commenced. In addition, under subdivision (e) a claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented. This provision is in line with the purpose of Rule 13 to provide a means for complete litigation in one action of all claims that parties may have with respect to each other, thus avoiding multiplicity of suits.¹⁷²

H. MOTIONS

Separate pleadings, preliminary steps and delays are avoided by the motion practice under the Rules. Demurrers are abolished,¹⁷³ and motions to dismiss, for judgment on the pleadings, and for summary judgment are available in their place. A motion for summary judgment, which may be granted only if there is no genuine issue as to any material fact, may be made by a party defending against a claim at any time either before or

¹⁶⁹Under R.C.M. 1947, § 93-3415, a cross-complaint may be against an opposing party as well as against a co-party.

¹⁷⁰See 3 MOORE ¶ 13.24, at 63 (1948). Although a counterclaim under R.C.M. 1947, § 93-3402, must tend to defeat or diminish the plaintiff's recovery, this is not true of a cross-complaint under R.C.M. 1947, § 93-3415. In *Pioneer Engineering Works, Inc. v. McConnell*, 113 Mont. 392, 130 P.2d 685, 132 P.2d 160 (1942), plaintiff brought an action in claim and delivery for a machine sold under a conditional sale contract upon which the defendant defaulted. A pleading, designated a counterclaim, was filed for damages for breach of warranty. The court held that the defendant's pleading would be treated as a cross-complaint and was proper. The same result would follow under Rule 13, even in a case where the defendant's claim does not relate to the subject matter of the action.

¹⁷¹The Supreme Court of Montana held that both transaction and contract counterclaims must exist at the time the suit was brought. But a cause of action which was a transaction counterclaim might be considered a cross-complaint and the limitation thus avoided. Mason, *Counterclaims in Montana*, 3 MONT. L. REV. 33, 57 (1942); *Pioneer Engineering Works, Inc. v. McConnell*, 113 Mont. 392, 130 P.2d 685, 132 P.2d 160 (1942).

¹⁷²3 MOORE ¶ 13.32, at 86 (1948).

¹⁷³Rule 7(c).

after pleading to the claim;¹⁷⁴ but a motion to dismiss must be made before pleading,¹⁷⁵ and a motion for judgment on the pleadings must be made within such time after the pleadings are closed as not to delay the trial.¹⁷⁶ Further, a defendant may join defenses in law with defenses in fact in a responsive pleading, and objections which afford a ground for a motion to dismiss may be raised in an answer.¹⁷⁷ Also, if a motion to dismiss or for judgment on the pleadings is made, the court may postpone hearing and determination thereof until trial.¹⁷⁸

The grounds for a motion to dismiss are those specified in subdivision (b) of Rule 12.¹⁷⁹ They are (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join an indispensable party. A motion to dismiss may be made on no ground except one of these.

Special appearances required under code practice¹⁸⁰ to contest jurisdiction over the person are not contemplated. Also, objections to improper venue no longer require an affidavit of merits or a written demand that the trial be had in the proper county.¹⁸¹ Both defenses may be raised by a motion to dismiss, or they may be asserted in the answer itself.¹⁸² However, inasmuch as Rule 12 does not abolish all motions not enumerated in the Rule,¹⁸³ and Revised Codes of Montana, 1947, section 93-2906 is not superseded, a motion for change of place of trial, when the county designated in the complaint is not the proper county, is also proper.

There may be some doubt as to whether or not the defense of the statute of limitations may be raised by motion to dismiss. This is especially true if the complaint alleges a date of accrual beyond the statutory period, because Rule 9(f) provides that, for the purpose of testing the sufficiency of a pleading, averments of time are material. Federal cases have held that the defense of limitations may be raised by motion.¹⁸⁴ But Revised Codes of Montana, 1947, Section 93-2719, which provides that the objection can be taken only by answer, has not been superseded; and it would seem that this special statute should control.¹⁸⁵

Rule 12(b) expressly contemplates the presentation to the court of

¹⁷⁴Rule 56(b). A party seeking to recover upon a claim may move for summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 56(a). Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Rule 56(c).

¹⁷⁵Rule 12(b).

¹⁷⁶Rule 12(c).

¹⁷⁷Rule 12(b).

¹⁷⁸Rule 12(d). Also, the court may deny a motion for summary judgment without prejudice to its renewal at trial. *Rotberg v. Dodwell & Co., Ltd.*, 152 F.2d 100 (2d Cir. 1945).

¹⁷⁹The Rule does not in terms specify a motion to dismiss, but such is the usual way of raising the defenses enumerated.

¹⁸⁰R.C.M. 1947, § 93-4801 (2); *Missoula Belt Line Ry. Co. v. Smith*, 58 Mont. 432, 193 Pac. 529 (1920).

¹⁸¹R.C.M. 1947, § 93-2905

¹⁸²Rule 12(b).

¹⁸³2 MOORE ¶ 12.07, at 2243 (1948, 1960).

¹⁸⁴2 MOORE ¶ 12.10, at 2257 (1948, 1960), citing one case contra, "believed erroneous" by Moore.

¹⁸⁵See CRAWFORD, STATUTORY CONSTRUCTION § 167 (1940); *In re Wilson's Estate*, 102 Mont. 178, 56 P.2d 733, 105 A.L.R. 367 (1936).

matters outside the pleading, when the motion asserts the defense numbered (6). However, it seems that speaking motions are also available to present the defenses specified by the other six grounds for motion to dismiss.¹⁸⁶ As a matter of fact, the extraneous material which may be presented when the ground of the motion is failure to state a claim upon which relief can be granted is more limited than it is when the motion is made on one of the other grounds. This results from the fact that only defense numbered (6) is integrated with the motion for summary judgment, and the Montana Rule on summary judgment¹⁸⁷ departs from the Federal Rule by providing that on such a motion "Affidavits shall not be considered for any purpose." Depositions, answers to interrogatories,¹⁸⁸ and admissions on file, in addition to the pleadings, may be considered on a motion for summary judgment; and these are the only materials which may be considered on a motion to dismiss for failure to state a claim upon which relief can be granted because subdivision (c) of Rule 12 provides that when such a motion is made and "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." But defenses (1) through (5), and (7) in Rule 12(b) are not thus integrated with the motion for summary judgment.¹⁸⁹ Consequently, when the motion to dismiss is on one of the grounds other than (6), affidavits may be considered by the court in its discretion. This conclusion is buttressed by Rule 43(e), which provides that "Except as otherwise provided in Rule 56, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Affidavits may not be considered on motions for judgment on the pleadings, because such motions are integrated with Rule 56 in similar manner as motions to dismiss for failure to state a claim upon which relief can be granted.

This departure from the Federal Rules evidences distrust of affidavits. It probably does not seriously curtail the use of speaking motions, since it would seem that, if a reliable affidavit can be obtained, with some additional effort a deposition may be taken.¹⁹⁰

¹⁸⁶2 MOORE ¶ 12.09, at 2256 (1948, 1960).

¹⁸⁷Rule 56(c).

¹⁸⁸Rule 56(c) does not refer to interrogatories as one of the things which may be considered, but Rule 26(d) provides that depositions may be used upon the hearing of a motion, and Rule 33 provides that answers to interrogatories may be used to the same extent as provided in Rule 26(d) for the use of depositions. See 4 MOORE ¶ 33.29 (1950).

¹⁸⁹The reason is that defenses (1) through (5), and (7) do not raise matters in bar, and under Rule 56 on summary judgment only matters on the merits can be raised and if a judgment is rendered thereunder it is one in bar. 2 MOORE ¶ 12.09, at 2257 (1948, 1960).

¹⁹⁰Under Rule 12(b) and (c) it is left to the discretion of the trial court whether or not to receive even depositions on a motion to dismiss for failure to state a claim upon which relief can be granted or a motion for judgment on the pleadings. Under Rule 56 the court has no such discretion on a motion for summary judgment. 2 MOORE ¶ 12.09, at 2256 (1948, 1960). Of course, no extraneous matter should be used for the purpose of deciding an issue of fact; such matter should only be used for the purpose of discovering whether there is an issue of fact. *Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647 (D.C. Cir. 1946).

Other motions provided for by Rule 12 are for a more definite statement and to strike. A motion for a more definite statement is proper only when the moving party is required or permitted to file a responsive pleading, and when the pleading to which the motion is directed is so vague or ambiguous that the moving party cannot reasonably be required to frame a responsive pleading.¹⁹¹ A motion to strike is proper to reach any redundant, immaterial, impertinent, or scandalous matter. This is a reflection of the inherent power of the court to prune down pleadings.¹⁹² But also, the motion to strike is a method of objecting to an insufficient defense, it being expressly provided in Rule 12(f) that on such a motion "the court may order stricken from any pleading any insufficient defense."

Rule 12 does not permit successive motions, such as is possible under code practice. Under subdivision (g), a party who makes a motion under Rule 12 may join with it other motions provided for in that Rule and then available to him.¹⁹³ There is no waiver by including all defenses in one motion. But if a party makes a motion under Rule 12 and does not include all defenses then available to him which the Rule permits, subject to the exceptions set forth in subdivision (h), he may not thereafter make a motion based on such omitted defenses or objections,¹⁹⁴ nor raise them by answer or reply.¹⁹⁵ The non-waivable exceptions of subdivision (h) are failure to state a claim upon which relief can be granted, failure to join an indispensable party, failure to state a defense to a claim, and lack of jurisdiction of the subject matter. These defenses may be made by pleading, by motion for judgment on the pleadings or at trial, and the defense of lack of jurisdiction of the subject matter may be raised at any time by suggestion of the parties or otherwise.

Since the requirement of consolidation applies only to defenses and objections permitted to be raised by Rule 12, motions such as for security for costs, or for stay, or for an extension of time to answer, need not be consolidated with motions under Rule 12, although consolidation is not improper.

J. AMENDED AND SUPPLEMENTAL PLEADINGS

1. Amendments

Rule 15 with respect to amendments is similar to the superseded statutes.¹⁹⁶ However, under the code practice the Supreme Court of Montana said that an amended complaint must not state a new and distinct "cause of action" from that contained in the original complaint.¹⁹⁷ Such a restriction upon amendment becomes crucial when the statutory period of limitations has run between the date of the filing of the original complaint and the amendment. Although a liberal construction of "cause of action" was adopted by the court, permitting an amendment to state a

¹⁹¹Rule 12(e).

¹⁹²2 MOORE ¶ 12.21, at 2312 (1948, 1960).

¹⁹³This qualification on the requirement for consolidation would permit a motion for a more definite statement followed by a motion to dismiss for failure to state a claim on the basis of facts disclosed in the more definite statement. 2 MOORE ¶ 12.22, at 2324 (1948, 1960).

¹⁹⁴Rule 12(g).

¹⁹⁵Rule 12(h).

¹⁹⁶R.C.M. 1947, §§ 93-2303, -3304, -3818, -3901 to -3905, -3909.

¹⁹⁷Cooke v. Meyers, 86 Mont. 423, 283 Pac. 1114 (1930).

“good cause of action,”¹⁹⁶ nevertheless such a restriction necessarily introduces the confusion and uncertainty which surrounds the phrase “cause of action.”¹⁹⁹ Under the new procedure there is no rule preventing an amendment because it changes the “cause of action” or “claim”; but granting permission to amend is within the discretion of the court, except for amendment as a matter of right before responsive pleading, or, if no responsive pleading is permitted, within 20 days after the pleading sought to be amended is served.²⁰⁰ More particularly, Rule 15(c) provides as follows: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” The question is whether the original pleading gives fair notice of the general fact situation out of which the claim or defense arose. If so, the amendment will relate back even though the statute of limitations has run in the interim. There is no objection to merely making more specific what has already been averred generally or to changing the legal theory of the action.²⁰¹

The time for pleading in response to an amended pleading is somewhat different from that under code practice. Under code practice one has 20 days to plead to an amended pleading,²⁰² under Rule 15(a) he has the time remaining for a response to the original pleading or 10 days after service of the amended pleading, whichever may be longer, unless the court orders otherwise.

2. Supplements

Rule 15(d) permits supplemental pleadings, within the discretion of the court, relating to transactions, occurrences or events happening *after* the date of the pleading sought to be supplemented. This is similar to the code provision.²⁰³ The Rule does not permit a supplemental pleading of facts merely because the pleader was ignorant of them at the date of the original pleading, as is permitted in some states.²⁰⁴

Montana Rule 15(d) has added to the Federal Rule a clause recommended in 1955 by the Federal Advisory Committee, which permits a supplemental pleading, whether or not the original pleading is defective in its statement of a claim for relief or defense. This would seem to be the correct position, even without this added clause. But some federal cases have held that if parties are before the court on a defective complaint, it is necessary to dismiss their action and require the commencement of a new action, even though the events occurring after the commencement of the original action give a right to judicial relief.²⁰⁵ Under the Montana Rule it is clear that a supplemental complaint will be tested on its own merits.²⁰⁶

¹⁹⁶Clark v. Oregon Short Line R.R. Co., 38 Mont. 177, 185, 99 Pac. 298 (1909).

¹⁹⁹Supra, pages 19-21.

²⁰⁰Rule 15(a).

²⁰¹3 MOORE ¶ 15.15, at 852 (1948).

²⁰²R.C.M. 1947, § 93-3904.

²⁰³R.C.M. 1947, § 93-3818.

²⁰⁴CLARK 742.

²⁰⁵1A BARRON AND HOLTZOFF § 455, at 820 (1960). There seems to be no more justification for this when dealing with a supplemental pleading than when dealing with an amendment.

²⁰⁶Federal Advisory Committee, Final Report, October, 1955.

V. PARTIES AND CLAIMS

The foundation code requirement²⁰⁷ that every action shall be prosecuted in the name of the real party in interest is continued.²⁰⁸ However, the Rules with respect to joinder of parties have been simplified and extended so far as consistent with trial convenience, and these rules control the joinder of claims.²⁰⁹

A. JOINDER OF CLAIMS AND REMEDIES

1. *Claims*

Joinder of claims is treated by the Rules as a trial and not a pleading problem.²¹⁰ The arbitrary code classification²¹¹ of causes of action which may be joined is abandoned, and the learning with respect to the eight code classes and when they may be said to affect all of the parties to the action may be forgotten. Under Rule 18(a) if there is but one plaintiff and one defendant, there is no limit upon permissive joinder of claims, legal or equitable or both. If there are multiple parties, the requirements with respect to joinder of parties serve as the only limitations upon joinder of claims.²¹²

2. *Remedies*

Rule 18(b) provides that whenever a claim is one heretofore cognizable only after another claim has been prosecuted to conclusion, the two claims may be joined. This permits a claim to adjudicate the plaintiff's status as a stockholder to be joined with a claim to enforce a secondary right on behalf of the corporation,²¹³ and an action against a surety on a bond of a deceased administrator may be maintained before an accounting and de-

²⁰⁷R.C.M. 1947, § 93-2801.

²⁰⁸Rule 17(a).

²⁰⁹Rules 19, 20, 21.

²¹⁰3 MOORE ¶ 18.05, at 1813 (1948).

²¹¹R.C.M. 1947, § 93-3203.

²¹²There has been some disagreement as to the result when there are multiple claims and parties. Rule 20, dealing with joinder of parties, refers to the assertion of a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences, and to the existence of a question of fact or law common "to all of them." (Emphasis supplied). The position has been taken that these requirements relate to the *claims*. Thus in *Federal Housing Administrator v. Christianson*, 6 F. Supp. 419 (D. Conn. 1939), a plaintiff held two promissory notes, both of which had been made and endorsed to him the same day. Three persons whom he joined as defendants were liable to him on one of the notes. Two of the same people were liable on the other note. It was held that there was a misjoinder under Federal Rules 18 and 20, because there was no common question of fact or law as to the two claims. Professor Moore agrees that this is a proper position. 3 MOORE ¶ 18.04, at 1812 (1948). But Professor Wright disagrees, taking the position that it is not necessary that there be a question common to both *claims*. His position is that the requirement of a common question relates only to the *parties*, and that much the same interpretation should be given to the requirement of the same transaction or occurrence. Thus, he contends that the *Christianson* case was wrong, since "plainly whatever questions are involved in the note on which all three of the Christianson defendants were sued are common to them all," and "there was a right to relief asserted against all of the defendants growing out of the first note." Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 604-11 (1952).

Rule 18 does not extend the jurisdiction or venue of the district courts. Rule 82. Consequently, a motion under Rule 12(b) to dismiss a claim as to which the court has no jurisdiction, or as to which the venue is improper, should be sustained, although so far as the subject matter of the claim is concerned it is properly joined with another claim as to which the court has jurisdiction and as to which the venue is proper.

²¹³*Richardson v. Blue Grass Mining Co.*, 29 F. Supp. 658 (E.D. Ky. 1939).

termination of the amount for which the principal is liable.²¹⁴ The Rule covers specifically the joinder of a claim for money and a claim to set aside a fraudulent transfer, without first having obtained a judgment establishing the claim for money.²¹⁵

Rule 18(b) is intended to cover only matters of procedure, and does not permit the joinder of the defendant's liability or indemnity insurer contrary to a substantive rule of law.²¹⁶ To avoid any confusion, the following sentence was added to the Montana Rule: "This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless such carrier is by law or contract directly liable to the person injured or damaged."

3. *Power to Separate; Effect of Misjoinder*

To avoid inconvenience of trial and prejudice which may result from such freedom of joinder, the Rules provide for broad discretion in the court to order the separate trial of any claim or separate issue.²¹⁷ And such an order, rather than dismissal, is the normal way of handling the rare situation where there is a misjoinder of claims, as when multiple parties join in a claim as to which there is no common question of law or fact.²¹⁸

B. NECESSARY JOINDER OF PARTIES

In substance Rule 19 continues the code requirement that parties "united in interest must be joined as plaintiffs or defendants."²¹⁹ However, the Rule requires the distinction between indispensable and necessary parties which, originating in equity, has been made in federal courts for over a century.²²⁰ Failure to join an indispensable party is ground for a motion to dismiss under Rule 12(b), and under 12(h) the defense is not waived by failure to present it by such motion or by responsive pleading but may be made by motion for judgment on the pleadings or at the trial on the merits. On the other hand, the omission of a necessary party is handled quite differently. Under Rule 19(c) the name of any necessary party who is not joined must be set forth by the pleader and the reason for the omission given. Under Rule 19(b) the omission is not ground for a motion to dismiss but only for an order of the court summoning the omitted person to appear, and the court in its discretion may proceed without such a person if jurisdiction over him cannot be acquired without his consent or voluntary appearance.

Consequently, the term "necessary party" is a misnomer, and it may clarify thinking to refer to such a party as "conditionally necessary."²²¹ Such parties are described in Rule 19(b) as persons "who ought to be parties if complete relief is to be accorded between those already parties." But an indispensable party is one whose interest would necessarily be affected by a judgment in the case. In *State of Washington v. United States*,²²² Judge Haney of the Ninth Circuit said:

²¹⁴Utesch v. United States Fid. & Guar. Co., 27 F. Supp. 933 (N.D. Iowa 1939).

²¹⁵3 MOORE ¶ 18.03, at 1826 (1948).

²¹⁶2 BARRON AND HOLTZOFF § 505, at 50-51 (1950). 3 MOORE ¶ 18.08, at 1828 (1948).

²¹⁷Rules 21 and 42(b).

²¹⁸3 MOORE ¶ 18.05, at 1813 (1948).

²¹⁹R.C.M. 1947, § 93-2821.

²²⁰Perhaps the leading case is *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158 (1855).

²²¹This is a New York classification. CLARK 362.

²²²37 F.2d 421, 427-28 (9th Cir. 1936).

There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such a party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

It has been said that this merely gives an illusion of certainty, since one returns to concepts of equity and good conscience, which are hardly terms of art. But the character of parties in many situations appears to be settled. A good illustration of an indispensable party is presented by a Wisconsin case arising under the code provision requiring joinder of parties united in interest.²²³ The plaintiffs alleged that their land was overflowed by reason of a dam maintained by the defendant city, and prayed that it be abated. The defendant answered that streets had been graded up to the level of a lake caused by the dam and that the abutting property owners should be brought in. The court sustained the position of the defendant, saying: ". . . [I]f a person is so affected by the decree that his property interests are impaired or destroyed by its enforcement, he is an indispensable party to the litigation, and it cannot proceed without his presence, unless the case is brought within the rule of one representing a class."²²⁴

Under the above principles, joint obligees are indispensable parties, but joint obligors are only necessary, even in jurisdictions where joint obligations have not been made joint and several.²²⁵ In Montana joint obligations are made joint and several;²²⁶ consequently, joint obligors are not even necessary parties.²²⁷ And in a tort action, joint tortfeasors are neither indispensable nor necessary, because their liability is both joint and several.²²⁸ If the purpose of the suit is the disposition of a fund or an estate to which there are several claimants, generally all of the claimants are indispensable.²²⁹ In actions involving real or personal property, the question is whether the relief sought goes beyond the protection of the interest of the parties. Thus, as is stated in *Moore's Federal Practice*:

²²³Castle v. City of Madison, 113 Wis. 346, 89 N.W. 156 (1902).

²²⁴*Id.*, 89 N.W. at 159. Rule 19(a) also makes its provisions subject to those of Rule 23 which deals with class actions.

²²⁵3 MOORE ¶ 19.11, at 2169-70 (1948).

²²⁶R.C.M. 1947, § 58-202.

²²⁷They would be proper parties under Rule 20.

²²⁸3 MOORE ¶ 19.07, at 2153 (1948).

²²⁹3 MOORE ¶ 19.08 (1948).

... [O]ne tenant in common may sue in ejectment in order to recover his aliquot portion of the land without joining the other tenants in common. On the other hand when tenants in common seek to cancel or rescind a lease, all of them must be before the court because the contract involved is an entire and indivisible one; the right of any one tenant is not distinct and the relief sought is interwoven with the rights of the other tenants.²³⁰

C. PERMISSIVE JOINDER OF PARTIES

Rule 20 removes code restrictions upon permissive joinder of parties. The code attempted to state the equity rule by providing that all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs.²³¹ But equity courts had taken the position that the rule was largely in the discretion of the court, and that the guiding purpose was to prevent multiplicity of suits by allowing joinder whenever the issues could conveniently be settled together.²³² Courts under the codes, particularly in actions at law, tend to disregard the meaning of the rule in equity and construe the statute strictly as requiring that all plaintiffs be interested not only in the subject of the action but also in the relief sought.²³³ Thus, joinder is not allowed under the code in a suit for damages when defendant's single act injures lands of which the plaintiffs each own separate parcels or chattels owned separately by the plaintiffs. If injunction is sought against a common injury or nuisance, however, the courts allow joinder in such situations. But when contractees under separate but similar contracts attempt to join in a suit against an obligor for a money judgment, code cases hold that there is a misjoinder.²³⁴

Much the same situation exists under code practice with respect to permissive joinder of defendants. The provision permitting joinder of any person who has or claims an interest in the controversy adverse to the plaintiff²³⁵ might seem sufficiently broad to permit the complete settlement of a transaction in a single suit. But frequently it does not work out that way. Many courts have given a limited construction to the term controversy, and have imposed much the same limits upon joinder of defendants as upon joinder of plaintiffs. The result is that the arbitrary common law distinction between joint and several interests is continued.²³⁶ Thus, when a plaintiff sues a servant who is the wrongdoer, and the master who is liable under the doctrine of *respondeat superior*, a number of code cases hold that there is a misjoinder.²³⁷ A leading case on strict construction of causes and parties is *Ader v. Blau*,²³⁸ decided by the Court of Appeals of New York. An administrator sued for the death of a child, joining the owner of a fence and a physician. The plaintiff alleged in one cause of action that the death was caused by the negligence of the defendant property owner in maintaining the fence on which the child was injured; in another cause of action the plaintiff alleged that the death was caused by the negli-

²³⁰3 MOORE ¶ 19.09, at 2158-59 (1948).

²³¹R.C.M. 1947, § 93-2811.

²³²CLARK 355.

²³³*Id.* 366.

²³⁴*Id.* 366-67.

²³⁵R.C.M. 1947, § 93-2812.

²³⁶CLARK 382-83.

²³⁷*Id.* 385.

²³⁸241 N.Y. 7, 148 N.E. 771 (1925).

gence of the defendant physician who treated the child for the injury received on the fence. The court held that there was a misjoinder of causes and parties, although the statute on joinder of parties provided for joinder in the alternative.

Such holdings do not promote the convenience of either the parties or the courts. Two suits are required although much of the evidence will be the same. The result is unnecessary costs and delay and the risk of inconsistent jury verdicts.

Actually, as is the case with joinder of causes, the problem of joinder of parties is not a pleading problem but a trial problem. Rule 20 so treats it. The provisions for joinder of plaintiffs and defendants are similar, and impose two limitations: (1) the right to relief must be in respect of or arise out of "the same transaction, occurrence, or series of transactions or occurrences," and (2) there must be a "question of law or fact common to all of them." And misjoinder of parties is not ground for dismissal.²³⁰ Subdivision (b) of Rule 20 gives the court needed discretion in handling the trial problem by providing that it "may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice." Rule 21, which must be read in connection with Rule 20, permits the court to drop parties on motion or of its own initiative. The claims remain separate and distinct by reason of the provision of Rule 20(a) that judgment may be given for or against one or more of the parties according to their respective rights or liabilities.

The ultimate effect is to place the matter of joinder of parties in the discretion of the court as a matter of trial convenience whenever there is any common question of fact or law arising upon the facts of the particular case. A good illustration of permissive joinder of parties plaintiff is presented by automobile negligence cases. All persons suffering personal injuries or property damage in the same collision have been permitted to join as plaintiffs in one action.²⁴⁰ Again, the same New York court that decided *Ader v. Blau*, a year earlier in *Akely v. Kinnicutt*,²⁴¹ under statutory language similar to that of Rule 20, permitted 193 persons who were defrauded by a stock prospectus issued by the defendant to join in their recovery of several damages. As to defendants, no pleading problem is presented by joinder of defendants against whom liability is asserted severally. In fact, liability may even be asserted against the defendants in the alternative, permitting a plaintiff who is in doubt as to which of two defendants is liable to submit the entire controversy to the court for determination.²⁴²

D. INTERPLEADER

Subdivision (a) of Rule 22 authorizes interpleader as the converse of alternative joinder authorized by subdivision (a) of Rule 20, materially liberalizing code practice. Not only does Rule 20 permit joinder of defendants in the alternative; it also permits the joinder of two or more

²³⁰Rule 21.

²⁴⁰2 BARRON AND HOLTZOFF § 532, at 104 (1950).

²⁴¹238 N.Y. 466, 144 N.E. 682 (1924).

²⁴²Gavit, *The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 374 (1939).

persons as plaintiffs when they are in doubt as to which one possesses the right. Conversely, Rule 22(a) authorizes a plaintiff to join as defendants two or more persons having claims against him.

The code removed some of the technical restrictions upon equitable interpleader, by authorizing relief against conflicting claimants "although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another."²⁴³ However, the equitable requirements that the person asking the relief must not have or claim any interest in the subject matter, and must have incurred no independent liability to either of the claimants,²⁴⁴ remained under the code. As the Supreme Court of Montana said in *Central Montana Stockyards v. Fraser*,²⁴⁵ the plaintiff in an interpleader action under the code must maintain "the delicate poise and balance of a *disinterested stakeholder*." The result was that under the code, "a bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the fund."²⁴⁶ Rule 22(a) removes this restriction, and expressly provides that it is not a ground for objection that a plaintiff in an interpleader action "averts that he is not liable in whole or in part to any or all of the claimants."

Subdivision (b) of Montana Rule 22 adds to the Federal Rule the code provision²⁴⁷ for substitution by a defendant of another in his place. This is a more limited procedure, available to a defendant who wishes to obtain an order discharging him from liability without awaiting final judgment in the case. It is available only in actions upon a contract or for specific real or personal property, and only when the defendant is in the position of a mere stakeholder.²⁴⁸ Application for an order of substitution must be made before answer, and the granting of the order is within the discretion of the court. An affidavit of no collusion is required, and the defendant must place the money or property in dispute in the custody of the court.

It is doubtful whether the procedure authorized by subdivision (b) of Rule 22 will be availed of frequently, since subdivision (a) extends its unrestricted provisions to a defendant who is exposed to multiple liability. Such a defendant may obtain interpleader by way of cross-claim or counter-claim pursuant to the practice authorized by Rule 13, and may implead third parties as provided in Rule 14.

E. THIRD PARTY PRACTICE

Devices for bringing in a person liable over to an original defendant are provided by the code. Provision is made for bringing in such a person

²⁴³R.C.M. 1947, § 93-2825. The equitable remedy of interpleader before the codes required, *inter alia*, that the same thing, debt, or duty be claimed by the parties against whom the relief was demanded; and that all their adverse titles be dependent upon or derived from a common source. CLARK 428, citing 4 POMEROY, EQUITY JURISPRUDENCE § 1320 (5th ed. 1941).

²⁴⁴CLARK 428.

²⁴⁵133 Mont. 168, 194, 320 P.2d 981, 994 (1957).

²⁴⁶4 POMEROY, EQUITY JURISPRUDENCE § 1327 (5th ed. 1941). *Wight v. Ferrell*, 188 Ga. 200, 3 S.E.2d 736 (1939).

²⁴⁷R.C.M. 1947, § 93-2825.

²⁴⁸*Central Montana Stockyards v. Fraser*, 133 Mont. 168, 320 P.2d 981 (1957); *Union Bank & Trust Co. v. State Bank of Townsend*, 103 Mont. 260, 62 P.2d 677 (1936). The affidavit of no collusion must state that the person sought to be substituted makes against the defendant "a demand for the *same* debt or property." Rule 22(b). (Emphasis supplied).

by order of court when "a complete determination of the controversy cannot be had without" his presence.²⁴⁹ Also the code provides that a defendant may, at the time of filing his answer, or subsequently by permission of court, file a cross-complaint against persons not originally parties and ask relief necessary or required to permit full determination of all rights "relating to or dependent upon the contract, transaction, or subject-matter, or affecting the property to which the action relates."²⁵⁰

Rule 14 extends these provisions in accordance with the general purpose "to avoid two actions which should be tried together to save time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant."²⁵¹ The Rule permits a defendant at any time after commencement of the action by summons and complaint to bring in a person "who is or may be liable" to him.²⁵² The Montana Rule, following the 1955 proposal of the Federal Advisory Committee, departs from the requirement of the Federal Rule that the third-party plaintiff move the court for leave to file his complaint. Such a complaint may be filed as a matter of right, regardless of when filed, subject to subsequent motion for severance, separate trial, or dismissal of the third-party claim. By using the term "claim" the Rule avoids limitations resulting from narrow constructions of terms such as "controversy," "transaction," and "subject matter." Thus, in *Fruit Growers Co-op. v. California Pie & Baking Co., Inc.*,²⁵³ a seller of cherries sued the buyer for the contract price. The buyer had refused to pay because the fruit had arrived in bad condition, and was permitted to implead the railroads over which the fruit was shipped. The court was not concerned with the fact that the action was in contract and the third-party complaint was in tort. Neither was it concerned with the fact that the third-party defendants were not indemnitors. Rather it was influenced by the fact that the defendant was seeking to transfer the liability being asserted against it, and that considerable time would be wasted were two separate actions necessary.

The third-party practice is, of course, procedural; it does not change the substantive law. Impleader is proper when liability to the third-party plaintiff is by way of indemnity, subrogation, contribution, or express or implied warranty, and although it is contingent and cannot be established until the original defendant has been held liable.²⁵⁴ But the liability of the third-party defendant must exist as a matter of substantive law. Thus, the right of a defendant to implead a joint tortfeasor may depend upon whether there is a substantive right of contribution between joint tortfeasors. The general rule in this country, that joint tortfeasors in *pari delicto* have no right to contribution, has been departed from by a few

²⁴⁹R.C.M. 1947, § 93-2828.

²⁵⁰R.C.M. 1947, § 93-3415.

²⁵¹3 MOORE ¶ 14.04, at 412 (1948).

²⁵²A defendant who uses this device is called a third-party plaintiff, and the impleaded party is called a third-party defendant. A plaintiff confronted with a counterclaim is in the position of a defendant with respect to the counterclaim and may cause a third party to be brought in under circumstances which would entitle an original defendant to do so. Rule 14(b).

²⁵³2 F.R.D. 415 (E.D.N.Y. 1942).

²⁵⁴1A BARRON AND HOLTZOFF § 426, at 664-73 (1960).

American courts and by the legislatures of several states.²⁵⁵ But until this general rule is abrogated, Rule 14 affords no right to implead a joint tort-feasor.²⁵⁶

A somewhat different question is presented when a defendant in a negligence case seeks to implead his insurer. The decided weight of authority recognizes that impleader is proper. But the problem arises only in that limited class of case where the insurer has disclaimed liability and has refused to defend on behalf of the insured.²⁵⁷ In such a case, even where the insurance policy contains a "no action" clause or a provision that nothing contained in the policy shall give any person any right to join the insurer as a co-defendant in any action against the insured to determine the insured's liability, the rule allowing impleader of one who "may be" liable to the defendant controls.²⁵⁸

F. INTERVENTION

Intervention is a device by which non-parties may present claims or defenses in pending actions, counterbalancing devices for joinder of parties.²⁵⁹ Montana has had the broader type of intervention statute found in code states;²⁶⁰ but, because of two limitations, it has not adequately accomplished its purpose of preventing multiplicity of suits. Under this statute a petition for intervention must be filed before trial; also the intervenor must have an interest in the matter in litigation. The courts very generally have required such an interest that the intervenor will gain or lose by the direct legal operation and effect of the judgment. For example, in an action for personal injuries, the defendant's insurer could not intervene, since coverage of the insurance policy was not involved in the action, although the insurer claimed that the plaintiff and defendant were conspiring to defraud it.²⁶¹

Under Rule 24 intervention must be "timely," but there is no requirement that it be before trial. And, in addition to three categories for intervention of right, there is provision for intervention in the discretion of the court when the applicant's claim or defense and the main action have a question of law or fact in common. The first category for intervention of right is "when a statute confers an unconditional right to intervene." The right to intervene under the second and third categories is similar to the right to intervene under a statute requiring an interest in the matter in

²⁵⁵No Montana case or statute has been found which changes the general rule. Under R.C.M. 1947, § 58-203, a right of contribution exists when an obligor satisfies more than his share of the claim. (See also R.C.M. 1947, § 93-5843 with respect to satisfaction of a writ of execution issued on a judgment in an action on a joint contract.) However, if under substantive law a right of contribution does not arise until a judgment debtor claiming contribution has paid more than his proportionate share of a money judgment, it is not a proper case for impleader. *Lo Cicero v. Continental Baking Co.*, 13 F.R.D. 243 (E.D., N.Y. 1952).

²⁵⁶3 MOORE ¶ 14.03, at 410 and ¶ 14.11, at 427-28 (1948). A case of optional joinder by the plaintiff cannot be converted into a case by which the defendant can compel the plaintiff to proceed against someone other than the one he has chosen to sue.

²⁵⁷Any attempt by an insured to implead the insurer who has not disclaimed liability would be a breach of the "cooperation" clause of the policy of insurance.

²⁵⁸1A BARRON AND HOLTZOFF § 426.2 (1960). The leading case is *Jordan v. Stephens*, 7 F.R.D. 140, 141 (W.D. Mo. 1945).

²⁵⁹4 MOORE ¶ 24.02, at 6 (1960).

²⁶⁰R.C.M. 1947, § 93-2826; CLARK 421.

²⁶¹*Brune v. McDonald (Pacific Indemnity Co., Intervener)*, 158 Ore. 364, 75 P.2d 10 (1938).

litigation, except for the greater liberality as to the time for intervention. Thus, in *Wolpe v. Poretsky*²⁶³ an action was brought against a zoning commission to enjoin it from enforcing a zoning order. Adjoining property owners, who would be bound by a judgment setting aside the zoning order, were permitted to intervene after judgment. Inadequacy of representation, which is required when the ground for intervention is that the applicant's interest is or may be bound by the judgment, was indicated by failure of the zoning commission to take an appeal. In determining whether the application for intervention was "timely," the court considered the nature of the rights involved as well as the time element. Of course, the intervenors may not have had reason to think that their interests would not be properly protected by the zoning commission until it decided not to appeal.

In cases of permissive intervention it is not necessary that the intervenor have a direct interest in the matter in litigation, but the court, in exercising its discretion whether to grant the motion to intervene, must consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. The court may refuse intervention if the intervenor merely underlines issues already raised by the primary parties, accumulating proofs and arguments without assisting the court.²⁶⁸

A motion to intervene is required, even in cases of intervention of right, stating the grounds for intervention. This motion and a pleading setting forth a well-pleaded claim or defense for which intervention is sought must be served on all parties affected.

The public interest is protected by two provisions. Subdivision (c) of Rule 24 provides that the court shall notify the Attorney General when the constitutionality of legislation affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer is a party, and that "the Attorney General may within 20 days thereafter intervene . . . on behalf of the state." The quoted clause is substituted for a reference in the Federal Rules to a statute of the United States,²⁶⁴ and contemplates intervention of right. In cases in which no such constitutional issue is involved, provision for permissive official intervention is made by subdivision (b). On timely application, a state agency or officer may intervene, within the discretion of the court, in an action in which a party relies upon a statute or executive order administered by the officer or agency or upon a regulation or agreement issued or made pursuant to the statute or executive order.

G. CLASS ACTIONS

The code provisions for representative suits²⁶⁵ is superseded by the more precise provisions of Rule 23. Subdivision (a) divides class actions into three categories which have been called "true," "hybrid," and "spurious."²⁶⁶ In the situations covered by these categories, an action may be maintained by or against one or more persons on behalf of a class, provided (1) the persons constituting the class are so numerous as to make it impracticable to bring them all before the court, and (2) the named parties

²⁶³144 F.2d 505 (D.C. Cir. 1944).

²⁶⁸*Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944).

²⁶⁴28 U.S.C. § 2403 (1958).

²⁶⁵R.C.M. 1947, § 93-2821.

²⁶⁶3 MOORE ¶¶ 23.08-2310 (1948).

are such as will fairly insure adequate representation. The true class action, where the character of the right sought to be enforced for or against the class is joint, or common, or secondary, is illustrated by suits by or against representatives of an unincorporated association,²⁶⁷ which are to be distinguished from suits under the Revised Codes of Montana, 1947, section 93-2827, which permits suits against, but not by, an unincorporated association in its common name. The hybrid class action, where the character of the right is several and claims affecting specific property are presented, is comparatively uncommon but has been said to be especially suited for the relief of bondholders by way of protecting the fund established for redemption of such bonds.²⁶⁸ The spurious class action, where the character of the right is several and a common question of law or fact is presented and a common relief is sought, expands the representative suit and is a modern development as a counterpart of the expanded Rule for permissive joinder of parties.²⁶⁹ Illustrations are actions in behalf of property owners damaged by fire negligently started by a railroad,²⁷⁰ in behalf of purchasers or holders of securities defrauded by a common course of dealing on the part of the defendants,²⁷¹ and by an insurer for a declaratory judgment to determine liability to a large number of beneficiaries under a fire insurance policy.²⁷²

The Rule does not attempt to deal with the effect of judgments on persons who are not parties, due process requirements of notice and opportunity to be heard being involved. The prevailing view found in federal cases makes the effect of judgments depend upon the type of action. In a true class action the judgment is conclusive on the absent members of the class represented. In a hybrid class action it is conclusive on the absent members insofar as the proceeding operates *in rem*, but insofar as the proceeding is *in personam* the judgment does not bind those who are not parties. In a spurious class action the judgment is conclusive only as to those actually before the court.²⁷³

With the effect of the judgment thus limited, the spurious class action provided for by the Federal Rule is a device to expand federal jurisdiction by allowing parties to intervene who would otherwise be barred by requirements of diversity of citizenship,²⁷⁴ but would seem to have little, if any, utility in state practice. However, the Montana Rule 23 incorporates as subdivisions (d) a proposal of the Federal Advisory Committee made in its May 1954, Preliminary Draft of Proposed Amendments, which opens the way to attach conclusive effect to judgments in such actions and thus accomplish the fundamental purpose to avoid multiplicity of suits. The Federal Advisory Committee Note explains that the first two sentences of the

²⁶⁷3 MOORE ¶ 23.08, at 3435 (1948).

²⁶⁸2 BARRON AND HOLTZOFF § 562, at 148 (1950).

²⁶⁹3 MOORE ¶ 23.10 (1948).

²⁷⁰See *Shibley v. Pittsburgh & Lake Erie R.R. Co.*, 70 F. Supp. 874 (W.D. Pa. 1947).

²⁷¹*Hackner v. Guaranty Trust Co. of New York*, 117 F.2d 95 (2d Cir.), cert. denied, 313 U.S. 559 (1941).

²⁷²*Pacific Fire Ins. Co. v. Reiner*, 45 F. Supp. 703 (E.D. La. 1942).

²⁷³3 MOORE ¶ 23.11, at 3465 (1948).

²⁷⁴Since under Rule 24 intervention of right depends upon judicial determination that parties seeking to intervene will or may be bound by the judgment, under cases making the effect of the judgment depend upon the type of action, intervention would not be of right in a spurious class suit.

subdivision give the court broad power to impose any terms necessary to insure adequate protection to absentees, including, but not limited to, the giving of notice. The notice, which the court may order given, may be "of the pendency of the action, or a proposed settlement, of entry of judgment or of any other proceeding in the action, including notice to come in and present claims and defenses." The concluding sentence of the subdivision allows the court, if there is inadequate representation notwithstanding such orders, to eliminate all class-representation aspects from an action.

Professor Moore has criticized the addition as it appears in the Montana Rule on the ground that it gives the court power to *compel* nonparties to come in and present claims and defenses,²⁷⁵ and the Federal Advisory Committee, in its 1955 Report, revised its proposal so that it would merely permit the court to give notice to the absent parties that they *may* come in and present claims and defenses *if they so desire*. Perhaps such a notice to absentees would permit conclusive effect to be given to judgments on issues of law or fact common to the group.²⁷⁶ If so, it would not seem that the revision materially ameliorates the notice; if not, it would not appear to add materially to the utility of spurious class actions. Of course, it is to be assumed that a court will not unwarrantably interfere with the rights of nonparties by compelling appearance of persons who have their own suits pending and who object for good cause to being brought into the class action.

Subdivision (c) of Rule 23 affords protection to represented parties by providing that a class action cannot be dismissed or compromised without the approval of the court. Further, in a true class action, notice of a proposed dismissal or compromise must be given to the members of the class in such manner as the court directs.²⁷⁷ This is necessary because the right or duty involved partially belongs to or runs against all members of the class.²⁷⁸ In hybrid and spurious class actions, notice need be given only if the court requires it.

Subdivision (b) of Rule 23 covers derivative actions by a shareholder to enforce the association's cause of action.²⁷⁹ The complaint must set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and the shareholders the action desired, and the reasons for failure to obtain such action or the reasons for not making the effort. However, the Montana Rule does not require, as does the Federal Rule, that the complaint be under oath and contain averments that the plaintiff was a shareholder at the time of the transaction or that his share thereafter devolved upon him by operation of law. Such a requirement is unnecessary in a state court which does not have the same jurisdictional problems as the federal court.²⁸⁰

²⁷⁵3 MOORE ¶ 23.01 (1948, Supp. 1960, at 219).

²⁷⁶*But see* Hansberry v. Lee, 311 U.S. 32 (1940).

²⁷⁷This requirement of notice applies only to voluntary dismissals by a plaintiff and is not a condition precedent to dismissal by the court after hearing on the merits. 3 MOORE ¶ 23.24, at 3550 (1948).

²⁷⁸3 MOORE ¶ 23.24, at 3549 (1948).

²⁷⁹The subdivision is limited to suits which are derivative in nature, and is not applicable to suits to enforce primary rights, as distinguished from secondary rights. 3 MOORE ¶ 23.16 (1948). Of course, subdivision (a) may be applicable to stockholders' suits to enforce primary rights.

²⁸⁰3 MOORE ¶ 23.15, at 3493 (1948).

H. SUBSTITUTION OF PARTIES

Rule 25 provides for substitution of parties on motion in case of death, incompetency, transfer of interest, and separation from public office. The Federal Rule is a wholly procedural rule, merely providing the method by which parties may be substituted in actions pending in district courts. It does not attempt to affect substantive rights by stating what actions shall survive.²⁸¹ This is not entirely true of the Montana Rule. The right of a parent or guardian to bring an action for damages for the wrongful death of his child or ward,²⁸² and the right to bring an action for the benefit of heirs for the wrongful death of an adult,²⁸³ are unaffected by the Montana Rule. But section 93-2824 of the Revised Codes of Montana of 1947, the general survival statute, has been repealed; and subdivision (a)(3) of the Montana Rule provides that after verdict is rendered or an order for judgment is made, an action shall not abate by death of any party and substitution shall be allowed as in other cases. Inasmuch as the right to sue for damages for personal torts and wrongful death does not survive at common law,²⁸⁴ the result is a material change in substantive rights in this type of action.²⁸⁵

Subdivision (a)(1) of the Federal Rule 25 requires that any order of substitution in case of death of a party shall be made within two years after the death. The Federal Advisory Committee in its Final Reports of 1946 and 1955 proposed an amendment to remove the arbitrary two year limitation and provide instead for substitution within a reasonable time. The Montana Rule adopts this proposal. Again, subdivision (d) of the Federal Rule, providing for the substitution of a successor in office, in case a public officer dies, resigns, or otherwise ceases to hold office, at the time of the adoption of the Montana Rules required that the substitution be made within six months after the successor takes office. The Federal Advisory Committee had recommended that this arbitrary six-month period be removed and that the action be permitted to be brought by or against the office rather than the officers.²⁸⁶ The Montana Rule adopts these proposals. Thus, these provisions of the Federal Rule which were in the nature of statutes of limitations are not present in the Montana Rule.

Substitution of parties under Rule 25 is not the same thing as an amendment under Rule 15 bringing in new parties. Rule 25 covers only those cases where proper parties were joined originally, and the substituted parties occupy the same relative position as the original parties in the cause of action or claim. On the other hand, upon amendment under Rule 15, the cause of action or claim, so far as the new parties are concerned, may be a new one.²⁸⁷

²⁸¹ 4 MOORE ¶¶ 25.03, 25.04 (1950).

²⁸² R.C.M. 1947, § 93-2809.

²⁸³ R.C.M. 1947, § 93-2810.

²⁸⁴ PROSSER, TORTS § 105 (2d ed. 1955).

²⁸⁵ Clearly the Rule overlaps section 93-2824 to some extent, but the inclusion of section 93-2824 in the "List of Statutes Superseded by Rules" (and its resultant repeal) is unfortunate. The wrongful death and survivorship statutes of the state are more unsatisfactory now than they were before the enactment of the Rules, and the 1963 Legislature should consider remedial legislation.

²⁸⁶ A 1961 Amendment to Federal Rule 25(d) provides for automatic substitution in actions involving public officers.

²⁸⁷ 4 MOORE ¶ 25.02 (1950).

VI. PRE-TRIAL PROCEDURE

Some twenty years ago the pre-trial conference was transplanted into Montana practice.²⁸⁸ Some members of the Montana Bar regarded it as an "exotic plant from another soil" which could not grow in Montana.²⁸⁹ It did not prosper, and lived only ten years.²⁹⁰ However, it was given an overdose of nitrogen, in the form of a district court order making pre-trial conferences compulsory for all civil cases involving an issue of fact triable before a jury, even when the conference might be of no avail.²⁹¹

The pre-trial conference has flourished in federal courts and has spread to approximately two-thirds of the states.²⁹² But the deposition and discovery devices afforded by the Rules are necessary to make pre-trial effective. As Judge Murrah stated in *Lynch v. Call*:²⁹³

The salutary, indeed the desirable and efficacious, purpose of a pre-trial conference is to sift the discovered and discoverable facts to determine the triable issues, both factual and legal, and to chart the course of the lawsuit accordingly. If, as is often the case, no disputed facts survive the pre-trial discovery and conferences, a summary judgment is timely and appropriate.

If the pre-trial conference is to be successful, counsel must be acquainted with the true facts of the case and must be in a position to cooperate with the court in sifting the facts. Pleadings alone are not a sufficient source of information; and it is not surprising that the pre-trial conference was not successful in Montana under a code system which provided no means for compelling disclosure and discovery by interrogatories and requests to produce and admit.²⁹⁴

The pre-trial conference is an integral part of the system of procedure prescribed by the Rules, a prime purpose of which is to expedite the trial of cases on their merits, thereby avoiding unnecessary delays and expense. Pleadings can be simplified because the real issues can be defined at the pre-trial conference, and freedom of joinder of causes and parties "is made workable by the availability of a pre-trial conference at which the court can decide the form and order of trial."²⁹⁵

From what has been said, it should be clear that a pre-trial conference will be most successful when it is brought into play shortly before trial²⁹⁶ in cases where the issues may be simplified, proof facilitated, preliminary matters disposed of, or trial otherwise expedited.

Under Rule 16 it is within the discretion of the court whether a pre-trial conference should be held. The court may establish by its own rule a pre-trial calendar and may either confine the calendar to jury actions or

²⁸⁸Laws of Mont. 1939, ch. 61.

²⁸⁹State *ex rel.* Kennedy v. District Court, 121 Mont. 320, 334, 194 P.2d 256 (1948).

²⁹⁰The pre-trial act was repealed by Laws of Mont. 1949, ch. 84.

²⁹¹State *ex rel.* Kennedy v. District Court, 121 Mont. 320, 194 P.2d 256 (1948); State *ex rel.* Carlin v. District Court, 118 Mont. 127, 164 P.2d 155 (1945).

²⁹²According to the Report of the Committee on Pre-Trial Procedure to the Judicial Conference of the United States, Sept. 9, 1955, there were at that time 41 jurisdictions which authorized pre-trial conference.

²⁹³261 F.2d 130, 132 (10th Cir. 1958).

²⁹⁴*Supra* note 290.

²⁹⁵1A BARRON AND HOLTZOFF § 471, at 832-33 (1960).

²⁹⁶See 3 MOORE ¶ 16.08, at 1110 (1948).

to non-jury actions or extend it to all actions. The court's rule may provide that cases be put on the pre-trial calendar automatically or upon motion of a party. If a motion for a pre-trial conference is required, it should comply with Rule 7(b)(1) and state the grounds. However, it has been said that a pre-trial calendar is probably of greatest utility in centers where calendars are congested,²⁹⁷ and perhaps generally in Montana it would be preferable for the court to call pre-trial conferences, on its own initiative or on request of a party in particular cases, by notice to the attorneys to appear before the court prepared to assist and cooperate with the court in its efforts to simplify and shorten the actual trial of the case.²⁹⁸

Rule 16 lists five specific matters for consideration at a pre-trial conference, as follows: (1) "The simplification of the issues." If the real issues are isolated and defined, the necessity for preparation on non-existent issues is eliminated and the danger of surprise during the course of the trial will be avoided.²⁹⁹ (2) "The necessity or desirability of amendment to the pleadings." This avoids delays resulting from requests to amend after the case goes to trial. (3) "The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." The parties may be willing to waive formal proof of documents, they may agree that technical rules of evidence shall not apply to certain evidence or exhibits, or they may enter into appropriate stipulations. (4) "The limitation of the number of expert witnesses." (5) "The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury." This should be read in connection with Rule 53(b), however, which provides that reference to a master shall be the exception and not the rule; that in actions to be tried by a jury a reference shall be made only when the issues are complicated; and that in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it. The five specific matters to be considered are followed by a sort of residual clause permitting consideration of "such other matters as may aid in the disposition of the action." Under this latter the court may consider and rule upon questions of jurisdiction, the right to jury trial, the order of trial, interlocutory motions, and other questions of law. The procedure has resulted in the settlement of many cases, but this is not stated in the Rule as a matter for consideration at the conference and is really merely a by-product.

At the end of the conference, the court should make an order reciting the action taken at the hearing.³⁰⁰ Of course, counsel may prepare drafts of the order, and may be able to agree on the form of the order. The order controls the subsequent course of the action, "unless modified at the trial to prevent manifest injustice." Thus the order enables the parties to pro-

²⁹⁷3 MOORE ¶ 16.07, at 1108 (1948).

²⁹⁸A form of order is contained in 3 MOORE ¶ 16.09, at 1112 (1948).

²⁹⁹In *Burton v. Weyerhaeuser Timber Co.*, 1 F.R.D. 571, 573 (D. Ore. 1941), Judge McColloch said that "it must be made clear that surprise, both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure." The same position should obtain under the Montana Rules which are patterned after the Federal Rules.

³⁰⁰Although Rule 16 provides that the court *shall* make an order, not all federal judges make it a regular practice to do so. 3 MOORE ¶ 16.18 n.1, at 1124 (1948).

ceed at the trial with the assurance that the matters covered by the order have been determined.

VII. DEPOSITIONS AND DISCOVERY

With the adoption of the new Rules, Montana for the first time will have a comprehensive system for obtaining and requiring disclosure of information needed to prepare for and to prevent surprise at trial. As every lawyer knows, disputes over pleadings seldom result in obtaining a disclosure of the case which will be relied upon by the pleader. Equitable discovery was not a means by which one could discover facts of his opponent's case and thus protect himself from surprise at the trial,³⁰¹ and has not been utilized in Montana. A bill of particulars at best is "an inadequate method of discovery, since it does not seek directly the parties' own stories, but attacks only the formal allegations of their lawyers."³⁰² The Montana code has provided a system of taking depositions,³⁰³ and for inspection of documents relating to the merits of the action or defense.³⁰⁴ But the Rules afford more liberal devices to ascertain facts before trial for use at trial, to get clues that may be used to obtain evidence, and to discover what proof an adversary will use in support of his case. They provide for (1) deposition on oral examination or written interrogatories, (2) interrogatories submitted to parties and answered *ex parte* under oath, (3) the production of documents or things for inspection, copying, or photographing, (4) mental and physical examination, and (5) demand for the admission of facts or the genuineness of documents.

A. DEPOSITIONS

Rule 26 provides for depositions. Any party may take the deposition of any person, whether or not the deponent is a party. Leave of court is required only where the plaintiff serves his notice of taking of the deposition within 20 days after the commencement of the action and service of process on the defendant.³⁰⁵ This changes the requirement of the Federal Rule that leave of court need be obtained only when the plaintiff serves his notice within 20 days after the commencement of the action, which under Rule 3 is done by filing the complaint. The purpose of the requirement of leave of court within the twenty-day period is to protect the defendant and permit him time within which to obtain counsel and inform himself of the nature of the suit,³⁰⁶ and an explanation of the change from the Federal Rule is found in the greater danger of delay in service after the commencement of the action under the Montana Rule.³⁰⁷

Attendance of witnesses may be compelled by use of a subpoena, as provided in Rule 45. The examination may relate to "the existence, descrip-

³⁰¹1 POMEROY, EQUITY JURISPRUDENCE § 201 (5th ed. 1941).

³⁰²CLARK 341-42.

³⁰³R.C.M. 1947, § 93-1801-1 to -16.

³⁰⁴R.C.M. 1947, § 93-8301. The code also has provided a system for the perpetuation of testimony (R.C.M. 1947, § 93-2301-1 to -7), but it has not been a discovery device. State *ex rel.* Pitcher v. District Court, 114 Mont. 128, 142, 133 P.2d 350 (1943).

³⁰⁵Rule 26(a).

³⁰⁶Federal Advisory Committee Note to Rule 26(a). Of course, the plaintiff needs no such protection.

³⁰⁷This results from the fact that under the Montana Rule process may be issued to an attorney and served by any person over the age of 21 (Rule 4C(1) and D(1)); whereas under the Federal Rule process is only issued to and served by the marshal or person especially appointed by the court (Rule 4(a) and (c)).

tion, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." It may include "any matter, not privileged, which is relevant to the subject matter involved in the pending action."³⁰⁸ It does not matter whether the facts are exclusively or peculiarly within the knowledge or control of the adverse party, or whether the facts relate to the cause of the party taking the deposition or to the case of his adversary.³⁰⁹

Rules as to the admissibility of evidence, including those relating to competency, do not govern. Subdivision (b) of Rule 26 expressly provides: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." As the Supreme Court of the United States said in *Hickman v. Taylor*, "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."³¹⁰

There has been much litigation relating to the extent to which discovery may be had of the product of preparation by an adverse party for trial, such as statements of witnesses at an accident scene and memoranda of interviews.³¹¹ The decision of the Supreme Court of the United States in *Hickman v. Taylor, supra*, did much to settle questions presented but left some questions unanswered.³¹² In that case, the court held that discovery could not be had of statements of witnesses to and memoranda taken by an adversary's attorney. The basis for the decision was not that the attorney-client privilege protected the matter involved. Rather it was that the plaintiff had made no showing of necessity for the discovery. The court said:

"Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the area of discovery and controvenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."³¹³ And again: "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."³¹⁴

³⁰⁸Rule 26(b).

³⁰⁹*Nichols v. Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938), being an early but leading case under the Federal Rules; Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 207 (1942).

³¹⁰329 U.S. 495, 507 (1947). Cf. *State ex rel. Pitcher v. District Court*, 114 Mont. 128, 133 P.2d 350 (1942).

³¹¹For an extended discussion of the problems see 4 MOORE § 26.25 (1950).

³¹²In the *Hickman* case, the plaintiff purported to proceed under Rule 33 dealing with interrogatories, rather than by deposition under Rule 26, but the court did not regard this procedural informality as decisive. The question presented is equally present with respect to depositions, interrogatories, and motions for production of documents.

³¹³329 U.S. at 510.

³¹⁴*Id.* at 512.

The question arises whether the *Hickman* decision applies to statements of witnesses to a defendant's claim agent or reports of an accident made by a defendant's employees. No policy against invading the privacy of an attorney's files without good reason is present in such cases, and, although the cases are not in complete accord, the view has been taken that even if good cause is required, in the normal case the bare fact of inequality of the parties with respect to gathering statements of witnesses should suffice to permit discovery.³¹⁵

A related question, as to which there also has been conflict, concerns reports prepared by experts hired by the adverse party. In view of the *Hickman* case, it is difficult to contend that such reports are "privileged," and in *Hickman* the court ignored an argument of unjust enrichment. Perhaps the proper solution is the exercise of judicial discretion, as stated by Professor Moore, as follows:

The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research. However, since one of the purposes of the Federal Rules as stated in Rule 1 is to facilitate the inexpensive determination of causes, the court should have the discretion to order discovery upon condition that the moving party pay a reasonable portion of the fees of the expert.³¹⁶

Protection from abuse of the liberal provisions for depositions is afforded by Rules 30 and 31. Subdivision (b) of Rule 30, relating to depositions on oral examination, provides, *inter alia*, that the court may make any order "which justice requires to protect the party or witness from annoyance, embarrassment, or oppression"; and subdivision (d) of Rule 31, relating to depositions upon written interrogatories, provides that the court may make "any order specified in Rule 30 which is appropriate and just."

What has been said relates to the use of depositions for the purpose of discovery. They also may be used in the action as evidence against any party who was present or represented at the taking of the depositions, or who had due notice thereof, provided they are admissible under rules of law which would be applicable if the witnesses were present and testifying at the trial. Subdivision (d) of Rule 26 prescribes the circumstances under and the extent to which they may be so used. The deposition of a witness who is not a party to the action may be used as evidence if there are exceptional circumstances which make it desirable to do so. Specifically included in these exceptional circumstances is the fact that the witness is dead, more than 100 miles from the place of trial or out of the state, unable to attend because of age, sickness, infirmity or imprisonment, or cannot be procured by subpoena.³¹⁷ If the deponent is a party to the action, or a person who, at the time of taking the deposition was an officer, director or managing agent of a corporation, partnership, or association which is a party, the de-

³¹⁵4 MOORE ¶ 26.23, at 1114 (1950).

³¹⁶4 MOORE ¶ 26.24, at 1158 (1950).

³¹⁷Rule 26(d)(3).

position may be used as evidence although there are no unusual circumstances.⁸¹⁸ Also, any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness.⁸¹⁹

B. INTERROGATORIES

Rule 33 provides for written interrogatories to be answered in writing and under oath. They differ from depositions in that (1) leave of court is not required for their service, and (2) they may be served only upon an adverse party, and not upon witnesses in general. Further, the party must have been served with process or have appeared, and 20 days is allowed for service of answers or objections to the interrogatories. This changes the provisions of the Federal Rule, which permits service of interrogatories any time after commencement of the action, requires leave of court if service is made by plaintiff within 10 days after commencement of the action, and allows 15 days for service of answers and 10 days for service of objections to interrogatories. But the provisions of Montana Rule 33 mesh with the provisions of Montana Rule 26, and accord with the ordinary 20-day period for service of pleadings.

If interrogatories are directed to a corporation or partnership or association, the answers may be made by any officer or agent, who shall furnish such information as is available to the party. It is immaterial that the officer or agent is not competent to testify personally as to the matters.⁸²⁰ However, the term "agent" is not defined in the Rule and its exact scope is in some doubt. In *Waider v. Chicago, R. I. & P. Ry. Co.*,⁸²¹ the court held that an engineer, fireman, and watchman of a railroad were not "agents" within the Rule, saying:

The better definition as applicable to the word "agent" under Rule 33 would seem to be the one pronounced in *Mecham on Agency*, 2d Ed., p. 21: "The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons. To the proper performance of his functions, therefore, it is absolutely essential that there shall be third persons in contemplation between whom and the principal legal obligations are to be thus created, modified or otherwise affected by the acts of the agent."

Interrogatories are a less expensive method of discovery than the taking of depositions, although, of course, the lack of oral examination makes them less efficacious than depositions. Interrogatories may relate to any matter which can be inquired into by depositions under Rule 26(b), and may be used to the same extent as provided in Rule 26(d) for the use of the depositions of a party.⁸²² Further, interrogatories are a cumulative

⁸¹⁸Rule 26(d)(2).

⁸¹⁹Rule 26(d)(1).

⁸²⁰4 MOORE ¶ 33.01, at 2254, and ¶ 33.97, at 2277 (1950).

⁸²¹10 F.R.D. 263 (S.D. Iowa 1950).

⁸²²The provision of Rule 26(d) that a deposition may be used against any party "who was present or represented at the taking of the deposition or who had due notice thereof" is not entirely relevant to interrogatories, since Rule 33 contains no provision for cross-examination or for participation by anyone other than the propounding party and the one to whom the interrogatories are addressed. It would seem that answers to interrogatories would not ordinarily be admissible against anyone but the answering party. 4 MOORE ¶ 33.29, at 2342 (1950).

method of discovery; they are not merely an alternative to depositions. They may be served after depositions have been taken, or depositions may be taken after interrogatories are answered.³²³ The court may make such protective order as justice requires, but the burden is on the deponent or party interrogated to show that the interrogatories should not be allowed.

A number of cases have held that interrogatories calling for opinions, conclusions, and contentions are improper, reasoning that the object is the ascertainment of facts. But there is nothing in the Rule which so limits interrogatories, and the correct inquiry would seem to be whether they serve a substantial purpose in narrowing issues or leading to evidence and whether they unduly burden the interrogated party.³²⁴

C. PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

Rule 34 provides a direct and simple method of discovery by permitting a party to require the production of documents and tangible things³²⁵ for inspection, copying or photographing.³²⁶ The scope of discovery thus permitted is as broad as the scope of the inquiry permitted by depositions under Rule 26(b) and by interrogatories pursuant to Rule 33.³²⁷ However, the provisions for production are narrower than the provisions of Rules 26 and 33, in that (1) production can be had only by order of court for "good cause" shown,³²⁸ and (2) the document or thing to be produced must be designated. Also, the motion to produce must be made in a pending action,³²⁹ and the procedure can be invoked only against a party to the action and only to compel the production of documents in existence and in the party's possession, custody or control.³³⁰

The requirement that the documents or things be designated has resulted in some disagreement. The Rule refers to "designated" documents and things; Official Form 20 contemplates that the items be listed and described in the motion for production.³³¹ One view is that the designation must be sufficiently precise to enable the defendant to go to his files, and without difficulty, pick out the items requested.³³² Another view is that it

³²³The express provision permitting this was added by a 1946 amendment to the Federal Rule. Before the amendment there was authority limiting the cumulative use of depositions and interrogatories, especially the use of interrogatories following depositions. 4 MOORE ¶ 33.09 (1950).

³²⁴4 MOORE ¶ 33.17, at 2311 (1950).

³²⁵The Rule in comprehensive terms refers to "documents, papers, books, accounts, letters, photographs, objects, or tangible things."

³²⁶Rule 34(2), which is to be distinguished, deals with entry upon land or other property.

³²⁷Originally Federal Rule 34 provided only for the production of documents "which constitute or contain evidence material to any matter involved in the action." But by a 1946 amendment the Rule was correlated to the broader language of Rule 26(b): "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party."

³²⁸What is "good cause" involves a consideration of practical convenience and depends upon the facts of the particular case. Elements are suggested in 4 MOORE ¶ 34.08 (1950).

³²⁹A similar procedure, however, is available under Rule 27 to perpetuate testimony before any action is brought or while an appeal is pending.

³³⁰The procedure cannot be used to require preparation of a document or model for use by the adverse party. 4 MOORE ¶ 34.05, at 2435 (1950).

³³¹The motion should conform to Rule 7(b), and Official Form 20 contemplates that the motion be supported by an affidavit showing that the party has possession or custody and that the items are relevant.

³³²United States v. American Optical Co., 2 F.R.D. 534, 536 (S.D.N.Y. 1942).

is sufficient if the documents or things are designated by categories, so long as the categories themselves are defined.⁸³³ The latter view has been approved by the Federal Advisory Committee.⁸³⁴ The question would seem to be whether a reasonable man would know what documents or things are called for.⁸³⁵

If a party does not have sufficient information to permit him to invoke Rule 34, he may take a deposition under Rule 26 or submit written interrogatories under Rule 33. On the basis of information thus obtained, he then may be able to move for production under Rule 34.⁸³⁶

Discovery under Rule 34 is "subject to the provisions of Rule 30(b)," which authorizes the court to frame its order so as to protect the party from "annoyance, embarrassment, or oppression." In addition, Rule 34 provides that the order "shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

D. PHYSICAL AND MENTAL EXAMINATIONS

Under Rule 35 it is no longer necessary to rely upon stipulations to permit physical and mental examinations. The Rule provides that in actions in which the physical or mental condition of a party is in controversy, the court may order examination. Such order is made only on motion for good cause shown and is in the discretion of the court.⁸³⁷ The person examined is entitled, if he requests it, to the detailed report of the examining physician. After such request and delivery to the person examined of the report of the examining physician, the party causing the examination to be made is entitled upon request to receive from the person examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If a physician fails or refuses to make a report when ordered to do so he is in contempt of court.⁸³⁸

E. REQUESTS FOR ADMISSION

Under Rule 36 after an action has been commenced and a party has been served with process or has appeared,⁸³⁹ he may be served with a written request for the admission of the genuineness of any relevant document, or the truth of any relevant matter of fact set forth in the request. The document must be described in and exhibited with the request; and a copy must be served with the request, unless a copy has already been furnished. The party to whom the request is directed may respond by sworn

⁸³³Leven v. Birrell, 13 F.R.D. 341, 342 (S.D.N.Y. 1952).

⁸³⁴Note to 1946 amendments of Rule 34.

⁸³⁵4 MOORE ¶ 34.07, at 2448 (1950).

⁸³⁶4 MOORE ¶ 34.05, at 2437 (1950). By means of a subpoena *duces tecum* any person, whether or not a party, may be directed to produce a document at the taking of his deposition. Rule 45 deals with production of "books, papers, documents, or tangible things" in the possession or under the control of a party or third person.

⁸³⁷Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert. denied* 345 U.S. 997 (1953).

⁸³⁸Rule 35(b)(1). This is a change from the Federal Rule which provides that if the physician refuses to make such a report the court may exclude it from trial. However, Rule 37(b)(2)(ii) provides that a party who refuses to submit to a physical or mental examination may be prohibited from introducing evidence of physical or mental condition.

⁸³⁹This changes the Federal Rule, which provides for requests for admission after the commencement of the action, which would be when the complaint is filed, and which requires leave of court if the plaintiff desires to serve a request within 10 days after commencement of the action.

statement either specifically denying the matters in question or setting forth in detail the reasons why he cannot either admit or deny the matters; or he may test the propriety of the request by written objection that some of or all the requested admissions are privileged or irrelevant or that the request is otherwise improper, in which event he must give notice of a hearing on his objections at the earliest practicable time. The burden is on the person to whom the request is directed to act not less than 20 days⁸⁴⁰ after service of the request or within such shorter or longer time as the court may allow on motion and notice. If he fails to do so the matters stated in the request are deemed admitted.

Requests for admissions are especially effective in obtaining admissions of facts not really in dispute, thus narrowing the issues. But they are not the most potent means of discovery because the only penalty for improper denial is payment of expenses incurred by the party serving the request in making proof necessitated by the denial.⁸⁴¹ Other means of discovery are enforceable by more drastic sanctions, such as punishment for contempt, provision that certain facts shall be deemed established, an order precluding the introduction of evidence, striking out a pleading, dismissing the action or entering a default judgment, and arrest of a disobedient party.⁸⁴²

VIII. TRIALS AND JUDGMENT

No attempt will be made to review in detail the Rules dealing with Trials and Judgment or those Rules which follow these topics. However, a few matters to which reference has not been previously made are particularly deserving of brief attention.

A. JURY TRIAL

Rule 38 prescribes the steps to be taken to assure the right of jury trial, although it does not enlarge or diminish the right itself.⁸⁴³ Under code practice jury trial is only waived by failing to appear at the trial, by written consent filed with the clerk, or by oral consent in open court entered in the minutes.⁸⁴⁴ Rule 38 changes this. A party must demand jury trial by filing and serving a written demand upon the other parties not later than 10 days after the service of the last pleading directed to the issue to which the demand relates.⁸⁴⁵ No particular form of demand is required, and the demand may be incorporated into a pleading. Rule 38(c) recognizes that a general demand for jury trial is sufficient, since it provides that where demandant does not specify the issues "he shall be deemed to have demanded trial by jury for all the issues so triable." But, where a case

⁸⁴⁰This extends the 10 day provision of the Federal Rule.

⁸⁴¹Rule 37 (c).

⁸⁴²Rule 37 (b) and (d).

⁸⁴³5 MOORE ¶ 38.07 (1951).

⁸⁴⁴R.C.M. 1947, § 93-5301.

⁸⁴⁵The Montana Constitution, art. III, § 23, provides that, "The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases . . . upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived. . . ." This commands that a jury trial if waived shall be waived in a certain manner, and it prohibits jury trial being waived in any other manner. *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254 (1905). However, it seems that it is competent for the legislature to prescribe that consent may be expressed by failure to demand. See, for instance, *Glogau v. Hagan*, 107 Cal. App. 2d 313, 237 P.2d 329, 332 (1951), for a case in a state having a constitutional provision similar to that of Montana.

presents both jury and non-jury issues,⁸⁴⁶ it may be advisable to specify particular issues and thus avoid a motion under Rule 39(a)(2) to strike non-jury issues from the jury calendar and transfer them to the court calendar.⁸⁴⁷ If a demandant does specify certain issues, the other party may, within 10 days after service of the demand or such lesser time as the court may order, serve a demand for trial by jury of other issues. Once a demand is made, it cannot be withdrawn without the consent of the parties.⁸⁴⁸

A party who fails to file and serve a demand within the time specified waives his right to jury trial even though the failure is inadvertent or unintentional.⁸⁴⁹ Relief from such waiver may, however, be obtained under Rule 39(b), which provides that the court upon motion or of its own initiative may, on 10 days notice to the parties, order a trial by jury of any or all issues for which jury trial could properly have been demanded. This goes further than the Federal Rule, which does not give the court the right on its own initiative to order a jury trial where the right has been waived.⁸⁵⁰

Confusion and diversity of views have developed under the Federal Rule as to whether an amendment of a pleading revives the right of trial by jury once waived. The Federal Advisory Committee pointed this out in its May 1954, preliminary draft and proposed an amendment to Rule 38(d) to provide, "A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."⁸⁵¹ The Montana Rule incorporates this proposal.

It is evident from the Federal Committee's Note that this provision was intended to apply where the pleader changes from "equity" to "law,"⁸⁵² and that it was not intended that it should apply only where the pleader amends a pleading in an action at law without changing the legal nature of the issue. Specifically, the Committee's Note shows an intent to overrule the *Bereslavsky* cases.⁸⁵³ In these cases it was held that, where a plaintiff has a substantive choice between equitable and legal relief and

⁸⁴⁶Of course, cases where this is true are not infrequent under a code system fusing law and equity, and they may be more frequent under the Rules because of greater liberality with respect to joinder of claims and counterclaims.

⁸⁴⁷5 MOORE ¶ 38.42, at 331 (1951).

⁸⁴⁸Rule 38(d). Under Rule 39(a)(1), the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, may consent to trial by the court.

⁸⁴⁹*McNabb v. Kansas City Life Insurance Co.*, 139 F.2d 591 (8th Cir. 1943).

⁸⁵⁰5 MOORE ¶ 39.08 (1951).

⁸⁵¹This proposal was not included in the October 1955 Report of the Federal Advisory Committee.

⁸⁵²Of course, a problem is presented as to when it may be said that there is such a change, since in many situations the chancellor in ancient equity could retain a case for the purpose of granting money damages, which, of course, ordinarily are granted only at law. 1 POMEROY, EQUITY JURISPRUDENCE § 237(e) (5th ed. 1941). *Gulbenkian v. Gulbenkian*, 147 F.2d 173 (2d Cir. 1945) was a suit for specific performance where the contract was not sufficiently certain in its terms to permit such a decree but where it was certain enough to constitute a valid contract for breach of which damages could be recovered. The plaintiff, after previous notice, amended his complaint to conform to the proof. After stating that the defendant waived his right of jury trial by failure to demand it, Judge Swan said: "But we regard this as a case where the chancellor in ancient equity would have awarded damages if he did not decree specific performance, and hence no jury trial was ever claimable."

⁸⁵³*Bereslavsky v. Caffey*, 161 F.2d 499 (2d Cir. 1947), cert. denied, 332 U.S. 770; *Bereslavsky v. Kloeb*, 162 F.2d 862 (6th Cir. 1947), cert. denied, 332 U.S. 816.

has originally proceeded for equitable relief but subsequently has been allowed to amend and claim legal relief, he may demand a jury trial on the legal claim asserted by his amended pleading.⁸⁵⁴ Consequently, it seems that under the Montana Rule a plaintiff who starts his suit as one in equity when he has a choice between equity and law, and a defendant who interposes an answer in equity when he could answer in law, and does not demand a jury trial within 10 days after service of the last pleading directed to the issue presented by the original complaint or answer, waives the right of trial by jury, and the waiver is not revoked by subsequent amendment from equity to law.⁸⁵⁵

It may be contended that such a position violates the Montana constitutional requirement of "consent" for waiver.⁸⁵⁶ It would seem that one does not by inaction waive a right when there is no basis for choice. However, notice of a potential claim for relief may be said to afford a basis for choice, and such notice may be said to result from a statement of the "conduct, transaction or occurrence" in the pleading, regardless of the relief demanded.⁸⁵⁷ If that theory be accepted, it would seem that the same result is to be reached regardless of whether it is the party who has amended his pleading or his adversary that has failed to demand jury trial.⁸⁵⁸ Each would be considered to have irrevocably waived the right of trial by jury. Of course, if a party has been misled by his adversary's pleading, the court may grant relief from his waiver under Rule 39(b).

The provision of Rule 39(c) with respect to advisory juries has resulted in some conflict. It provides that, "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury. . . ." The cases have not been in accord as to whether this excludes actions in which there was a constitutional or statutory right of jury trial which has been waived.⁸⁵⁹ Of course, as has been noted, Montana Rule 39(b) expressly gives the court the right on its own initiative to order a jury trial when the right has been waived; but it would seem that this does not contemplate calling a jury in an advisory capacity, since it deals with relief from waiver of a right to conclusive trial by jury. Consequently, it seems that a question still exists as to whether a court may use an advisory jury in cases where there was a right of trial by jury which has been waived.

⁸⁵⁴Professor Moore regards these cases as sound. 5 MOORE ¶ 38.41, at 326 (1951); MOORE (Rules and Official Forms, as amended) 639 (1961).

⁸⁵⁵The same problem is presented where the defendant changes his answer from "equity" to "law" as is presented when the plaintiff changes his complaint from "equity" to "law." *E. H. Tate Company v. Jiffy Enterprises*, 16 F.R.D. 571 (E.D. Pa. 1954).

⁸⁵⁶MONT. CONST. art. III, § 23.

⁸⁵⁷The Federal Committee's Note points out that the Rules stress the completely factual basis upon which the claim for relief rests, and that under Rule 54(c) an amendment changing the demand for judgment is unnecessary in the cases under consideration.

⁸⁵⁸See *Gulbenkian v. Gulbenkian*, 147 F.2d 173 (2d Cir. 1945); *Moore v. United States*, 196 F.2d 906 (5th Cir. 1952).

⁸⁵⁹5 MOORE ¶ 39.10 (1951) discussing (*American Lumberman's Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939); *Hargrove v. American Central Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942).

B. JURORS

Under Federal Rule 47 the trial judge has the choice of himself examining prospective jurors on the voir dire, or permitting counsel to do so, or combining these two methods. The Montana Rule does not follow the Federal Rule at this point; the Montana Rule follows the practice under the code and requires the court to permit the parties or their attorneys to conduct the examination under the supervision of the court, merely vesting authority in the court to supplement such examination.

Subdivision (b) of the Montana Rule is new and prescribes an orderly manner of selecting, examining and challenging jurors, which avoids the risk of the unknown replacement involved in the exercise of peremptory challenges. An initial panel of 20 jurors is called, and jurors are continually substituted for those challenged for cause so as to maintain a panel of 20 at all times until the voir dire has been completed. Peremptory challenges are then exercised alternately, the first by the plaintiff and the second by the defendant, each side having four such challenges. If necessary, additional jurors are called to provide alternate jurors, who are subject to challenge. When challenges have been completed, the court excuses sufficient of the last called jurors until a jury of 12 and alternates remain.

Subdivision (c) of the Montana Rule provides for one or two alternate jurors, as the court may direct. It follows subdivision (b) of the Federal Rule, except that it provides for substitution of an alternate juror to take the place of a juror who becomes incapacitated at any time before the jury arrives at its verdict, whereas the Federal Rule only provides for such substitution before the jury retires to consider its verdict.

C. ADVERSE AND HOSTILE WITNESSES

Montana Rule 43(b) is a mixture of the Federal Rule and the Montana code provision,⁸⁰⁰ but contains language not found in either with respect to the nature of examination of a party who has been called as a witness by the opposite party.

It is a universal rule that a party may interrogate any unwilling or hostile witness by leading questions, and the Montana Rule, as well as the Federal Rule so states. However, it is a general rule that impeachment by a party of his own witness is limited, and this rule has been applied even though the witness is an adverse party.⁸⁰¹ Rule 43(b), both Montana and Federal, changes this. A party may call an adverse party and contradict and impeach him in all respects as though he had been called by the adverse party. Under the Montana Rule, employees and agents of the adverse party, and officers, directors, employees and agents of a corporation or partnership which is an adverse party, those who are such at the time they are called and also those who were such at the time of the transaction out of which the proceeding grew, may be called on the same basis as the adverse party himself. But the adverse party may also contradict and impeach the witness, which gives protection to a party if one of its officers, agents or employees "has, so to speak, gone over to the enemy."⁸⁰²

⁸⁰⁰R.C.M. 1947, § 93-1901-9.

⁸⁰¹58 AM. JUR. *Witnesses* §§ 792, 796, 797 (1948).

⁸⁰²5 MOORE ¶ 43.10, at 1349 (1951).

Leading questions are expressly permitted by the Federal Rule to be asked by a party who calls the adverse party, his agents, etc. The Montana Rule does not expressly provide for such leading questions, but since the party calling the witness has the "right to examine and cross-examine such witness the same as if he were called by the opposite party," it would seem that leading questions may be asked by the party calling the witness. On the other hand, leading questions ordinarily would seem improper when the adverse party, his agents, etc., are being examined by the adverse party's counsel or counsel aligned with the adverse party. This would seem to be the result of the concluding provision of Montana Rule 43(b), which provides that the witness "may be examined by the opposite party upon the subject matter of his examination in chief, but any such examination by the opposite party shall be under the rules of direct examination unless the witness is unwilling or hostile with reference to the opposite party, in which case, the court may, in its discretion, allow the witness to be cross-examined."³⁰³

D. SPECIAL VERDICTS AND INTERROGATORIES

Under Rule 49 the use of special verdicts or, in the alternative, general verdicts accompanied by answers of the jury to interrogatories, is within the discretion of the court, but the Rule is designed to encourage and facilitate their use.³⁰⁴ Under subdivision (a), if the court requires a special verdict and neglects to include an issue of fact raised by the pleading or evidence, a party waives his right to a jury trial on that issue unless he demands its submission before the jury retires. If any issue is omitted without such demand, the court may make a finding with respect to it, and, if the court omits to make an express finding, one will be deemed made in accord with the judgment rendered.³⁰⁵

Under subdivision (b), if answers to interrogatories are inconsistent with the general verdict, the court may direct entry of judgment in accordance with the answers, or may return the jury for further consideration of its answers and verdict, or may order a new trial.³⁰⁶ When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court may not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

³⁰³This language is substituted for the provision of the Federal Rule that the witness "may be cross-examined by the adverse party only upon the subject matter of his examination in chief." It has been held that ordinarily leading questions are not proper even under such language. *J. & B. Motors v. Margolis*, 75 Ariz. 392, 257 P.2d 588 (1953); Annot., Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 A.L.R.2d 756, 758 (1954).

³⁰⁴*Pacific Greyhound Lines v. Zane*, 160 F.2d 731, 737, Note 7 (9th Cir. 1947); Lipscomb, *Special Verdicts Under the Federal Rules*, 25 WASH. U.L.Q. 185 (1940).

³⁰⁵At common law the special verdict had to cover all issues of fact raised by the pleadings or evidence. Green, *A New Development in Jury Trial*, 13 A.B.A.J. 715 (1927). This appears to be the law in Montana under the code. See *In re Glick's Estate*, 346 P.2d 987, 997 (Mont. 1959); *Coburn Cattle Co. v. Small*, 35 Mont. 288, 293, 88 Pac. 953 (1907).

³⁰⁶Compare the code rule that when a special finding of facts is inconsistent with the general verdict, the former controls over the latter. R.C.M. 1947, § 93-5202.

E. MOTION FOR DIRECTED VERDICT

It has been the settled law in Montana that, when plaintiff and defendant move for a directed verdict, and do nothing more, each thereby waives trial by jury and the court is constituted the trier of all questions of law and fact.³⁶⁷ Rule 50 changes this. Subdivision (a) provides that, "A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts." Further, a party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made.

Subdivision (b) authorizes a trial judge, without expressly reserving his ruling on a motion for directed verdict made at the close of all the evidence, to withhold his decision thereon until after the case has been submitted to the jury. On motion within 10 days after receipt of the verdict (or, when the jury has been unable to agree, within 10 days after the jury has been discharged), the court may enter a judgment in accordance with the previous motion for directed verdict. A motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence.³⁶⁸ However, a motion for new trial may be joined with a motion for judgment n.o.v., or a new trial may be prayed for in the alternative; and the trial judge is given discretion to either grant a new trial or enter a judgment in accordance with the previous motion for directed verdict.³⁶⁹

F. JUDGMENT

The definition of a judgment in subdivision (a) of Montana Rule 54 is a combination of the code definition³⁷⁰ and the Federal Rule definition. The Federal Rule includes within the term judgment "any order from which an appeal lies."³⁷¹ The Montana Rule precedes this provision with the code definition of a judgment as "the final determination of the rights of the parties." The result is somewhat abstruse. However, it seems that the Montana Rule does not justify a position that appealable interlocutory orders are "final judgments." Section 93-8003 of the Revised Codes of Montana, 1947, which differentiates final judgments from appealable interlocutory orders, is not superseded or repealed; and other code provisions with respect to appeals, which require a distinction between interlocutory orders and final judgments, remain unchanged.³⁷²

There has been considerable difficulty in determining what constitutes a final judgment in cases where there are multiple claims and parties. Subdivision (b) of Federal Rule 54 was originally adopted in view of the wide scope and possible content of the civil suit under the Rules, in order to

³⁶⁷*In re Glick's Estate*, 346 P.2d 987, 997 (Mont. 1959); *Granier v. Chagnon*, 122 Mont. 327, 334, 203 P.2d 982 (1949).

³⁶⁸5 MOORE ¶ 50.08, at 2328 (1951).

³⁶⁹*Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215 (1947).

³⁷⁰R.C.M. 1947, § 93-4701.

³⁷¹It is settled that Rule 56, which provides for "summary judgments" in some situations where what is involved is an interlocutory adjudication, does not enlarge or restrict the right of appeal. 6 MOORE ¶ 54.01, at 5, ¶ 54.02, n.4, at 15 and ¶¶ 54.20, 54.21 (1953).

³⁷²Thus R.C.M. 1947, § 93-8004, prescribing different time limits for taking appeals, is not superseded or repealed.

avoid injustice of delay in judgment of a distinctly separate claim to await adjudication of the entire case. But frequently a party could not be sure whether an adjudication respecting one of several claims was a judgment finally disposing of the claim. To avoid loss of rights, if the adjudication was adverse to him, such a party would appeal without awaiting final disposition of the entire case, thus leaving the determination of whether there was a final judgment for the appellate court. Consequently, subdivision (b) was amended in 1946, to prohibit an appeal from a separate judgment unless the trial court certifies that there is no just reason for delay.⁵⁷³ But conflict has existed as to whether the subdivision as amended applies to multiple party actions, where the court dismisses the action as to less than all the parties suing or being sued.⁵⁷⁴ This led the Federal Advisory Committee in its 1955 Final Report to propose another amendment, stating explicitly that Rule 54(b) does apply to multiple parties as well as to multiple claims. The Montana Rule incorporates this proposal.⁵⁷⁵ No determination as to fewer than all of the claims or parties is a final judgment from which an appeal may be taken, unless the trial court certifies that there is no just reason for delay; and it is in the discretion of the trial court whether to make such a certificate.⁵⁷⁶ The certificate may be reviewed by the appellate court only to determine whether there has been an abuse of discretion in making it.⁵⁷⁷

The provision of subdivision (c) of Rule 54 with respect to demand for judgment is similar to the code provision.⁵⁷⁸ The first sentence states the traditional view that a default judgment shall not give any relief different from or in excess of that demanded. The second sentence provides that in non-default cases the judgment is not limited by the demand, but "shall grant the relief to which the party in whose favor it is rendered is entitled." This implements the fusion of law and equity and Rule 15(b). It clearly permits the granting of a different kind of relief from that prayed. Some conflict exists, however, as to whether a claimant may be awarded money damages in excess of what is demanded in his pleading.⁵⁷⁹ It has been said that *Waldrip v. Liberty Mutual Insurance Co.*,⁵⁸⁰ holding that a claimant cannot be awarded damages in excess of those demanded in the complaint, "cannot be regarded as authoritative."⁵⁸¹

⁵⁷³Federal Advisory Committee Note of 1946 to amended subdivision (b).

⁵⁷⁴3 BARRON AND HOLTZOFF § 1193.2 (1958).

⁵⁷⁵In 1961 after the adoption of the Montana Rules, Federal Rule 54(b) by amendment was expanded to cover multiple parties.

⁵⁷⁶The Rule does not specify the standard or principle to be followed by the trial court in making its certificate, but under the original Rule the question for the court was whether the judgment was rendered on a claim not arising out of the same transaction or occurrence as a claim still to be litigated. *Reeves v. Beardall*, 316 U.S. 233 (1942). Presumably the trial court in deciding whether to make a certificate should apply the same standard.

⁵⁷⁷*Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956). The standard to apply in determining whether the trial court has abused its discretion is not spelled out.

⁵⁷⁸R.C.M. 1947, § 93-4704.

⁵⁷⁹3 BARRON AND HOLTZOFF § 1194, at 38 (1958); 6 MOORE ¶ 54.62, at 1209 (1953). See also CLARK 270-71.

⁵⁸⁰11 F.R.D. 426 (D.La. 1951).

⁵⁸¹3 BARRON AND HOLTZOFF § 1194, at 38-39 (1958).

G. NEW TRIALS; AMENDMENT OF JUDGMENTS

Under Montana Rule 59 the grounds for new trial are those "provided by the statutes of the state." A motion for new trial must be served not later than 10 days after service of notice of entry of judgment, and when a motion is based upon affidavits they must be served with the motion. The opposing party then has 10 days to serve opposing affidavits, which time may be extended for an additional 20 days either by the court for good cause shown or by the parties by written stipulation.

Two significant changes from code practice are made by Rule 59, giving the court control over verdicts and judgments which has not existed under code practice. First, the court is authorized to grant a new trial on its own initiative for any reason for which it might have been granted on motion of a party.⁸⁸² The court must act, however, within 10 days after entry of judgment and must state the grounds in the order. Second, the Rule materially expands the authority of the court in acting upon motions for new trial and adds a provision for a motion to alter or amend a judgment. Subdivision (a) provides that, "On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct entry of a new judgment."⁸⁸³ Thus, in a non-jury case the Rule gives great freedom to the court, both as to what it may hear and the action that it may take. The court is not confined to a consideration of affidavits and minutes of the court, but may open up the case for the purpose of hearing additional witnesses; and the court may grant relief other and less than a new trial. The court's authority is greater than in a jury case, although subdivision (e) applies to both jury and non-jury cases and permits the court, on notice within 10 days after service of entry of judgment, to alter or amend the judgment.⁸⁸⁴ Of course, this does not authorize a court, in contravention of the constitutional guarantee of jury trial, to alter or amend a judgment entered upon a jury verdict in any manner that would constitute a re-examination of the facts found by the jury, but it goes beyond authority which has existed under code practice.⁸⁸⁵

⁸⁸²*Cf.* holdings under code practice: *Lish v. Martin*, 55 Mont. 582, 585, 179 Pac. 826 (1919); *State ex rel. Smith v. District Court*, 55 Mont. 602, 605, 179 Pac. 831 (1919).

⁸⁸³Also Rule 52(b) provides: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59."

⁸⁸⁴According to the Federal Advisory Committee Note of 1946, subdivision (e) was added to the Federal Rule by amendment to codify such decisions as *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944). In that case the action had been dismissed without prejudice under Rule 41 at the close of the plaintiff's case. On motion of defendant made 2 days thereafter, the district court set aside the dismissal without prejudice and entered a judgment of dismissal with prejudice.

⁸⁸⁵*Cf.* the situation under code practice: A district court has inherent power to amend its judgment for the purpose of correcting an error which has crept into it by misprision of the clerk, judge, or counsel, so that it may speak the truth as to what was actually decided. *Morse v. Morse*, 116 Mont. 504, 154 P.2d 982 (1945). On motion for new trial, a court may remit a portion of a verdict on condition that unless remission be accepted by the successful party a new trial will be granted, but such practice is unwarranted where the verdict was influenced by passion and prejudice of the jury. *Blessing v. Angell*, 66 Mont. 482, 485, 214 Pac. 71 (1923).

IX. CONCLUSION

This article, and the briefing sessions for lawyers and judges which were held during the months of August and September, 1961, necessarily have hit only the high spots of the new Montana procedure. The bench and bar must familiarize themselves with details of the new Rules by study and application. Inevitably problems will arise in the adjustment of the new procedure to what remains of the old. The Rules must be integrated with code provisions to effect a mode of procedure which is a systematic whole. In their application, it should be borne in mind that the Rules were promulgated pursuant to an enabling act, stating the purpose and intent "to make possible the adoption of the Federal Rules of Civil Procedure so far as seems presently practicable to the existing Montana Code."⁸⁸⁶ Liberality and elasticity of interpretation should be practiced, to comply with the admonitions of Rule 1 that the new procedure "shall be construed to secure the just, speedy and inexpensive determination of every action," and of Rule 61 that "any error or defect in the proceeding which does not affect the substantial rights of the parties" must be disregarded. Wisely used and administered the new Rules will do much to expedite the determination of controversies on their merits and to eliminate and satisfy complaints about our legal system.

⁸⁸⁶Laws of Mont. 1959, ch. 255, § 1.

PARALLEL CITATION TABLE

Montana Rules of Civil Procedure and Revised Codes of Montana, 1947.

<u>Montana Rule</u>	<u>R.C.M., 1947 Section No.</u>	<u>Montana Rule</u>	<u>R.C.M., 1947 Section No.</u>
1	93-2701-1	41	93-2706-4
2	93-2701-2	42	93-2706-5
3	93-2702-1	43	93-2706-6
4	93-2702-2	44	93-2706-7
5	93-2702-3	45	93-2706-8
6	93-2702-4	46	93-2706-9
7	93-2703-1	47	93-2706-10
8	93-2703-2	48	93-2706-11
9	93-2703-3	49	93-2706-12
10	93-2703-4	50	93-2706-13
11	93-2703-5	51	93-2706-14
12	93-2703-6	52	93-2706-15
13	93-2703-7	53	93-2706-16
14	93-2703-8	54	93-2707-1
15	93-2703-9	55	93-2707-2
16	93-2703-10	56	93-2707-3
17	93-2704-1	57	93-2707-4
18	93-2704-2	58	93-2707-5
19	93-2704-3	59	93-2707-6
20	93-2704-4	60	93-2707-7
21	93-2704-5	61	93-2707-8
22	93-2704-6	62	93-2707-9
23	93-2704-7	64	93-2708-1
24	93-2704-8	65	93-2708-2
25	93-2704-9	66	93-2708-3
26	93-2705-1	67	93-2708-4
27	93-2705-2	68	93-2708-5
28	93-2705-3	69	93-2708-6
29	93-2705-4	70	93-2708-7
30	93-2705-5	71	93-2708-8
31	93-2705-6	72	93-2709-1
32	93-2705-7	77	93-2710-1
33	93-2705-8	80	93-2710-2
34	93-2705-9	81	93-2711-1
35	93-2705-10	82	93-2711-2
36	93-2705-11	83	93-2711-3
37	93-2705-12	84	93-2711-4
38	93-2706-1	85	93-2711-5
39	93-2706-2	Appendix of forms	93-2711-6
40	93-2706-3		