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Harry W. Henry Jr.

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THE PROPOSED CODE OF CIVIL PROCEDURE FOR MISSOURI —PARTIES AND PLEADINGS

HARRY W. HENRY, JR.*

INTRODUCTION

For nearly a century Missouri courts have been functioning under a code of civil procedure which was originally adapted from the Field Code in New York.¹ Missouri, like many other states, took advantage of the wave of procedural reform which the Field Commission had inspired and in it found the strength to break away from the procedural rules of the common law. The code at once proved itself and greatly facilitated civil procedure in our courts. But Missouri, unlike New York and many of the other code states, failed to amend and modernize her procedure to keep pace with the times.² Our code, except for a few changes, has largely remained as passed in 1849.

The recent adoption of the Federal Rules of Civil Procedure, and the wide discussion evoked by their formulation have set men's minds once again to the problem of procedural improvement. Missouri, following the example of several other states, is reexamining her present system of procedure, with the view of revising it and bringing it up to date. At the sixtieth session of the General Assembly of Missouri a resolution was passed requesting the supreme court to make its recommendations to the next ses-

*Attorney, San Francisco, Cal. A.B., 1938, Washington University; LL.B., 1941, Harvard. Member, Missouri and California Bar.

1. Mo. Laws 1848-49, pp. 73-109.

2. E.g., Missouri still retains the strict code provisions as to joinder of parties. MO. REV. STAT. (1939) §§ 852-854. New York, on the other hand, adopted in 1921 a provision permitting free joinder of parties patterned after the English rule. N. Y. C. P. A. § 209. See note 46, *infra*.

sion of the legislature "for a revised code and rules of civil procedure."³ Accordingly, the supreme court appointed a committee of fifty-three lawyers to investigate the desirability of changing the existing procedure and to make their recommendation to the court.

Not long after the committee had set to work, it became apparent that opinion both in the committee and the state at large was divided on the question of the preferable method of attack. One group felt that the present code was good enough, and all that was needed was some modernizing amendments. The other favored the adoption of a wholly new code to be patterned after the Federal Rules. In view of this split the committee decided to work out two separate programs. After laboring for over a year the committee finally made its report to the supreme court on December 10, 1940, in the form of two legislative proposals.⁴ The first consisted of a few specific amendments to be made to the present code. The second was a complete draft of a general code, entitled, *A Proposed Code of Civil Procedure for the State of Missouri*. The supreme court reported this progress to the Sixty-First General Assembly and without indicating its own conclusions, requested the legislature to renew its invitation, extending to the following session the time when the court should make its recommendations and giving to the bar of the state opportunity to study, understand, criticize and support the work undertaken and accomplished.

The legislature renewed the invitation as requested and ordered copies of the two plans printed for statewide distribution. The supreme court has appointed a new committee, entitled the Special Committee on Suggestions for Revision of the Civil Code, and the question is now before the bar of the state for discussion.

It is the opinion of the writer that the supreme court should urge the legislature to adopt the Advisory Committee's "Proposed Code" (known as

3. House Joint and Concurrent Resolution No. 23 (1939). Prior to the introduction of this resolution an attempt had been made to secure the passage of an enabling act that would have empowered the supreme court to regulate procedure by rules of court (House Bill 386). The bill would have given the Missouri court substantially the same powers that Congress conferred on the United States Supreme Court. Compare U. S. C., tit. 28, §§ 723 (b), (c). Regrettably the legislature failed to pass it. This action is entirely out of line with the recent trend. See Miller, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017, 1063, where he states that the trend towards regulation by rules of court is "so impressive as to rank it first of the procedural events of that period."

4. See letter of transmittal, Missouri Supreme Court Committee on Civil Procedure.

Plan II) for he feels that the improvement of our procedure can be more surely achieved through the adoption of a wholly new code than by an attempt to patch up an old one. This Proposed Code has been largely adapted from the Federal Rules of Civil Procedure. In fact a great many sections have been taken bodily from the rules and incorporated verbatim. In some of the sections only minor and formal changes were necessary to compose differences incident to the two jurisdictions; for example, the Missouri "sheriff" was substituted for the federal "marshall" in a section on service of summons.⁵ Several sections have been added which deal with special features of Missouri procedure and are, of course, not to be found in the Rules. Thus the Proposed Code is somewhat longer and more detailed than the Rules, but considerably shorter, more compact, and more competently drafted than our present code. Although at times the Proposed Code has departed considerably from the Federal Rules, it does represent a fair duplication of the latter and embodies most of the great procedural gains which they achieved.

As already indicated, we shall be primarily concerned with the provisions of the Proposed Code which cover parties and pleadings. However, before turning to these, it is well to consider the first article of the new code which is entitled, *General Provisions*.

GENERAL PROVISIONS

The Proposed Code makes the usual provision for the one form of action⁶ and for its application to all civil proceedings whether cognizable as cases at law or in equity.⁷ This principle of the singleness of the form of the action and of the fusion of law and equity is found in the Federal Rules⁸ and in the existing Missouri code.⁹ Further comment about a provision so common to all modern codes would not be necessary here, if it were not for the omission from the Proposed Code of a section equivalent to Federal Rule 38.¹⁰ The reason for this will become apparent in a moment.

In Missouri we have not yet achieved the complete union of law and

5. MO. PROP. CODE, Art. 5, § 4.

6. MO. PROP. CODE, Art. 1, § 3.

7. *Id.* at Art. 1, § 1.

8. Fed. Rules Civ. Proc. 1 and 2.

9. MO. REV. STAT. (1939) § 847.

10. Federal Rule 38(b) provides that any party may demand a trial by jury of any issue triable of right by a jury by making a written demand therefor not later than ten days after the service of the last pleading directed to such issue, and 38(d), that the failure of the party to make a timely demand constitutes a waiver by him of trial by jury.

equity which the adoption of the Field Code was intended to secure, nor have we been alone in this experience.¹¹ Our courts have acknowledged that distinctions of form have been abolished but hold that substantive distinctions still persist,¹² in spite of the statute.¹³ Where the pleadings set forth facts raising legal issues the action is one at law, but if the pleadings present issues of equitable cognizance the action is one in equity.¹⁴ This tendency of the courts to preserve the substantive distinctions has been largely due to the influence of two factors: (1) the theory of the pleadings doctrine, and (2) the right of jury trial in common law causes.

During the latter half of the nineteenth century, Missouri courts, probably because of the predilection for the old forms, adhered closely to the strict view that the party must recover on the theory of his pleading, or fail.¹⁵ If the proof at the trial did not sustain the theory on which recovery was sought, the party was not at liberty to amend even though the pleadings contained the essential allegations upon which another and consistent theory could be established. The effect of such a rule was to preserve in spirit the rigidity inherent in the multiplicity of the forms of action, the very thing the code was designed to get away from. At common law one selected his writ; under the code he chose his theory. In either case the pleader elected his remedy at his peril. In 1910, Missouri turned toward the more liberal view which permits the party to recover under any theory which may be fairly founded upon the cause of action stated.¹⁶ There has been some vacillation by the Missouri courts from one view to the other since then, and hence it is doubtful what the exact rule is.¹⁷ Nevertheless,

11. *E.g.*, *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917). "In New York, the birth state of the Code, there seems to be actually less fusion today than there was seventy-five years ago." Clark, *Union of Law and Equity* (1925) 25 COL. L. REV. 1, 2.

12. *Sandwich Mfg. Co. v. Bogie, Adm.*, 317 Mo. 972, 982, 298 S. W. 56 (1927).

13. Mo. REV. STAT. (1939) § 847. Clark points out that the corresponding provision in the original New York Field Code was intended by its makers to abolish not only the forms but the "inherent" distinctions between actions at law and in equity. Clark, *op. cit.* p. 3.

14. *Ebbs v. Neff*, 325 Mo. 1182, 1191, 30 S. W. (2d) 616 (1930).

15. See, Albertsworth, *The Theory of the Pleadings in Code States* (1922) 10 CAL. L. REV. 202, 209, and review of cases cited; Whittier, *The Theory of a Pleading* (1908) 8 COL. L. REV. 522, 532; James, *Trial by Jury and the New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 1022, 1026-28.

16. See discussion of F. L. Kuhlman, *Theory of a Pleading Under the Missouri Code* (1937) 22 WASH. U. L. Q. 251.

17. The Missouri law on this matter is in a state of flux. The more recent appellate decisions follow the liberal view, *e.g.*, *Vaughn v. Missouri Power & Light Co.*, 89 S. W. (2d) 699 (Mo. App. 1935), while some of the older supreme court decisions have applied the stricter view, *e.g.*, *Sandwich Mfg. Co. v. Bogie, supra*.

the tendency is in the right direction. The more liberal view certainly must prevail and with it we may expect a union of law and equity which is more real and complete.

The other factor impeding the unification of law and equity is the right to trial by jury of issues of fact in actions at law. Inasmuch as our constitution contains the usual provision that the "right to jury trial shall remain inviolate,"¹⁸ courts have felt compelled at all times during the proceedings to distinguish between legal and equitable issues with regard to the necessity of preserving a party's right to such trial.¹⁹ Former Dean Clark of Yale²⁰ and others²¹ have argued that the courts under the codes have felt an unnecessary compulsion in this respect. They maintain that the jury question should not have been permitted to influence the pleading stage of the proceedings. Their argument is based on the fact that the pleadings under the codes were intended to serve only the function of informing the court and other parties of the facts upon which the petitioning party based his right of recovery. They were not intended "to serve as sign posts to indicate the kind of trial desired."²² When the pleadings are closed and the issues defined there is then ample time in which to determine what the form of the trial shall be. Indeed, under a unified system of law and equity such as was contemplated by the codes, one should not have referred to issues as being "legal" or "equitable." They contend rather that it would have been more proper had the issues raised by the pleadings been simply denominated as "jury" or "court" issues.

However, the codes as they were drawn did not present a clean break with the old common law system. Much of the old was reflected in the procedural devices of the new. It is too much to have expected court and counsel to have ceased thinking in terms of legal as distinguished from equitable issues over night. The pleadings were bound to have reflected the same tendency. So long as the distinction had to be ultimately drawn for trial purposes, it was only natural for counsel to have used the pleadings to exploit his claim for a jury trial or for an equitable proceeding as the case

18. MO. CONST. art. II, § 28.

19. *Ebbe v. Neff*, *supra*.

20. Clark, *The Union of Law and Equity*, (1925) 25 COL. L. REV. 1; Clark and Moore, *A New Federal Civil Procedure—II, Pleadings and Parties* (1935) 44 YALE L. J. 1291; CLARK, CODE PLEADING (1928) 44-67.

21. Pike and Fisher, *Pleadings and Jury Rights in the New Federal Procedure* (1940) 88 U. PA. L. REV. 645.

22. CLARK, CODE PLEADING (1928) 65.

might be. Nevertheless, Clark has pictured a desirable goal and one which we hope ultimately to attain. Consequently, any device which will lead us in this direction by removing obstructions to the unification of law and equity should be earnestly considered.

The most obvious would be that of curtailing trial by jury. In England, by act of Parliament, the scope of jury trial has been confined to certain kinds of action.²³ In Missouri such a course is not open unless we are ready to amend our constitution. This is neither suggested nor contemplated. The most effective device yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to make a timely demand or be deemed to have waived his rights. This scheme is being used successfully in Federal Rules;²⁴ some states have gone farther and require the party to pay a special jury fee.²⁵ It has been found that the number of jury trials tend to decrease considerably,²⁶ and hence the problem of distinguishing between legal and equitable issues ceases to be of such significance.²⁷ Only in the cases where a jury trial is claimed need the court ever bother about the presence of jury issues at all. And even in these cases the jury question need not affect the pleading-stage to any extent. This is true, because generally the demand for jury trial will come near the close of pleading and after issues have been defined.²⁸ Consequently the pleading-stage is frequently over before the problem really presents itself. Thus the effect of the troublesome jury question can be re-

23. 23 & 24, Geo. V, c. 36, § 6 (1933).

24. Fed. Rules Civ. Proc., 38.

25. *E.g.*, Ill. Civ. Pract. Act 1933, § 64 (1); CAL. CODE CIV. PROC. (Deering, 1937) § 631(5); MICH. COMP. LAWS (1929) § 14273.

26. Connecticut adopted this method with its code in 1880. For present provision see CONN. GEN. STAT. (1930) § 5624. The result has been more jury waived cases. CLARK, CODE PLEADINGS (1928) 68. On page 54 he makes an interesting comparison between the number of jury-tried cases in Connecticut in 1927 with the number in New York which has the affirmative waiver provisions found in most of the Field Codes, including our own. (Compare N. Y. C. P. A. § 426 with Mo. REV. STAT. (1939) § 1101. See also the discussion in Pike and Fisher, *op. cit.* 88 U. PA. L. REV. 645, 646-49.

27. In Connecticut out of all cases examined over a certain period, only about 7% had juries. Most of these were negligence and tort actions. Thus only about 1.6% of all the cases filed ever present a sharp jury-trial problem. Pike and Fisher, *op. cit.* p. 648. That the necessity of demand for jury and jury fee has reduced the incidence of jury trials, see Miller, *The Old Regime and the New in Civil Procedure* (1936) 14 N. Y. U. L. Q. REV. 1, 20.

28. As to the best time for requiring a demand for jury trial, see James, *Trial by Jury and the New Federal Rules of Procedure* (1936) 45 YALE L. J. 1022, 1048.

duced to a minimum, thereby removing one stumbling-block in the way of complete union of law and equity.

The preliminary draft of the Proposed Code incorporated Federal Rule 38 verbatim. However, the committee, at the November, 1940, meeting, emasculated all of the provision with the exception of the section guaranteeing the right to trial by jury.²⁹ A chance to improve our procedure generally and to reduce the cost of rendering justice by cutting down the use of jury trials has been lost. The possibilities of a complete fusion of law and equity in Missouri is as remote as ever. The action of the committee is indeed regrettable.

In regard to service and filing of pleadings and other papers, the Proposed Code³⁰ as drawn conformed exactly to Federal Rule 5. The only substantial change this provision would have made in the existing practise would have been the sanctioning of service of pleadings, etc., by mail. The full committee rejected the prospective change, although service by mail seems to be working well enough in the federal courts, and is certainly an added convenience. Instead, on this detail they decided to retain existing practice and inserted, by way of amendment to section 5, the present statutory provision³¹ on service of papers.

Time provisions of the Federal Rules are embodied intact in the Proposed Code.³² The computation of time and the time of hearing of motions does not involve a substantial change over the existing procedure.³³ The present free discretion of Missouri courts to enlarge time to file pleadings and motions³⁴ is extended to matters generally but would, of course, be limited in two respects as in the case of federal practice³⁵ where the court is not permitted to enlarge the period for making a motion for new trial, or the period for taking an appeal as provided by law. The procedural technicalities which have grown up around the outmoded institution of terms of court will be largely eliminated, for the period of time provided for the

29. MO. PROP. CODE, Art. 9, § 8.

30. MO. PROP. CODE, Art. 1, §§ 4-8.

31. MO. REV. STAT. (1939) § 910.

32. *Id.* at Art. 1, §§ 9-12. Fed. Rules Civ. Proc. 6.

33. Compare MO. REV. STAT. (1939) §§ 907 and 912; § 912 (adopted in 1848) provided for service of notice five days prior to hearing. The Proposed Code will narrow the time to two days, art. 1, § 12. The Federal Rules provide for five days, Rule 6(d); otherwise the Proposed Code and Federal Rules are identical as to time provisions.

34. MO. REV. STAT. (1939) § 942.

35. Fed. Rules Civ. Proc. 6(b).

doing of an act is not to be affected by the expiration of a term of court.³⁶ Terms of court could not be abolished directly for the Missouri Constitution requires the circuit court to hold at least two terms annually in each county.³⁷ This constitutional hurdle, however, is neatly circumvented by providing that every term shall continue until the opening of the next term.³⁸ This improvement is an important one and should be welcomed by the bar generally.

PARTIES

The article on parties substantially covers the same material as Federal Rules 17 to 25.³⁹ A few minor changes and some additions have been made. It will be of interest, therefore, to note what salutary effects if any these provisions may have.

The real party in interest provision found in the Federal Rules and the Proposed Code has the same content as sections 698 and 699 of the existing procedure.⁴⁰ These sections have been interpreted rather narrowly in Missouri,⁴¹ and it was hoped that some change could have been made. Unfortunately, the literal adoption of the Federal Rules in this situation may only preserve the existing law, for our courts will very likely continue to interpret this provision in line with the cases which have construed sections 698 and 699. Here it would have seemed desirable for the committee to have departed from the Federal Rules, or at least to have included a supplementary section, which would have required our courts to reach an interpretation consonant with that obtaining under the Federal Rules, and in the more liberal states.

Next we come to joinder of parties. So far as compulsory joinder is concerned, the same results will obtain under the Proposed Code as in the

36. MO. PROP. CODE, Art. 1, § 11.

37. MO. CONST. art. 6, § 22.

38. MO. PROP. CODE, Art. 1, § 16.

39. MO. PROP. CODE, Art. 2, §§ 1-25. Federal Rule 18 on Joinder of Claims, however, has been included in art. 6 which deals with Pleadings and Motions. As to Third Party Impleader, see note 65, *infra*.

40. Fed. Rules Civ. Proc. 17(a); MO. PROP. CODE, Art. 2, § 1; MO. REV. STAT. (1939) §§ 849, 850.

41. Wheaton, *Missouri Practice and the Federal Rules: A Comparative Study* (1940) 25 WASH. U. L. Q. 505, 516. That the Missouri courts take a "narrow and technical view" as to the right of an equitable owner to sue in ejectment, see CLARK, CODE PLEADING (1928) 114. See also Clark, *The Real Party in Interest Statute in Missouri* (1914) 4 U. OF MO. BULL. L. SER. 3.

existing practice, namely that persons having joint interests must be made parties.⁴² Permissive joinder, however, presents far more difficulty.

The Field Code made a more liberal provision for permissive joinder of parties plaintiff over that of the common law.⁴³ It was visualized that all persons having an interest in the subject of the action and in obtaining the relief demanded might join as plaintiffs.⁴⁴ The courts went to work on this provision and in some of the states constricted the expected possibilities of joinder greatly. Narrow definitions were assigned to the phrase "subject of the action" and a requirement that the plaintiffs each have an interest in *all* the relief demanded was exacted. If a plaintiff had an interest in the judgment less than the entire amount demanded there was declared a misjoinder.⁴⁵ Missouri has joined with the minority in following this illiberal view.⁴⁶ Under the Proposed Code persons claiming a right to relief jointly, severally, or in the alternative may join in one action if such right arises out of the same transaction, occurrence, or series of transactions or occurrences, and if a question of law or fact common to all will be raised in the action.⁴⁷ This would eliminate all the technicalities which have grown up about "the subject of the action." Alternative joinder, a device which may be very useful at times, would be new for it was neither permitted at common law nor under the Field Code. The Proposed Code would specifically abolish the requirement that a person be interested in all the relief demanded, by allowing a plaintiff to recover judgment according to his respective interest in the relief demanded.⁴⁸

Missouri also stands in the illiberal column so far as joinder of defendants is concerned, although there has been a tendency to relax this position

42. Compare: MO. PROP. CODE, Art. 2, §§ 6 and 7 with Federal Rule 19, and MO. REV. STAT. (1939) §§ 853 and 972. The Proposed Code has been amended to omit Federal Rule 19(b) and (c), and MO. REV. STAT. (1939) § 972 has been substituted. Both provide that whenever a complete determination of a controversy cannot be had without the presence of other persons, they may be ordered to appear in the action.

43. Generally joinder was permitted only where persons had joint interests. CLARK, CODE PLEADING (1928) 244.

44. See MO. REV. STAT. (1939) §§ 851, 852 and 854.

45. CLARK, CODE PLEADING (1928) n. 62, p. 253.

46. For a good discussion of the rule in Missouri and review of the cases, see POMEROY, CODE REMEDIES (5th ed. 1929) 193. He states that Missouri courts have in effect been willing to apply § 851 only to equitable and not legal actions.

47. MO. PROP. CODE, Art. 2, § 9; also Fed. Rules Civ. Proc. 20(a).

48. MO. PROP. CODE, Art. 2, § 9.

somewhat.⁴⁹ Joinder of defendants would also be completely liberalized by the Proposed Code, for the same test of joinder is applied as in the case of plaintiffs.

It is evident that the test of "a common question of law and fact" was originally taken from equity where a practice of much freer joinder prevailed. It was first adapted by the English nearly a half century ago.⁵⁰ Since then several American jurisdictions have incorporated the English Rule into their codes.⁵¹ Fears that joinder will run unbridled are not well founded, since the court has the discretion to order separate trials whenever joinder would result in delay or prejudice, or unduly embarrass one of the parties.⁵² Such a rule naturally tends to reduce litigation for all parties involved in a dispute may be joined and the controversy settled in one action. Whether the Proposed Code is accepted or not, the Missouri legislature should follow the lead of the more liberal states and make free joinder of parties a part of our procedure.

Missouri has no general interpleader statute such as that found in the New York Code as amended in 1851.⁵³ What provisions we do have are scattered through our code conferring upon the party a right to interplead in certain specified situations. The two oldest sections make interpleader possible where property or money has been subjected to an attachment⁵⁴ or garnishment.⁵⁵ In 1911, as a part of the Uniform Warehouse Receipts Act, a warehouseman was given the privilege to interplead rival claimants to the good which he held either by way of original or defensive interpleader.⁵⁶ With the passage of the Uniform Bill of Lading Act in 1917 the same was accorded to carriers.⁵⁷ The Proposed Code would make original interpleader

49. *E.g.*, certain early cases held that inasmuch as a guarantor's undertaking is a separate and independent contract, and not a joint engagement with the principal, a joint action against both principal and guarantor cannot be maintained, *Graham v. Ringo*, 67 Mo. 324 (1878). But, *Write Away Pen Co. v. Buckner*, 188 Mo. App. 259, 175 S. W. 81 (1915) allowed joinder. *McConnon & Co. v. Kennon*, 281 S. W. 450, 451 (Mo. 1926), *semble*.

50. As to the English practice, see Miller, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017, 1022.

51. CAL. CODE CIVIL PROC. (Deering, 1937) §§ 378, 379a; N. J. COMP. STAT. (2 Cum. Supp., 1911-1924) tit. 163, §§ 280, 282; N. Y. C. P. A. §§ 209, 211; ILL. REV. STAT. (1937) c. 110, §§ 147-148.

52. MO. PROP. CODE, Art. 2, § 10; also Fed. Rules Civ. Proc. 20(b).

53. New York Laws, CODE OF PROCEDURE, § 122.

54. MO. REV. STAT. (1939) § 1489.

55. MO. REV. STAT. (1939) § 1568.

56. MO. LAWS 1911, p. 431; MO. REV. STAT. (1939) § 15515.

57. MO. LAWS 1917, p. 564; MO. REV. STAT. (1939) § 15575.

available to any person who might be exposed to double or multiple liability, and defensive interpleader would be obtainable by cross-claim, or counter-claim.⁵⁸ The provision would eliminate the old requirements of privity and identity of claims, and permit the stakeholder to have an interest in the fund. Such an interpleader provision might not be necessary in view of the free joinder of parties permitted by Art. 2, § 9, because as has been suggested, the joinder provision of itself could probably take care of all situations calling for interpleader.⁵⁹ But the provision should obviously be retained for it serves to make the code more elastic, and abolishes some old distinctions which might arise to cause further harassment.

As in the case of interpleader, Missouri has no general statute⁶⁰ covering intervention, but there are several sections in the code⁶¹ giving a third person the right to intervene in certain types of proceedings where he claims an interest in property subject to litigation.⁶² Under the contemplated intervention provision of the Proposed Code, these statutes would be unaffected, for such rights as are conferred by statute are preserved.⁶³ Otherwise, the Proposed Code would greatly broaden the possibilities of intervention in Missouri both as to intervention by right and permissive intervention. An applicant would be able to intervene as of right wherever his interests are inadequately represented by existing parties, and he might be bound by a judgment. Also, an applicant may intervene where he may be adversely affected by distribution of property in the custody of the court. Permissive intervention is extended along the line of permissive joinder of

58. MO. PROP. CODE, Art. 2, § 12; Fed. Rules Civ. Proc. 22.

59. CLARK, PROCEEDINGS OF AMERICAN BAR ASSOCIATION INSTITUTE, CLEVELAND (1938) p. 263.

60. The closest approach to a general statute is MO. REV. STAT. (1939) § 852 which provides that, "any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff. . . ." This provision has been so narrowly construed as to exclude much chance of intervention. Where a 30 year adverse possessor sued the holder of the paper title to quiet title, and a third party who claimed part of the land also by adverse possession tried to intervene, held: not entitled to intervene, since he had no "interest in the controversy." *Miller v. Boulware*, 267 Mo. 487, 492, 184 S. W. 1148 (1916).

61. *E.g.*, MO. REV. STAT. (1939) § 343 (any person claiming title to land against which dower is asserted may be made defendant); § 1489 (the same as to property or money subjected to attachment); § 1533 (person from whom defendant in ejectment derives title); there are several others.

62. The early codes provided generally that in an action for recovery of real or personal property, a person not a party may intervene if he has an interest in the subject matter. *New York Laws, CODE OF PROCEDURE*, § 122. This was widely adopted. For list of states, see *POMEROY, CODE REMEDIES* (5th ed., 1929) 462. Since the Missouri Code was adopted in 1849, such provision does not appear.

63. MO. PROP. CODE, Art. 2, §§ 18, 19. Fed. Rules Civ. Proc. 24(a), (b).

parties by making the test of a common question of law or fact the determining factor. Again, as in case of joinder the court has the discretion to deny the applicant's motion if it would delay or prejudice the original parties to the action. The state or any subdivision thereof is given right to intervene wherever the validity of a statute or regulation involving public interest is being contested.⁶⁴

Third party impleader, as set forth in the Federal Rules, is provided for in the Proposed Code, giving the defendant the privilege of bringing in any person not a party to the action, who may be liable to him on the plaintiff's claim, or directly liable to the plaintiff.⁶⁵ It is a procedural device relatively new in the American scene having been tried for the first time in the United States by Wisconsin in 1915.⁶⁶ Traditionally, under the codes a defendant could not bring in third persons unless the strict grounds of joinder were met; indeed, a defendant's right to cross-claim against a person already a party was confined to only those claims which could be interposed in defense of plaintiff's cause of action. This is the existing practice in Missouri.⁶⁷ Third party impleader should be made a part of our procedure for it tends to reduce litigation and costs by enabling a settlement to be made in one proceeding of what would normally require several distinct proceedings.

In Missouri, representative suits or class actions are proper only in cases of equitable cognizance.⁶⁸ Most of the code states, following the example set by New York in 1849, have passed statutes making representative suits equally available in legal causes.⁶⁹ Federal Rule 23, which the Proposed Code has followed,⁷⁰ exhibits an attempt simply to codify the ancient equity practice.⁷¹ The test is laid down that where persons constituting a class are very numerous and there is a common question of law or fact affecting the rights of each, and common relief is sought, they may all be

64. Compare: MO. PROP. CODE, Art. 2, § 20 and Fed. Rules Civ. Proc. 24(e).

65. MO. PROP. CODE, Art. 2, § 16; Fed. Rules Civ. Proc. 14. Note that third party impleader has been classified as a section on parties, whereas, in the Federal Rules it is dealt with under "Pleadings and Motions."

66. Wis. Laws 1915, c. 219, § 6; WIS. STAT. (1935) § 260.19. See also, New York Laws 1922, c. 624; N. Y. C. P. A. § 193.

67. *Campbell v. Spotts*, 331 Mo. 974, 55 S. W. (2d) 986 (1932).

68. Discussed in *Lilly v. Tobbein*, 103 Mo. 477 at 488, 15 S. W. 618 at 620 (1890).

69. New York Laws 1849, c. 438, § 119; N. Y. C. P. A. § 195. For list of states see CLARK, CODE PLEADING (1928) 277.

70. MO. PROP. CODE, Art. 2, §§ 13-15.

71. See old Federal Equity Rule 38.

represented in a suit by some member of the class. Such a rule would not only make possible class actions in legal causes, but would also perform the added service of clarifying our existing equity rule, the limits of which have been difficult to define. Interesting to note also is that Proposed Code specifically exempts labor unions from the operation of this section so far as their rights to sue or be sued are concerned.

Substitution of parties need not detain us, for the Proposed Code would cause no substantial change.⁷² However, the provision for substitution, modeled after Federal Rule 25, would greatly simplify our existing statute law which covers approximately twenty sections.⁷³ Substitution of parties, under the Federal Rule, in case of death, incompetency or transfer of interest may be made at any time within two years after the death of such party. The time for making the motion under the existing practice is made to depend upon terms of court. The Proposed Code has set the period at one year.

PLEADINGS

The Article on Pleadings and Motions in the larger part conforms to Federal Rules 7 to 16. The Proposed Code, however, makes one important departure and that is in the manner in which objections are taken to pleadings. It will be seen that the procedural machinery for handling objections as developed by the Proposed Code manifests a wholly different pleading concept from that of the Federal Rules.⁷⁴ Joinder of claims as noted above is included under this heading⁷⁵ although in the Federal Rules it appears under "Parties." These are the principle distinctions; others will be noted in the discussion which follows.

The Proposed Code visualizes the adoption of federal pleadings to state practice.⁷⁶ We would have a petition and an answer; reply would be made only if the answer contained a counterclaim denominated as such, or if the court ordered a reply to be made. Further pleading would be permitted only in case there was a cross-claim or third party petition. Objections and certain defenses would be taken by motion. In the present state practice we have a petition and an answer or demurrer or both; plaintiff may reply or

72. MO. PROP. CODE, Art. 2, §§ 21-25.

73. MO. REV. STAT. (1939) §§ 1042-1056 and 1220-1224.

74. Compare: Fed. Rules Civ. Proc. 12, and MO. PROP. CODE, Art. 6, §§ 30-41.

75. MO. PROP. CODE, Art. 6, §§ 6 and 7.

76. Compare: Fed. Rules Civ. Proc. 7, and MO. PROP. CODE, Art. 1, § 1.

demur to new matter set up in the answer. Outside of demurrer to the reply and the regular code motions, further pleading is not permitted.⁷⁷ It is evident that the proposed procedure would cut the pleadings under the existing practice at least one step shorter and in some cases two. Professor Carl Wheaton in canvassing the possibilities of adapting the Federal Rules to Missouri practice voiced objection to the reduced number of pleadings and to their rather sketchy content.⁷⁸ He suggested that in a state version of the Federal Rules, pleadings should be made flexible by permitting courts to allow pleadings beyond the reply. If only a minimum of pleadings are permitted, parties may go to trial uncertain of the issues. That fuller and more detailed pleadings were wanted, should be indicated by expanding the federal forms which accompany the Rules.

With this position I cannot agree. Since we are contemplating a complete revision of our practice, so as to draw it into line with the Federal Rules, it would seem desirable to adhere to the procedural principles of that system as closely as possible. These Rules exhibit a new pleading concept which is somewhat different from that of fact pleading upon which our present practice is based. Fact pleading was introduced by the code-makers in the middle of the last century to avoid the artificiality and complexity of common law pleading.⁷⁹ Pleadings were not to go on mechanically till a single issue was reached. Rather it was expected that by confining the pleadings to the ultimate facts that the issues would be as clearly raised and that the pleadings could be cut short at the reply. Thus, in the terms of the codes, the pleader was required to set forth the "substantive facts" constituting his "cause of action."⁸⁰ Evidence or legal conclusions could not be plead. The courts found it necessary to draw fine distinctions between facts, law, and evidence, whenever the sufficiency of a pleading was questioned by a demurrer.⁸¹ The term "cause of action" has also given the courts a great deal of trouble so that it is now very difficult to define or employ the term.⁸² As a result of this body of judicial opinion, pleadings under the

77. See MO. REV. STAT. (1939) §§ 916, 920, 922, 924, 928, 931.

78. Wheaton, *Missouri Practice and the Federal Rules: A Comparative Study* (1940) 25 WASH. U. L. Q. 505, 509, 511.

79. CLARK, CODE PLEADING (1928) 30, 150.

80. E.g., MO. REV. STAT. (1939) § 916.

81. Simpson, *A Possible Solution of the Pleading Problem* (1939) 53 HARV. L. REV. 169, 183-184; Clark and Moore, *A New Federal Civil Procedure—II, Pleadings and Parties* (1935) 44 YALE L. J. 1291, 1303.

82. Miller, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017, 1040; Simpson, *op. cit.* (1939) 53 HARV. L. REV. 169, 184. See list of cases in POMEROY, CODE REMEDIES (1929) §§ 411, 412, 413.

codes have emerged as rather detailed and complicated affairs, the very thing the code-makers wanted to get away from.

The Federal Rules have approached the pleading question from a somewhat different angle. The tendency is decidedly toward a more general kind of pleading rather than the detailed and lengthier pleadings characteristic of the Codes. An examination of the forms which accompany the Rules reveals this fact very clearly.⁸³ Witness how Rule 8 dealing with the content of pleadings has been drafted. The pleader need make only "a short and plain statement showing that he is entitled to relief." Under this rule all the pleader is called upon to do is to appraise the other party of his claim, so as to fairly advise him what he is being sued for. The tricky "cause of action" has been purposely omitted from the draft. The requirement that "substantive facts" be plead to the exclusion of evidence and legal conclusions is no longer imposed. Thus a fertile field of judicial technicality has been swept away and with it the opportunities for delay and obstruction which it gave.⁸⁴ From the foregoing it is evident that the traditional function of pleading has been modified. The emphasis is no longer upon the formulation of issues. Rather the office of pleading has become one of notification. The problem of developing and formulating issues for trial has been left to the more efficient procedural devices of discovery and pre-trial conference.⁸⁵

Through the machinery of a liberal discovery a party may learn in advance of trial upon what the opposite party is basing his claim, and how he will seek to prove it. Opportunity for surprise is minimized by the right of either party to examine the other or his witnesses by oral or written interrogatories, and by the privilege of examining on showing good cause, any document or papers which are material to the action and in possession of the adverse party.⁸⁶ This free examination of witnesses and parties enables counsel to know in advance what the nature of their testimony will be and

83. See, Fed. Rules Civ. Proc. 84, also Clark, *The Handmaid of Justice* (1938) 23 WASH. U. L. Q. 296, 316-18.

84. Brown, *Pleading Under the Proposed Florida Rules of Civil Procedure* (1940) 14 FLA. L. J. 382, 383; Clark, *Proposed Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 447, 450.

85. Pike and Willis, *The New Federal Deposition—Discovery Procedure: I* (1938) 38 COL. L. REV. 1179.

86. Hyde, *Streamlined Procedure* (1940) 8 KAN. CITY L. REV. 205, 212; Clark, *op. cit.* (1938) 23 WASH. U. L. Q. 296, 318. For general discussion see, Sunderland, *Discovery Before Trial Under Federal Rules* (1939) 15 TENN. L. REV. 737.

in general what course the trial may be expected to take. By means of pre-trial conferences,⁸⁷ issues of fact and law may be definitively drawn. Both counsel together with the judge can in a short space of time shape the pleadings, and by compromise and stipulation agree upon the litigable issues presented by the case. By weeding out sham and irrelevant matters in advance, trials may be shortened, for only the real issues in dispute ever get before the court and jury. Experience has demonstrated that quite frequently such pre-trial scrutiny of a case is conducive of compromise or settlement simply because no issue really worth a trial is shown to exist. Pre-trial procedure therefore not only simplifies the case, but tends to reduce the costs of rendering justice as well.⁸⁸

The Proposed Code in adopting the general or notice pleading of the Federal Rules has not failed to make provision for discovery or pre-trial procedure.⁸⁹ The existing Missouri law on discovery by deposition⁹⁰ which is considered liberal and wholly satisfactory⁹¹ has been retained, but has been supplemented by the Federal Rules which deal with discovery by way of interrogatories, production of documents, physical and mental examination of persons, and of admission of facts and of genuineness of documents.⁹² The pre-trial procedure of Federal Rule 16 has been taken over.⁹³ One basic

87. See note 93, *infra*.

88. Pre-trial procedure has been found successful in Boston, Detroit and Cleveland where it has done much to relieve congested trial calendars. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months* (1937) 23 A. B. A. J. 966, 969. There are several articles which describe the operation of pre-trial procedure and its effectiveness. See, Sunderland, *The Theory and Practice of Pre-Trial Procedure* (1937) 36 MICH. L. REV. 215; Phillips, *Should the Rule of Federal Civil Procedure Be Adopted by the Supreme Court of Florida* (1940) 14 FLA. L. J. 339, 342; Moynihan, *Observations on Pre-Trial Procedure* (1940) 11 MO. BAR J. 144 (relating Judge Moynihan's personal experiences with pre-trial work in Detroit).

89. MO. PROP. CODE, Art. 8, and Art. 6, § 55.

90. MO. REV. STAT. (1939) §§ 1917-1948, 1953-1970.

91. Hyde *op. cit.* (1940) 8 KAN. CITY L. REV. 205, 213. That the Missouri provisions have adequately protected defendants from "fishing expeditions," see Clark, *A Striking Feature of the Proposed New Rules* (1936) 22 A. B. A. J. 787, 789.

92. Compare: Fed. Rules Civ. Proc. 33, 34, 35, 36, 37 and MO. PROP. CODE, Art. 8, §§ 2, 3, 4, 5, 6. There have been several minor changes made. It seems a mistake, however, to have dropped Federal Rule 37(b) (1) making it a contempt of court for refusing to make discovery.

93. Federal Rule 16 provides: In any action the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- 1) The simplification of the issues;
- 2) The necessity or desirability of amendments to pleadings;
- 3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

objection to the provision as drafted is that it fails to make pre-trial procedure compulsory.⁹⁴ In this respect the Proposed Code should not have followed the Federal Rules.

To sum up then, we may say that there is really nothing to fear from requiring shorter and more general pleading in Missouri courts. Ample procedural safeguards are contemplated which will assure against surprise and prevent uncertainty of issue at trial. Giving Missouri courts permission to extend pleadings at will, as Professor Wheaton would have us do, would be an open invitation to continue the existing practice of detailed code pleading. The natural tendency of court and bar is to perpetuate the old ways, with the result that a program for procedural improvement is very often crippled and distorted from the start.⁹⁵ We want to avoid this if we can. The Proposed Code has therefore properly indicated that a new kind of pleading is meant and wanted.

Federal Rule 11 requires an attorney to sign a pleading. His signature constitutes a certificate by him that he has read the pleading, that to the best of his knowledge there is good ground to support it, and that it has not been interposed for delay. "For a wilful violation of this rule, an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted." The Proposed Code, as originally drafted, included the same provisions but the full committee withdrew them. There seems to be no reason for such action even though there is doubt that attorneys may be effectively policed through such a measure. This language certainly would have done no harm, and would

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 to the jury;

6) Such other matters as may aid in the distribution of the action.

Art. 6, § 55 of PROPOSED CODE has dropped "5" and "6," above. It seems a mistake to cut-out "6" for it is desirable to give pre-trial judge ample discretion.

94. Mitchell, *op. cit.* (1937) 23 A. B. A. J. 966, 970, explains that pre-trial was not made compulsory in the Federal Rules, because the drafting committee felt that the rule could be effective only if sympathetic cooperation of the federal judges were secured, and that this could not be gained through compulsion. However, in England it is compulsory.

95. "The attitude taken by the courts at the outset will control the operation of practice acts long after new generations of judges have come upon the bench with more liberal views. The original New York Code of Civil Procedure failed of effect in many important particulars, . . . because so many of the judges who were first called upon to administer it were determined to limit its operation and preserve the principles and the dogmas of the older procedure wherever possible." Pound, *Some Principles of Procedural Reform* (1910) 4 ILL. L. REV. 388, 390. As to the early illiberal interpretation of Missouri Code, see Hyde, *Simplification of Missouri Procedure* (1939) 7 KAN. CITY L. REV. 225, 226.

have furnished a court with a clear basis for meting out punishment to an attorney should it ever have occasion to do so.

The provision on joinder of claims in the Proposed Code will permit great improvement in the existing practice.⁹⁶ As our code is now constituted, seven categories of "causes of action" are set forth within any one of which joinder is permitted.⁹⁷ One cannot join causes in one category with those of another. The whole scheme is rather clumsy and needlessly complex. This standard code provision has been gradually giving way to a more liberal type patterned after the English rule which has been followed by several states.⁹⁸ The tendency has been constantly towards freer joinder and in the Federal Rules the principle is carried to its fullest extent by permitting unlimited joinder of claims whether the parties are identical or multiple. Thus, under Federal Rule 18, it is difficult to conceive of a claim which could not be joined. The only limitation placed upon the right of joinder is the power of the judge to order separate trials where it would be unwieldy or confusing to try the joined claims at the same time.⁹⁹ This provision for joinder of claims, together with the liberal joinder of parties section, already discussed, would give our state procedure under the Proposed Code a flexibility heretofore unknown. We should by all means adopt both of these measures.

The Proposed Code as originally drafted listed defenses which had to be affirmatively plead. The provision followed Federal Rule 8 (c) identically by requiring "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, and waiver" to be set forth affirmatively. The committee amended this section so as to cut out all reference to these specific defenses.¹⁰⁰ This action would seem undesirable for the retention of this section would have given our code greater clarity and definiteness.

96. MO. PROP. CODE, Art. 6, §§ 6 and 7.

97. MO. REV. STAT. (1939) § 917.

98. N. Y. C. P. A. § 258 as amended by New York Laws 1935, c. 339; ILL. REV. STAT. (1937) c. 110, § 168; see English Rules Under the Judicature Act (Annual Practice, 1937) O. 18, r.r. 1-6. A short history of the development of joinder of causes is found in Miller, *op. cit.* (1937) 30 HARV. L. REV. 1017, 1021-1025.

99. Fed. Rules Civ. Proc. 21; MO. PROP. CODE, Art. 2, §§ 10, 11(a).

100. Compare: Fed. Rules Civ. Proc. 8(c) and MO. PROP. CODE, Art. 6, § 9. See also Ill. Pract. Act 1937, c. 110, § 168(4) which requires certain defenses to be affirmatively plead.

If the Proposed Code is adopted, time for pleading under state and federal practice will substantially conform. Under the existing system it is determined by terms of court.¹⁰¹ The time between pleadings may vary from fifteen days to several months depending on the date for the opening of the proper term. Missouri should abolish this antiquated system, and substitute in its place a simplified and more definite one. Briefly, under the Proposed Code a responsive pleading must be served within twenty days (subject to the court's power to enlarge time) after the prior pleading.¹⁰² If a motion is interposed it will extend the time for making a responsive pleading. If the motion is denied or hearing on the motion is postponed until trial, the responsive pleading may be filed within ten days after the court's ruling. However, if the motion be one for a bill of particulars or more definite statement and is granted, ten days are given to the one whose pleading is attacked to meet the objection. After he serves his more definite statement or the bill of particulars, the party who made the motion is given ten further days in which to make his responsive pleading. Thus it is evident that under the Proposed Code the pleading time would be definite and not fortuitous; each party would be given a proportionate share of the time eliminating the lopsided schedules which now obtain.

The Proposed Code has utilized the general phraseology of Federal Rule 12 which sets up the procedure by which objections to pleadings may be taken.¹⁰³ However certain modifications have been made which will greatly change the procedure under the Proposed Code. We must briefly compare the two systems before attempting an appraisal of the practice as it would prevail under the latter.

Under the Federal Rules all defenses in law or fact must be plead in the answer. However there are six enumerated defenses which may be made by motion or answer at the pleader's option. These six 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, and (6) failure to state a claim upon which relief can be granted.¹⁰⁴ Hereafter, we may refer to the first five simply as the "jurisdictional defenses." Demurrers, pleas, and exceptions for insufficiency of a

101. MO. REV. STAT. (1939) § 921.

102. MO. PROP. CODE, Art. 6, § 27.

103. MO. PROP. CODE, Art. 6, §§ 28-41.

104. Fed. Rules Civ. Proc. 12(b).

pleading are abolished.¹⁰⁵ Attack on the form of the pleadings may be made by a motion for a more definite statement, or for a bill of particulars, and by a motion to strike.¹⁰⁶

Whenever a pleader makes a motion he must consolidate therewith all other motions then available to him.¹⁰⁷ Should he fail to do so, all opportunity to make any further objections by motion or defenses by motion is lost. However, there is an exception to this rule. If a pleader makes a motion joining solely jurisdictional defenses, he is not required at that time to make the other motions then available. The latter may be made at a later time within the pleading period. Thus the Federal Rules definitely contemplate the possibility of a dual motion stage. A pleader is entitled to have all motions heard and determined before trial unless the court in its discretion orders the matter postponed till trial.¹⁰⁸

Coming now to the provisions in the Proposed Code, we find that all defenses in law or fact are to be asserted in the answer.¹⁰⁹ However, there are certain enumerated defenses which must be raised by motion and by motion only.¹¹⁰ The pleader is not given the option of pleading them in his answer as under the Federal Rules. These defenses are: (1) the same five jurisdictional defenses set forth above, and (2) that the plaintiff should furnish security for costs. Notice that the "failure to state a claim upon which relief can be granted" has been omitted from this group.

As we have seen, objections, other than to jurisdictional matters and to the legal sufficiency of the claim, must be raised in the answer under the Federal Rules and cannot in any way be made in advance of pleading. In this respect the contemplated practice in Missouri will differ, for it will be possible to raise in advance the several dilatory defenses which are now subject to the typical code demurrer. The Proposed Code provides that the following objections when they appear on the face of the pleading may be made by motion: (1) failure to state a claim upon which relief can be granted; (2) failure to state a legal defense to a claim; (3) that the plaintiff has not the legal capacity to sue; (4) that there is another action pending between the same parties, for the same cause, in this state; (5) that several

105. Fed. Rules Civ. Proc. 7(c).

106. *Id.* at 12(e), (f).

107. *Id.* at 12(g).

108. *Id.* at 12(d).

109. Mo. PROP. CODE, Art. 6, § 41.

110. *Id.* at § 30.

claims have been improperly united; and (6) that the counterclaim or cross-claim is one which cannot be properly interposed in the action.¹¹¹ Demurrers and pleas in abatement and to the jurisdiction are abolished.¹¹² As in the case of the Federal Rules the pleader may move for a more definite statement or for a bill of particulars; a motion to strike is available for redundant, immaterial, impertinent and scandalous matter.¹¹³

All motions regardless of what objections or defenses they may raise must be consolidated and made at one time.¹¹⁴ Jurisdictional defenses cannot be raised in advance. The Proposed Code, therefore, unlike the Federal Rules, contemplates a single motion stage. Any defense or objection which might be taken by motion must be so raised at the motion stage or be deemed waived. The failure to state a claim upon which relief may be granted and lack of jurisdiction over the subject-matter are two substantive defenses which are, of course, never waived. As in the case of the Federal Rules, they may be raised at any time during the proceedings.

The foregoing is hardly more than a brief outline of the workings of the two pleading systems, but will be enough for our purposes. The question which now presents itself is whether it was wise to have departed so far from the Federal Rules in drafting this part of the Proposed Code.

The writer believes that the consolidation of motions provision of the Proposed Code is superior to its counterpart in the Federal Rules. Perhaps in federal practice where nearly every case raises a question of jurisdiction, it is better to provide means for raising this question in advance of every other motion or pleading. Cases may frequently be decided on the jurisdictional issue alone. The value in time saved in these cases and the added convenience, perhaps, far outweighs the disadvantage attendant upon setting

111. MO. PROP. CODE, Art. 6, § 31. Notice similarity to the present Missouri demurrer: "The defendant may demur to the petition when it shall appear upon the face thereof, either:

(1) That the court has no jurisdiction of the defendant, or the subject of the action; or (2) that the plaintiff has not legal capacity to sue; or (3) that there is another action pending between the parties, for the same cause, in this state; or (4) that there is a defect of parties plaintiff or defendant; or (5) that several causes of action have been improperly united; or (6) that the petition does not state facts sufficient to constitute a cause of action; or (7) that a party plaintiff or defendant is not a necessary party to a complete determination of the action." Mo. REV. STAT. (1939) § 922.

112. MO. PROP. CODE, Art. 6, § 28.

113. *Id.* at §§ 32, 33.

114. *Id.* at § 35.

up another and separate stage in the pleading proceedings. However, these reasons do not prevail in state practice, for certainly but few cases are decided solely on the issue of jurisdiction. Therefore it would seem more desirable to require the pleader to join at one time his jurisdictional defenses with all other objections or defenses which are available by motion.

The necessity for consolidating all available motions on penalty of waiver will be of great benefit to Missouri litigants. The opportunities now presented to a pleader for vexation and delay by making successive demurrers and motions will be practically eliminated.¹¹⁵ Too frequently these devices have been used deliberately to prolong the proceedings only for the purpose of harassing the plaintiff. The Proposed Code, by making "consolidation" a pleading requirement, will institute a timely improvement.

The Federal Rules have to some extent perpetuated the old general demurrer. By motion to dismiss, a pleader is able to object to the legal sufficiency of the complaint and secure a determination of this matter in advance of trial.¹¹⁶ The only limitation rests in the court's discretion to order the determination made at the trial. True enough, the motion is quite different from the demurrer and by its flexibility avoids many of the objections of the latter. But, nevertheless, the significant feature of the demurrer remains, namely, that it is still possible for a pleader, practically as a matter of right, to secure a preliminary determination of the legal sufficiency of the complaint. The desirability of this practice has been the subject of much debate.¹¹⁷ Several writers have maintained that the demurrer is no longer used for the traditional purpose of disposing of the case on the legal issues.¹¹⁸ In fact, relatively few cases are settled on demurrer, since the tendency in recent years has been to save any important legal issues for the trial. Hence, the demurrer has largely become an instrument for testing the mere sufficiency of a pleading itself. Instead of settling the case on the merits, it simply forces the pleader to amend, or plead over. There is, therefore, ample reason for completely abolishing the demurrer.

115. Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure* (1937) 47 YALE L. J. 50, 51, 58.

116. Fed. Rules Civ. Proc. 12(b).

117. CLARK, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND (1938) 239. Clark and Moore, *op. cit.* (1935) 44 YALE L. J. 1291, 1308; Miller, *op. cit.* (1937) 50 HARV. L. REV. 1017, 1036-39; Pike, *op. cit.* (1937) 47 YALE L. J. 50, 56; CLARK, CODE PLEADING (1928) 343.

118. Atkinson, *Pleading the Statute of Limitations* (1927) 36 YALE L. J. 914, 928; CLARK, CODE PLEADING (1928) 371.

The Preliminary Draft of the Federal Rules attempted to do this very thing. As the Rules were drawn, only the jurisdictional defenses could be raised by a motion to dismiss in advance of pleading.¹¹⁹ All other objections in law or fact had to be raised in the answer. However, if any defense presented in the answer was such that a decision thereon might finally dispose of the whole or a material part of the issues, then the courts could order a preliminary hearing and determination of the matter.¹²⁰ If the court did not order a preliminary hearing, then the defense would have to be heard at the trial. The effect would have been to have wiped out all vestiges of the general demurrer for the emphasis was placed upon the court's control of and discretion in ordering a preliminary hearing. No longer would the parties have been entitled to a preliminary determination of a defense as a matter of right. These provisions were largely adopted from the English practice on this point¹²¹ which is believed by many to be the most desirable.¹²² However, as Dean Clark has pointed out,¹²³ the elimination of the preliminary proceeding was objectionable to many, and, hence, in the final draft a compromise was struck by giving the pleader the privilege of testing the legal sufficiency of the complaint in advance, subject only to court's power to postpone the matter until trial

The Proposed Code has not only followed the final draft of the Federal Rules in this respect, but has taken a further retrogressive step which has many positive objections. As mentioned above, the pleader under the Proposed Code will be able to raise by motion to dismiss not only objections in law appearing on the face of the pleading but all the traditional dilatory defenses as well. This sounds like our existing code demurrer, dressed up in the thin disguise of a motion.¹²⁴ Section 36 has provided that a motion opens the record, permitting a consideration of all substantial defects in prior pleadings and requiring judgment to be rendered against the party who

119. Preliminary Draft of Fed. Rules Civ. Proc. (1937) 16(b).

120. *Id.* at 16(c).

121. See English Rules Under the Judicature Act (Annual Practice, 1937), O. 25, r.r. 1-4. An objection in law is filed along with the answer on the facts, but the court will consider it in advance of trial only where a decision would substantially dispose of the case. See, Miller, *The Old Regime and the New in Civil Procedure* (1937) 14 N. Y. U. L. Rev. 197, 198, 204. As to the influence of Federal Equity Rule 29, see Pike, *op. cit.* (1937) 47 YALE L. J. 50, 56-60.

122. See articles cited in note 117, *supra*.

123. CLARK, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND (1938) 240; also HAMMOND, SOME CHANGES IN THE PRELIMINARY DRAFT OF FEDERAL RULES (1937) 629, 630.

124. See note 111, *supra*.

first failed to state a claim or defense.¹²⁵ A clearer invitation to our courts to treat the new motion as a mere substitute for a demurrer would be hard to imagine. The old problem of distinguishing between defects which appear or do not appear on the face of the pleading will still be with us. At the present time the courts draw fine distinctions as to the propriety of a demurrer in a given situation and that of a motion to make more definite, or to strike.¹²⁶ May we not expect this same body of judicial technicality to have continued vitality and that the motion to dismiss will be merely slipped in where the demurrer previously stood? Judging by the experience in other states this seems to be the customary result when the demurrer has been abolished in name only.¹²⁷ The Federal Rules have wisely avoided to a large extent this needless difficulty by requiring that all dilatory defenses be made in the answer and by rejecting the "appearance on the face of the pleading" test. In this respect it would have been more advisable for the Proposed Code to have followed the Federal Rules.

In the last analysis the only justification for preserving the old code demurrer must be measured by the extent to which it may be expected to facilitate procedure under the new. Experience has demonstrated that the demurrer has ceased to function otherwise than as an instrument for perfecting the sufficiency of the pleading itself, and as such has been too frequently employed only for purposes of delay.¹²⁸ If this is any criteria of what to expect of the substitute motion, certainly it should have no place in a reform code. The utility of the demurrer even further declines when liberal provisions for amendment of pleadings are provided as in the case of the Federal Rules¹²⁹ or Proposed Code.¹³⁰ Objections to the sufficiency of the pleadings can then be made with more convenience in the answer, there-

125. Compare ILL. REV. STAT. (1937) c. 110, § 169; Ill. Civ. Pract. Act 1933, § 45(4). See comment on Illinois practice of carrying back an attack on a prior pleading by motion which is in effect the old rule that the demurrer searches the record, in Miller, *Pleading Under the Illinois Civil Practice Act (1933)* 28 ILL. L. REV. 460, 471.

126. The problem of distinguishing between matters of form and substance is set out in POMEROY, *CODE REMEDIES* (1929) §§ 487-495. See also, CLARK, *CODE PLEADING* (1928) 374-381.

127. This seems to have been the New York experience where the courts have developed "a hierarchy of different motions each of which must follow in its own groove," thereby considerably complicating the practice. CLARK, *CODE PLEADING* (1928) 372, n. 131.

128. See note 118, *supra*.

129. Fed Rules Civ. Proc. 15.

130. Mo. PROP. CODE, Art. 6, §§ 51-54.

by rendering unnecessary a preliminary device for this purpose. The constant trend in procedural development has been towards a reduction of the numerous pleading stages which was characteristic at common law.¹³¹ The English practice clearly points the way; it now requires all defenses and objections regardless of their nature to be raised in the answer. Since there is no positive advantage to be had in retaining the demurrer stage it should be abolished entirely in the interest of speeding up the pleading process. The Proposed Code in preserving the outdated code demurrer has taken a retrogressive step, endangering the reform which we so sadly need in this field.

CONCLUSION

With the repeal of the old Conformity Act and the adoption of the Federal Rules an entirely new procedure was set up in the federal courts in the place of the state procedure which used to be controlling. The result has been that practitioners have been required to familiarize themselves with two distinct procedures. The decision of *Erie R. v. Tompkins*¹³² has made the situation even more illogical for the doctrine of that case requires the federal courts to recognize as binding the substantive law of the state in which the court is sitting. We now have therefore two court systems of equal dignity within the same state administering the same substantive law, yet each functioning under a wholly different form of procedure. Convenience and sound legal administration would seemingly require all states to revise their codes so as to conform to the Federal Rules.¹³³ Unfortunately Missouri's Proposed Code has not adhered as closely to the Rules as it should have.¹³⁴ Much criticism can be leveled against it on this ground, but certainly should not be permitted to stand in the way of its adoption, inasmuch as a fair conformity between Missouri and federal practice would be achieved.

Considering the Proposed Code only from the standpoint of the effect

131. Miller, *op. cit.* (1937) 50 HARV. L. REV. 1017, 1038. For a fuller discussion of the history and theory of this development, see Miller, *The Formative Principles of Civil Procedure—I* (1923) 18 ILL. L. REV. 1, 24 *et seq.*

132. 304 U. S. 64 (1938).

133. Mitchell, *Uniform State and Federal Practice* (1938) 24 A. B. A. J. 981; *Recent Developments in Revision of State Civil Procedure* (1940) 11 MO. BAR J. 60.

134. *E.g.*, see discussion of Arizona's recent adoption of Federal Rules, Sunderland, *Arizona's New Rules of Procedure Effect Conformity with the Federal Rules* (1940) 23 J. AM. JUD. SOC. 215.

it could be expected to have on Missouri procedure, it would seem that its passage is mandatory. The draft has embodied the basic procedural devices necessary for the modernization of our practice. A more general form of pleading, free joinder of parties and claims, third party practice, pre-trial conference, and an expanded discovery would greatly facilitate and improve our present procedure. These alone commend its passage.