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MISSOURI PRACTICE AND THE FEDERAL RULES: A COMPARATIVE STUDY

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INTRODUCTION

From time to time man has felt the urge to better his condition. He has seen a new and more hopeful vision than his former mental development had enabled him to discern. This evolution has occurred in legal fields as well as in other spheres of life. Thus, he has pushed forward into more efficient and just realms of procedure.

All students of practice know of the slow march of the legal mind from what might be called the valley of adjective law, when it was almost a sport, up to the foothills, when lawyers began to think of procedure as a possible aid to just results. Surely the minds of Bentham, Livingston, and Field must have gained those foothills. Perhaps they had travelled far beyond them. Moreover, they encouraged others who came after them to toil at improving procedure. Today the more far-sighted lawyers believe that adjective law should, and must, be used as a means to attain the nearest approach to fair results in law suits that imperfect man can reach. A less exalted goal than that is an unworthy one.

Distinguished results have been reached in several states, but the best known and advertised late high achievement has been the creation of the Federal Rules of Civil Procedure for District Courts of the United States. The hope of those who have sponsored and worked for the adoption of these Rules has been that

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they may create such interest and be so appreciated that they, improved if possible, will become state as well as federal law.

There can be no doubt of three things: first, these Rules are being thought and talked about in all parts of this country; second, they are a vast improvement over the practice law of most jurisdictions; third, unless the state law is changed to coincide to a great extent with the Federal Rules, the lawyers who practice in state and federal courts are, in most states, going to be obliged to deal with two procedural systems.

For generations, lawyers and others in Missouri have striven to improve procedure in the state courts. This state was one of the first to adopt a system of code pleading. Ever since then, many of its citizens have endeavored to make more effective the mode of trying and appealing cases.

The last few years have seen an intensification of these efforts. They have resulted, for example, in the creation of the Missouri Institute for the Administration of Justice. Through the efforts of the members of this Institute and other persons, the 1939 State Legislature invited the Supreme Court of Missouri to submit to the 1941 session of the Legislature suggestions for a revision of the present code of civil procedure. The Supreme Court then appointed a committee to aid it in drafting such suggestions. This committee has very graciously and wisely called upon the lawyers of the state to send it helpful recommendations. In view of these facts, it will be of some value to compare the present Missouri civil procedure with the new Federal Rules and to determine whether it would be wise for Missouri to adopt the Federal Rules, with any possible improvements. If this can wisely be done, uniformity of procedure in state and federal courts for the most part will be attained. Such a result will be a splendid one if it improves our practice and gives us as fine a system of procedure as we can now obtain. Moreover, we lawyers shall have but one system of adjective law to learn for purposes of practice here. This will release time and energy for use in other profitable fields, and will be of special benefit to those who are yet to begin the study and practice of law.

At this point, it should be noticed that this discussion applies not merely to the situation in Missouri, but to that in many other states which have approximately the same type of civil procedure as exists in Missouri. Let us, therefore, proceed to compare

the more important Federal Rules of Civil Procedure and the apposite practice common to Missouri and many other states. Reference will be made to Missouri law only, as far as state procedure is concerned, but similar statutes and rules in other non-federal jurisdictions will easily be recognized by those practicing therein.

ONE FORM OF ACTION

Both Rule 2[1] and Section 696 of the Revised Statutes of Missouri (1929)[2] state that there shall be but one form of action in civil cases. This has been interpreted to mean that, although the fundamental distinction between law and equity has not been abolished, the differentiation between names has, on the whole, been abolished.[3] One must still state and prove a cause of action; but if he fails to allege all the elements of the particular type of action on which he believes he is suing, he need not worry so long as he has stated any good cause of action.[4] The rule and statute are salutary and should be retained.

COMMENCEMENT OF ACTION

In general, Rule 3 and Section 724, *as interpreted,* are identical in result, although their wording is not exactly alike. In each jurisdiction the filing of a complaint or petition commences an action and stops the running of the statute of limitation. It would be wise to simplify the state law to read as plainly as does the Federal Rule. As the statute stands, it must be interpreted to obtain the result mentioned, for it says the filing of the petition *and* the suing out of the process commences the action. It has been decided that, in the absence of directions to the contrary, the filing of a petition amounts to an order to the clerk of court to issue process.[5]

PROCESS

Rule 4, relating to process, cannot be used without extensive change in state procedure because the authority of a state does

1. Rules referred to are Rules of Civil Procedure for the District Courts of the United States.
2. Hereafter, sections of the Revised Statutes of Missouri will be referred to simply as "Sections."
3. Bellavance v. Plastic-Craft Novelty Co. (D. C. D. Mass. 1939) 30 F. Supp. 37; Fowles v. Bentley (1909) 135 Mo. App. 417, 115 S. W. 1090.
4. Nester v. Western Union Telegraph Co. (D. C. S. D. Cal. 1938) 25 F. Supp. 478.
5. McGrath v. St. Louis, K. C., & Colo. R. R. (1895) 128 Mo. 1, 30 S. W. 329.

not extend beyond its borders, and because many references to the federal government and federal agencies do not apply. However, simple methods of service in cases of individuals and corporations are set forth. These are preferable to the more varied provisions stated in Chapter 5 of Article 4 of the Missouri statutes.

Subdivision (e) of Rule 4 appears to refer to published service. It says that service provided for by federal statute and orders of federal courts shall be made in the manner provided therein. This, of course, cannot be the basis of publication in state cases. Probably the usual state statutes such as Sections 739, 741, and 747 of the Missouri laws will suffice, though a careful study should be made to determine whether they can be improved upon.

TIME

Rule 6 succinctly covers points relating to time and procedure. This is preferable to the practice in some states which is based on scattered statutes and cases. Subdivision (d) states that the expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it. This appears to change the rule in many jurisdictions, including Missouri, that a final judgment cannot be set aside after the term at which it is rendered unless such action is expressly authorized by statute.

Before changing the present state rule, the usefulness of the change should be carefully considered. The writer favors the innovation, for he thinks it will lead, on the whole, to cheaper litigation.

PLEADINGS

A. Availability

Various jurisdictions take different positions concerning the availability of pleadings. All lawyers recall the theory of the old rule providing sufficient pleadings finally to reach an issue.[6] The new Illinois Civil Practice Act gives the courts permission to allow pleadings beyond the reply.[7] On the other hand in some procedural systems there is a paucity of permissible pleadings.

Rule 7 allows complaints and answers, but replies are available only when an answer contains a counterclaim *denominated*

6. State ex rel. Maple v. Mulloy (1929) 322 Mo. 281, 15 S. W. (2d) 809.
7. (1933) sec. 32; Ill. Smith-Hurd Ann. Stats. (1936) c. 110, sec. 156.

as such, and when a court orders a reply. Cross-claims by one party against a co-party and third-party complaints by a defendant against one not yet a party, together with answers and ordered replies to third-party answers, are also permitted. Demurrers and the old equitable pleas and exceptions are abolished. In their places motions and answers are provided. Rule 22 permits interpleader and Rule 24 authorizes intervention.

In Missouri, we have petitions, answers, replies (unrestricted in use), demurrers, and motions.[8] Cross-claims by one party against the other are not permitted unless the cross-claim is also against the plaintiff and in aid of the cross-pleader's defense to the plaintiff's petition.[9] True third-party complaints do not exist in Missouri. Section 3268 allowing contribution among defendants applies only after judgment in the original action. Section 701 has been interpreted to permit intervention,[10] and various sections of the Revised Statutes of Missouri allow interpleader.[11]

The query arises as to what philosophy of permitted pleading best serves the ends of justice. If many pleadings are allowed, reaching an issue consumes much time and expense. If a minimum of pleadings is used, the parties may go to trial somewhat uncertain as to the issues. To the writer, it seems that a rule as to the number of pleadings should be flexible. A court should be permitted to determine the matter. He recommends, therefore, that in remolding the state statute the Federal Rules be changed to the extent that the court may allow pleadings beyond the reply. This discretion would seldom need to be used, but the authority to employ it would exist if special circumstances called for its exercise.

Cross-complaints and third-party complaints, as above defined, complaints in intervention and interpleader, together with the proper later pleadings to these complaints, certainly should be provided for in state practice. To make the third-party complaints available, the substantive law in the state in which the alleged claim of one party against another is said to exist would have to permit such an action. This is true whether a third-

8. R. S. Mo. (1929) c. 5.

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

10. Green v. Conrad (1893) 114 Mo. 651, 21 S. W. 839; State to the Use of Kendrick v. Hudson (1901) 86 Mo. App. 501.

11. (1929) secs. 1316, 1325, 1332, 1404, 1405, 1407, 2535-2538, 5384, 14390, 14450, 14452.

party action be brought in a federal or a state court. Adopting motions in place of demurrers has the advantage of making it unnecessary to interpret any law giving grounds for demurrer in order to decide whether the defect plain on the face of the pleading demurred to is, or is not, included in one of the permissible grounds of demurrer.

B. Contents

Facts and Law. Rules 8 through 11 deal generally with the contents of pleadings. The most important difference between the Federal Rules and the Missouri pleading statutes involves the manner of stating one's case or defense. Rule 8(a) (2) declares that the complaint shall contain a short and plain statement of the claim and show that the pleader is entitled to relief. Rule 8(b) says a party shall state his defenses in short and plain terms. In contrast to this, the statutes in Missouri and many other states asserts that a claim shall consist of a plain and concise statement of the *facts* constituting the causes of action.[12] In turn, Section 783 says that only the *substantive facts* necessary to constitute the cause of action or defense shall be stated.

It may be that, if one interprets the Federal Rules by looking at some of the forms drafted by the committee which aided the Supreme Court of the United States in formulating the rules, he may think necessary more complete statements of causes and defenses than one finds in the forms. However, the tendency toward too brief notice pleading which one may discover in the new Rules creates little difficulty compared with the trouble encountered under state law.

The Missouri rule, for example, is to the effect that one must state *substantive* facts constituting causes and defenses. The impracticability of this formula is, in part, that very often lawyers and judges do not know the difference between facts and law. Even though they have a fair idea of what facts are, there is a further differentiation to make—the difference between *substantive* and *evidentiary* facts.

Moreover, sometimes it is quite impossible to allege a cause by stating facts. Let us illustrate. One, for instance, depends on ownership as one of the elements of his case. May he allege *ownership*? He may not, if he is confined merely to the pleading

12. R. S. Mo. (1929) sec. 764.

of facts. This word connotes, in part, the existence of legal rights and duties. Thus, it is not a pure fact-word. But if one cannot allege "ownership" of certain personalty, how can he plead ownership? He cannot know the whole chain of title. The result is that practical judges do the matter-of-fact thing. They call "ownership" a fact-word.

Again, Judge Valliant, in *Reilly v. Cullen*,[13] said that one could not properly plead the very words of an instrument sued on, for that would be pleading evidentiary facts. This cannot be right, for evidentiary facts in this respect are facts that go to prove broader facts. Yet the instrument, in a case like this, would not be used to prove broader facts. The court would want to look at the terms of the instrument for some of the last border of facts (final, ultimate, or substantive facts) to determine the rights and duties of the parties to the action.

It is clear that reform of procedure here will be of great benefit. Whether that reform, however, is to be in the pattern of the new Rules may be questionable. Yet, why should one be compelled to do more than to make a short and plain statement of his claim or defense? Under such a rule one must state all the elements of his cause of action or defense. The difficulty with the new Federal Rule on this matter seems to be its connection with the forms. A few of them are so sketchy that to some it may seem that they do not really contain all the elements of causes and defenses. This is doubtful, but if those reforming state procedure want to prepare sample pleadings to accompany new rules or statutes there is no reason why they should not amplify the federal forms.

Pleadings—Alternate, Hypothetical, and without Knowledge or Information. Rule 8(e) (1) permits alternative and hypothetical pleading. Alternative pleading is common in state procedure[14] and is helpful, but hypothetical pleading is not provided for in many jurisdictions. However, it may be helpful, for one may not be sure of his ground. To allow him to plead alternatively or hypothetically may save time and expense. It is advisable to permit these methods of pleading. Pleading lack of knowledge or information, which is permitted by Rule 8(b) and Section 776, may allow one to delay a case unnecessarily. Yet,

13. (1900) 159 Mo. 322, 60 S. W. 126.
14. E. g., R. S. Mo. (1929) sec. 798.

since this practice is so firmly entrenched and since it often may be honestly used, it should be retained.

General Denials. In most jurisdictions, general denials are permitted to be used freely without being verified.[15] This is a pernicious rule. Any lawyer who has practiced law for only a short time can recall instances when such general denials have been used to obstruct justice. Rule 8(b) happily curtails the use of general denials to cases in which all the averments of the pleading are attacked including allegations relating to jurisdiction. This will result in the use of very few general denials to complaints. The Federal Rules do not go so far as to require the verification of all pleadings. On the other hand, Rule 11 does make lawyers subject to "appropriate disciplinary action" if they sign pleadings knowing that there is no good ground to support them. This is a better solution, probably, of the problem of false pleadings than to require every pleading to be verified, for it might be difficult to draft, with proper exceptions, and administer a law providing for general verification of pleadings.

Affirmative Defenses. Rule 8(c) names various defenses which, it declares, should be deemed affirmative defenses. This is seldom done in state law, though the federal example is followed in section 43(4) of the Illinois Practice Act. If such a rule will work, it will be helpful, for a defendant's lawyer will know just what to do in many instances in which he was formerly doubtful.

But already, under the federal law, doubt has arisen as to whether contributory negligence relates to substantive or adjective law. In Illinois the rule is that the proof of the lack of such negligence is part of the plaintiff's case when he bases his recovery on the defendant's negligence. Therefore, the Rules, which cannot deal with substantive law according to the act authorizing them, cannot make contributory negligence an affirmative defense according to one decision.[16] This decision has been questioned on the ground that the Supreme Court has

15. E. g., R. S. Mo. (1929) sec. 776.

16. Francis v. Humphrey (D. C. E. D. Ill. 1938) 25 F. Supp. 1. It was recently held that Rule 8(c), defining contributory negligence as an affirmative defense to be pleaded by the defendant, is only a rule of procedure and does not affect burden of proof. Sampson v. Channell (1940) 8 U. S. L. Week 599.

passed on this matter and decided that the whole question of what affirmative defenses are, is procedural.[17]

C. When Answered

Rule 12(a) establishes definite times within which one must answer an opponent's pleading. In Missouri[18] and some other states the answer is, at least in part, governed by court terms. The writer has no doubt that the federal practice is the better. It speeds up the forming of issues.

Under the Missouri procedure, if one fails to serve a petition within the statutory number of days before the beginning of a term the defendant need not answer until the beginning of the second term after the service of the petition. This should be deemed intolerable. This does not mean that there should be no terms of court for any purpose. It may be necessary to retain terms for trial purposes in circuits when a single judge holds terms of court in different localities at various times during a year. However, it would be better to do away with terms entirely. Then a court could do its work whenever and wherever it could best be accomplished.

D. How Answered

Rule 12(b) states that every defense *in law or fact* to a claim for relief shall be asserted in the responsive pleading, if one is required, except that named defenses may, at the option of the pleader, be made by motion. The meaning of this is not clear. Does it permit one by answer or motion to raise questions of either law or fact? The wording impels an affirmative reply. If that solution to the inquiry is correct, an answer or a motion may have the effect of an ordinary answer, motion, or demurrer.

The cases in relation to motions are not harmonious. It has been decided that a motion to dismiss which requires consideration of matter not appearing in the complaint is analogous to a speaking demurrer and should be overruled.[19] But a later case has declared that facts appearing in affidavits, depositions, and answers to interrogatories may be considered in the disposition of a motion to dismiss.[20] As to answers, it has been said that

17. Note (1939) 6 U. of Chi. L. Rev. 510.
18. R. S. Mo. (1929) sec. 769.
19. McConville v. District of Columbia (D. C. D. C. 1938) 26 F. Supp. 295.
20. Alabama Independent Service Station Ass'n v. Shell Petroleum Corp. (D. C. N. D. Ala. 1939) 28 F. Supp. 386.

failure to state a claim for relief may be raised as an affirmative defense in the answer.[21] If one is to be allowed to take advantage of defenses either by answer or motion whether or not those defenses appear on the face of a pleading, the statute or rule permitting this should state the existence of the privilege in no uncertain terms. Therefore, if the policy of this Rule is adopted in state procedure, the meaning of the Rule should be clarified.

There is a real advantage in such a practice. Any mistake in the choice of method of attack upon a pleading would be harmless. Certainly the usual state practice confines the attack upon pleadings by motions or demurrers to defects plain upon the face of the pleadings, while answers consist of denials and affirmative defenses. The writer inclines toward the adoption of the Federal Rule, if clarified, for state procedure.

E. Consolidation of Motions

The time- and cost-saving device of consolidating in one motion nearly all of the grounds therefor existing when a motion is made is provided in Rule 12(g). The writer finds no statute or rule definitely requiring such consolidation in Missouri. It is an improvement which should be adopted.

F. Motions to Make More Certain

Rule 12(e) permits the court to grant a motion for a more definite statement or a bill of particulars. Section 785 likewise allows the court to require a pleading to be made definite and certain. This privilege should be retained in state law. One difficulty that arises in relation to the Rule is that it is connected with forms. If the forms are sufficient, why should one be allowed a bill of particulars to amplify them? Are these bills of any value except in case the new forms are not used? One case suggests, but does not surely give, an affirmative answer to this question.[22] The way to avoid this trouble is to state definitely that the court *may* grant the right to bills of particulars in all cases.

G. Counterclaims

Rule 13(a) *requires* a party, either defendant or plaintiff, to counterclaim any cause of action not the subject of a pending

21. Goodman v. United States (D. C. S. D. Iowa 1939) 28 F. Supp. 497.
22. Lost Trail, Inc. v. Allied Mills, Inc. (D. C. E. D. Ill. 1938) 26 F. Supp. 98.

action which the pleader has against any opposing party if his claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Rule 13(b) *permits* the counterclaiming of any other cause one may have against an opposing party. Section 777 allows counterclaiming of a claim existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, if it is a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or if the cause of action is connected with the subject of the action with which the plaintiff's claim is connected. Also, one contract action may be counterclaimed against another contract action if the counterclaimed cause exists when the plaintiff sues.

At a glance, one can see the great difference between the federal and state law. Under the Federal Rule there is compulsory counterclaim and the broadest possible power to counterclaim, if one so desires. Plaintiffs may counterclaim. Under the state statute the authority to counterclaim is much less extensive, and only defendants may counterclaim. Moreover, the lawyers are very uncertain about the meaning of "subject of the action." This leads to a variety of results in different jurisdictions. The Federal Rule certainly is the procedure to adopt, since it gives much greater promise of saving of time, energy, and expense than does the state law.

H. Cross-Claims

Rule 13(g) accords a party the privilege of suing a co-party on a claim arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim in the proceeding. Missouri permits one a cross-claim against a co-party only when this cross-claim also amounts to a defense to the plaintiff's petition. The Federal Rule is the one to adopt, since it will result in fewer lawsuits.

I. Third-Party Practice

Rule 14 grants one the privilege of bringing in as parties third persons who are, or may be, liable to him or his opponent for all or part of the opponent's claim against him. No such practice exists in Missouri. It should exist, however, for the power to try

the obligations of such third-parties would eliminate a lot of unnecessary litigation.

PRE-TRIAL PROCEDURE

Rule 16 is one of the most valuable of all the rules. It *permits* a trial judge to require the attorneys for the parties to appear before him to consider the problems of the pending lawsuit with the view to removing all unnecessary issues and questions, and to aid in a quick and inexpensive, though fair, disposition of the suit.

There is no Missouri statute providing for this procedure. This deficiency should be remedied. This has just been recommended by the Committee on Pre-Trial Procedure of the Bar Association of St. Louis.[23] That committee believes that a trial court may, under Section 1953 institute this practice under the power there given to make rules of procedure. This statute should not be relied upon. Definite authority should be granted. Moreover, the Federal Rule should not be followed exactly. Instead of *permitting* pre-trial practice, it should be made *compulsory,* and trial courts should be permitted to appoint masters to aid them. The matter of providing for pre-appeal practice should also be investigated.

PARTIES

A. Real Parties in Interest

Rule 17 and Sections 698 and 699 have approximately the same content. They permit the real party in interest and certain legal title holders to sue. By real parties in interest are usually meant those who have a right to the fruits of the proceeding. In Missouri these statutes have been interpreted narrowly. Thus, it has been said that in strictly legal actions such as ejectment equitable title holders could not sue.[24] Again, it has been decided that, where several insurance companies have paid an entire loss, they could not sue a wrongdoer, for the legal title to any claim against him remained with the insured.[25] Such unfair and costly results should be rectified when the state practice is remodeled.

23. [Since this article was written, the Bar Association of St. Louis has declined to approve the recommendation of its Committee.—EDITOR.]
24. Bailey v. Winn (1890) 101 Mo. 649, 12 S. W. 1045.
25. Swift & Co. v. Wabash R. R. (1910) 149 Mo. App. 526, 131 S. W. 124.

B. Joinder of Parties

Although both Rule 19(a) and Section 702 require the joinder of all necessary parties (those whose interest *will* be effected by the judgment in an action), Rule 20(a) and Sections 700 and 701, relating to permissive joinder of parties, differ greatly.

The Federal Rule permits all persons to be joined as plaintiffs or defendants who assert, or have asserted against them, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if, in addition to this connection, there is *any* question of law or fact common to all of the parties which will arise in the action. A party need not be interested in obtaining or defending against all the relief demanded. The state law allows all persons to be joined as plaintiffs who have an interest in the subject of the action, and in obtaining the relief demanded. Any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved.

One need merely look at the last paragraph to realize the narrowness of the Missouri law, especially as to plaintiffs, when compared with the federal practice. Some may believe that the new Rule is altogether too broad and is not desirable. The writer would also reach that conclusion if it were not for the fact that Rule 20(b) permits a court to order separate trials or make other orders to prevent delay or prejudice. The state law surely needs to be altered. Can the Federal Rule be safely adopted in place of the local practice? Certainly it may be, in the light of Rule 20(b).

The wording of Section 700, relating to the joinder of plaintiffs, has been too little understood, and therefore too narrowly interpreted to countenance its retention. As has been stated, lawyers are not at all in accord as to the meaning of *subject of the action.* Moreover, many courts believe that, under a statute like Section 700, the plaintiffs must each have an interest in all the relief requested. These problems should not exist, for the subject of the action is not difficult to pick out. It is, properly, the tangible or intangible thing which is peculiar to the particular case and around which the lawsuit revolves. Thus, the contract is the subject of the action when one sues in relation thereto; one's reputation is the subject of the action in a slander or libel suit; one's person is the subject of the action in a suit for

assault and battery; and the marriage relationship is the subject of the action in a divorce proceeding. Again, the statute plainly says that each plaintiff need merely have *an* interest in the relief requested. But many courts hold each plaintiff must have an interest in all of the relief requested. Each has this interest when all that is demanded is an injunction, for each plaintiff wants all of the injunction. But, if money damages are requested, each plaintiff may have an interest only in part of the relief asked for. Hence, they cannot join. This is the Missouri law.[26]

Not only do we find such holdings relating to the joinder of plaintiffs, but some courts hold that when defendants are joined in tort cases the relief requested against each one must be all of the recovery demanded. Again, this is the local law.[27] There is absolutely no justification for this result, for there is no reference to the relief requested in the statute relating to the joinder of defendants. The defendants in these cases must be jointly liable, as they are permitted to be sued jointly in actions in which the only judgment requested is one for an injunction. A typical case is that in which it is claimed that several defendants have jointly caused the pollution of a stream.

INTERPLEADER AND INTERVENTION

Interpleader[28] and intervention[29] are allowed under both the federal and Missouri practice. Although the ordinary state practice relating to these matters may be adequate, it would be wise to have provisions similar to the Federal Rules dealing with these matters. Of course, the rule covering intervention, as far as it relates to federal statutes conferring rights to intervene, would have to be revamped. The state rule should allow a very broad right to intervene.

CLASS ACTIONS

Rule 23 is the ultimate in liberality, to date, in allowing class actions, that is, in allowing less than all of a given class to

26. Breimeyer v. Star Bottling Co. (1909) 136 Mo. App. 84, 117 S. W. 119.

27. State v. Dearing (1912) 244 Mo. 25, 148 S. W. 618.

28. Rule 22, Rules of Civil Procedure for the District Courts of the United States; 28 U. S. C. A. (1927) sec. 41 (26); R. S. Mo. (1929) secs. 1316, 1325, 1326, 1332, 1404, 1405, 1407, 2535-2538, 5384, 14390, 14450, 14452.

29. Rule 24, Rules of Civil Procedure for the District Courts of the United States; R. S. Mo. (1929) sec. 701.

represent the entire class in a lawsuit. This Rule has rendered a service in definitely indicating that a class action is not permitted unless the class is so large that it would be impracticable to bring every member thereof before the court *and* unless there is some connection among all of such members. However, the writer believes that possibly the Rule goes too far in merely requiring, as the essential common interest among the class members, that there be a common question of law *or* fact affecting the several rights and a common relief be sought. Yet, it would be well to try out this formula.

In Missouri there is no statute providing for class actions. Therefore, they are permitted only under the equity law. Provisions should be made for class actions in both law and equity actions. The Federal Rule, as far as it is applicable, might well be adopted in the first instance. Of course, Rule 23 (b) (2), which says, in relation to secondary actions by shareholders, that the verification of the complaint must state that the proceeding is not a collusive one to confer jurisdiction on the federal court, which would not otherwise have jurisdiction, would not apply in a state court.

TRIAL BY JURY OR COURT

A. Right to Jury Trial

Rules 38 and 39 state the methods of obtaining a jury trial. Section 950 indicates how one waives a jury in Missouri state courts. The rules and the statute apply different philosophies. The idea of the Federal Rules appears to be that juries should be eliminated where possible. Therefore, Rule 38 provides that unless one makes a formal demand for a jury, he waives the right to one. The Missouri law, on the other hand, grants one a jury, where juries are allowed, unless one waives his right. Experience, we are convinced, has taught that fair results can be gained by court trials at much less expense than is required by jury proceedings. Therefore, if one desires a jury, let him take the affirmative and make a formal demand for one.

Rule 39 (c) goes so far as to permit the court in an equity case to allow a jury, whose verdict shall have the same effect as if trial by jury were a matter of right. It should be noticed that this use of a jury is authorized only if the parties and court consent thereto. In remolding the state law, it would be worthwhile to try out the new federal practice.

B. Jurors

Rule 47(b) states that a court may direct the impanelling of one or two alternate jurors. There is no such provision in Missouri law. The discretionary power to have alternate jurors added to the regular panel should be a part of every jury system. Even the new Federal Rule can be improved. There is no good reason why the number of such jurors should be confined to two. Nor should the service of such jurors be ended when the jury retires, for a juror might become unable to serve after the retirement of a jury following a long trial.

DISMISSAL OF ACTIONS

Rule 41, in general, permits the voluntary dismissal of an action without an order of court only if a notice of dismissal is filed before service of the answer, or if the parties who have appeared generally in the action agree thereto. Section 960 allows such a dismissal at any time before a case is submitted to a jury or to a court. The Federal Rule represents the more honest practice and should be adopted by the states which have the present Missouri rule. In fact, it would be an advantage to state procedure to include the outline of dismissal in one rule or statute, as has been done under Rule 41. There one finds, in addition to the provision already discussed, material relating to involuntary dismissals, dismissal of counterclaims, cross-claims, and third-party claims, as well as costs.

EVIDENCE

A. In General

When the Federal Rules were being formulated, the question arose whether evidence could, or should, be dealt with under the authorization given the Supreme Court of the United States to make rules of procedure. The writer has outlined elsewhere[30] his reasons for thinking that the courts of a state have inherent power to make rules governing their procedure, including rules dealing with evidence. Professor Tyrrell Williams has written a clear article setting forth the opposite philosophy.[31] However, in Missouri we are not at this time confronted with this problem, since the supreme court is merely presenting a statement

30. Wheaton, Courts and Rule-making Powers (1936) 1 Mo. L. Rev. 261.
31. Williams, The Source of Authority for Rules of Court Affecting Procedure (1927) 22 WASHINGTON U. LAW QUARTERLY 459.

of law to be passed upon by the legislature, which believes it has the authority to make evidentiary statutes or to authorize evidentiary rules of court.

The new Federal Rules do not go into the law of evidence extensively. Rule 43, however, deals with the admissibility of evidence in general. Its form would not permit its adoption as state law, since it says that the more liberal law, state or federal, should apply to the admission of evidence. We believe that the states should reëxamine their evidence law, eliminate all unjust rules, and liberalize evidence to the greatest extent possible to the existence of fair trials. It would be well to experiment with a code or set of evidence rules. We should begin now thoroughly to test the idea that all relevant evidence, subject to the court's discretion, should be admissible. This means, for instance, that privileges of witnesses should be curtailed and the use of hearsay evidence broadened.

The American Law Institute is preparing a model code. Some states should give it a trial. We believe that those who do will never regret taking the step.

B. Discovery

Rules 26 through 37 include a comprehensive plan of discovery. Rules 26 through 33 cover depositions. It is not advisable here to go into them in detail. It should be noticed, however, that the scope of examination includes anything not privileged which is relevant to the subject matter of the pending action. Further, these rules deal very thoroughly with the method of taking depositions either before or after an action is begun and with the use of depositions after they are taken.

The present Missouri law[32] concerning depositions is liberal and lawyers appear to get along very well with the present method of taking depositions. Yet, if we are to enter upon a campaign to improve our procedural law, we should consider carefully the Federal Rules relating to depositions in order that we may discover whether they would serve us as well as, or better than, the present state statutes. If they would, they should be adopted so that there may be but one system of taking depositions in state and federal courts.

32. R. S. Mo. (1929) secs. 1753-1784, 1789-1806.

EXCEPTIONS TO RULINGS

Rule 46 says that formal exceptions to rulings of a court are unnecessary, but that it shall be sufficient for a party, at the time the ruling is made, to make known to the court the action he desires the court to take or his objection to the action of the party and the grounds therefor. If a party has no opportunity to object to a ruling when it is made, the absence of an objection shall not prejudice him. The difference between an exception and an objection is not clear. Perhaps it consists in a difference in the use of the word "object" and "except." It scarcely seems that men of the caliber of the advisory committee of the Supreme Court would suggest such a meaningless change. Yet it seems that the rule calls for some objection to rulings which one claims are incorrect.

However, it already has been held that exceptions will be assumed as taken.[33] It has also been declared that it is enough for a court to advise a party that exceptions will be allowed to any adverse rulings.[34] These rulings appear to abrogate the wording of the rule. Our Missouri law provides for exceptions, with the possibility of the court's permitting an agreement before trial that exceptions should be automatically saved.

Should the practice of raising exceptions be abolished? The writer thinks they should be. Lawyers, especially beginners, may well forget to make and save exceptions. On appeal, the appellee can be thoroughly warned by appellant's abstract and brief of the objections raised by the appellant.

SUMMARY JUDGMENTS

Rule 56 permits summary judgments. These are judgments permitted without a trial when the court is convinced that there is no real issue involved. This Rule is very broad. There is no limit to the type of case in which such a judgment is permissible, and both plaintiffs and defendants may obtain such a judgment. This law should be adopted by Missouri and every other state in the United States which does not have as liberal a summary judgment provision. Such a law prevents untold delay and expense.

33. United States v. Nat'l Biscuit Co. (D. C. S. D. N. Y. 1938) 25 F. Supp. 329.

34. First Nat'l Bank v. United States (C. C. A. 7, 1939) 102 F. (2d) 907.

APPEAL

Rules 73 through 76 furnish an admirable, uncomplicated method of appeal to circuit courts of appeals. To begin with, any losing party may appeal, the practice of summons and severance and separate appeal by those severally interested having been abolished. Moreover, there is but one method of appeal. The basic essential to an appeal is the filing of a notice of appeal with the clerk of the appellate court. The clerk then notifies those parties who do not appeal from the judgment that the notice has been filed. A cost bond is filed unless one is permitted to take a pauper's oath. A supersedeas bond is provided if one wishes to stay execution until appeal.

The appellate record is prepared by the clerk. Its content is based upon instructions of the different parties (or by a stipulation of the parties as to the proper contents of the record) and upon named portions of the trial record, if they are not covered by the requests of the parties. The testimony may be in narrative or question and answer form, unless the latter form is requested by the appellee. If the appellee demands the question and answer form of the evidence which has already been adequately drafted in narrative form, he may be forced to pay the costs.

There need be no bill of exceptions, and no approval of the record is necessary unless the parties disagree as to what is a true record. It is possible to have a record prepared for an appellate hearing on any intermediate order. The record on appeal is filed and the action is docketed with the clerk of the appellate court.

Sections 1018 through 1069 provide the appellate procedure for Missouri state courts. Those who are familiar with this practice can readily see how much more complicated our method of appeal is than that now effective in the federal courts. We require summons and severance before fewer than all the losing parties having joint interests can appeal. We retain appeals and writs of error. We still require printed bills of exceptions and the approval of such bills, unless the bill is filed during vacation.

Why should these practices be continued? What need is there for different methods of taking a case from one court to another on appeal? Would it not be much better to have one simple method of appeal which could be used, for the most part, either

in a state or federal circuit court of appeals? The suggested answers to these questions can lead to but one result, the adoption of the new rules on appeals from federal district courts to federal circuit courts of appeals.

This paper has not attempted a comparison of every Federal Rule with the corresponding state law, for on many subjects our state law and that covered by the Rules are substantially the same. The purpose of the writer has been to present variations between the two procedural systems which he considers important, and to suggest changes in state procedure which he believes may improve the state practice. On the whole, the new Federal Rules could be adopted with great profit to the law of many states, thereby providing a much better practice and eliminating a duplicity of procedure.

A splendid opportunity is now presented in Missouri for this state to be a testing ground. What a glorious thing it would be if supreme court and legislature, working together harmoniously, should give us an improved modern procedure in at least the fields covered by the new Federal Rules! There can be no doubt that our supreme court favors improved practice. It desires to eliminate undue delay and expense in litigation. Yet it is a practical body of men. It will, therefore, surely recommend to the legislature those changes in our procedure which it thinks are essential to the expedition of cases at the most reasonable expense, and which it believes the lawmaking body of our state will approve.