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The New Missouri Code of Civil Procedure — A Sister State Answers the Challenge

BY JOHN J. CZYZAK*

The movement for reform in procedure in this country during the early part of the nineteenth century led to the promulgation of the Field Code in New York in 1848. It was followed in Missouri a year later. The new Missouri Code which took effect on January 1, 1945, was the first major comprehensive reform of procedure in Missouri since 1849.

The new Code adopts substantially the provisions contained in the Federal Rules of Civil Procedure. The purpose in doing this was to improve the administration of justice. At the same time modernizing and streamlining the Code, the framers aimed at facilitating the dispatch of business and reducing the cost of litigation.

There are 145 sections in the new Code. The sections which deal directly with the subject of pleadings are Sections 32 to 83 inclusive. Although this article deals chiefly with these provisions on pleadings, it first appears necessary to discuss briefly the outstanding characteristics of the new scheme of practice as a whole.

Characteristics of the new Code

Probably the most outstanding departure from the old code is the new theory of joinder now present in the new Code. It relates both to joinder of parties and joinder of causes of action.1a

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1 The Code of Civil Procedure of Missouri may be found in Mo. Rev. Stat. Ann. § 847.1-847.145 (Supp. 1949). The references throughout are to Sections 32 to 83 which correspond to the numbers following the decimal point in the Missouri statutes.

2 The writer has relied heavily upon the transcript of proceedings taken during the meeting of the Institute on Code of Civil Procedure held under auspices of the Bar Association of St. Louis in St. Louis, Missouri, in 1944. Because of the proposal in Kentucky for a new Code modeled largely upon the Federal Rules of Civil Procedure it seems desirable to consider the attitude with respect to a new code of the bar of another state.

There is no limit to the number of causes of action which a plaintiff may assert against a defendant in a single suit. It makes no difference whether they arise in contract or in tort, or both, or whether they all arise out of the same transaction or series of transactions. When a plaintiff sues a defendant he is at liberty to assert every cause of action of whatever nature that he has against the defendant, so long as the court has jurisdiction to try the causes of action. The defendant, in turn, may, by way of counterclaim, assert every cause of action that he has against the plaintiff, whether they all arise out of the same transaction or series of transactions which gave rise to the plaintiff's claims against him or not. It makes no difference whether the actions are ex contractu, ex delicto, or both.

In addition, the defendant may assert a cause of action in that same suit against a co-defendant, or if the transactions or series of transactions upon which he has been sued also give rise, or may give rise to a cause of action in his behalf against third persons, he may file one or more third-party petitions and cause the third parties to be brought into court. The plaintiff may do

Section 37 provides: "The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims where there are multiple parties if the requirements of Sections 15, 16 and 18 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Section 77 and Section 20, respectively, are satisfied."

For a detailed discussion regarding this section of the Code, see Czyzak, Counterclaims, Cross-Claims, and Third-Party Petitions under the 1945 Missouri Code, 1950 WASH. U. L. Q. 201 at 207 et seq.

Section 77 reads as follows: "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim thereto. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." Compare Fed. R. Civ. P 13 (g).

This section looks to a speedy adjudication of all controversies between co-parties in a single action and without multiplicity of suits. To be a valid cross-claim it must be one that is asserted against a co-party concerning matters in question either in the original petition or in a counterclaim. See Czyzak, op. cit. supra, note 2.

As a matter of definition, a claim by a defendant against the plaintiff is a counterclaim; a claim against a co-party is a cross-claim.

Section 20 provides: "(a) Before filing his answer, a defendant may move ex parte or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to file a petition and serve a summons upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the petition is
likewise if counterclaims be filed against him. If it is necessary that third parties be brought into the action so that complete justice may be done he has the same right to protect himself against a counterclaim that a defendant has to protect himself against the claim set up in the petition. There is no limit upon either party confining him to the assertion of causes of action arising out of the same subject matter or the same transaction or series of transactions. That limitation only has to do with compulsory counterclaims, crossclaims and third party petitions.

In consequence of the wider latitude allowed in joinder of parties and causes of action, judgments in lawsuits have become much more flexible than in the past. Under the new Code a judgment is possible as to plaintiff for one kind of relief against one defendant, and for another kind of relief against another defendant, or against a third party defendant. It may be in favor of some defendants as to certain relief, but not for others. It may be against some defendants but not against others, or one kind of
judgment may be against one defendant and another kind of judgment against another.

The theory of the new Code is that when parties oppose each other in court they must dispose of all of the complaint which they have against each other arising out of the transactions or series of transactions alleged in the petition. In addition, they may adjudicate every right and every liability arising out of those transactions, both as to parties who are originally brought into court and as to others who must be brought into court by third party petitions for that purpose.

**Formal pleading requirements**

Under the new Code, a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim is required to contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. There does not appear to be any essential difference in the present requisites of a pleading from those established by the bar in the past. The petition, as previously, must name the court and all of the plaintiffs and defendants in the title. After the first pleading is filed, the title need only name the first plaintiff and the first defendant as those names appear in the title. This too has been the actual practice in the past. The pleading must be signed by an attorney, if the party has an attorney, and by himself if he has no attorney, the same as in the past. As in the past a pleading...

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9 See *supra* note 2.
10 See *supra* notes 2, 4, 5.
11 Section 36 provides: "A pleading which sets forth a claim, counterclaim, cross-claim or third-party petition shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. If a recovery or money be demanded, the amount shall be stated. Relief in the alternative or of several different types may be demanded."
12 See Section 33 which reads "Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in section 32. In the petition the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties."
14 Section 34: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his name to his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleading need not be verified or accompanied by affidavit."
shall be separated into paragraphs,\textsuperscript{15} which shall be numbered.\textsuperscript{16}

\textbf{Short Cuts}

The new Code provides for certain short cuts in pleadings. Certain allegations may be omitted. Wherever authority exists to allow doing away with certain allegations in the plaintiff's petition, it is based on the theory that it is better to require the defendant to deny specifically the existence of the fact than to require the plaintiff in every instance to make the formal allegation and furnish formal proof in support thereof.

Thus, for example, the new Code provides that it shall be sufficient to aver the ultimate fact of the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity or the legal existence of a corporation or of an organized association of persons.\textsuperscript{17} The same section provides that when a person desires to raise an issue as to the legal existence of any party or the capacity of a party to sue or be sued, or his authority to sue or be sued in a representative capacity, he shall do so by specific negative averments which shall include such supporting particulars as are peculiarly within the pleader's knowledge.\textsuperscript{18} The purpose is to allow the defendant to make his defense, if he has a defense, but not require the plaintiff to prove anymore than the defendant actually disputes. In other words, if the petition alleges that plaintiff is a corporation but the defendant believes that the corporation has been dissolved, he should allege that it has been dissolved. This relieves the plaintiff from procuring a certified copy of the articles of incorpotation

\textsuperscript{15} Section 43: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than demals shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

\textsuperscript{16} Ibid.

\textsuperscript{17} Section 45. It provides: "It shall be sufficient to aver the ultimate fact of the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of a corporation or of an organized association of persons that is made a party. When a person desires to raise an issue as to the legal existence of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge. When a party so raises such issue, the burden of proof thereon shall be placed upon the opposite party."

\textsuperscript{18} Ibid.
and removes the chance that he rely upon such a certified copy when the real purpose of the defendant is to rely upon a dissolution.

If the plaintiff alleges that he is a trustee under an indenture, and that fact is denied by general agreement, the plaintiff's attorney would naturally rely upon the provision in the trust indenture naming the plaintiff as trustee. If the defendant intends to claim that plaintiff never qualified as trustee and that under the terms of the trust indenture formal qualification was a prerequisite to his assuming his duties as trustee, he should allege this fact, thus directing the plaintiff's attention to the very defect upon which the defendant intends to rely.

The new Code eliminates a great deal of evidence which the defendant never intended to meet by thus switching the burden of specific averment from the plaintiff to the defendant. This tends to avoid surprise.

The section in question does not require the defendant to allege specifically facts which are not within his own peculiar knowledge. To the extent that the facts are in the peculiar knowledge of the plaintiff, the defendant is given the right, which he undoubtedly should have, to require the proof to be produced by him who has the proof.

Another section of the new Code, similar to the one just referred to, applies to partnerships. If a pleading alleges that the parties are partners, the allegation is taken as confessed unless it is denied with such supporting particulars as are peculiarly within the pleader's knowledge.19

It should be noted that under the new Code the denial of the existence of a corporation or a partnership need not be under oath.20

The new Code provides that it is sufficient to aver generally that all conditions precedent have been performed or have occurred, and a denial of the performance or occurrence shall be made specifically and with particularity.21 Thus, in a suit upon an

19 Section 46. It provides that "When parties sue or are sued as a partnership, and the names of the partners are set forth in the petition or counterclaim, the existence of the partnership shall be deemed confessed unless it be denied by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

20 See Section 34, supra note 14.

21 Section 48 provides as follows: "In pleading the performance or occurrence
insurance policy, it has long been the custom to allege that the policy was issued in consideration of the payment of a premium, that the policy insured the plaintiff against loss with regard to certain property by fire and for a certain term, that within that term the property was damaged by fire in a certain amount, and that plaintiff has performed all of the conditions by him to be performed under the terms of the policy. Such a pleading is justified upon the theory that the collateral provisions of the policy do not directly bear upon the statement of plaintiff's cause of action and, therefore, if the defendant relies upon any collateral conditions they should be pleaded in the answer. There is no question but that it was the intent of the legislature to do away with the cumbersome practice of alleging each and every provision in an insurance policy, followed with an allegation that each condition therein imposed was performed, or the performance thereof was waived, or that the facts which made such condition operative never occurred.

The new Code makes it unnecessary to determine when the performance or occurrence of a condition precedent must be pleaded and when such an allegation may be omitted. It applies not only to insurance policies but to all contracts, and will occasionally apply to actions which do not sound in contract.

Still another section of the new Code provides that in pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law.

In pleading a judgment or decision of either a domestic or foreign court or a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to aver the judgment or decision without alleging the matters showing jurisdiction. Jurisdictional facts, like conditions precedent, need not be pleaded.

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Section 49 provides: "In pleading an official document or official act it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made, the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence."

Section 50: "In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. If such allegations be controverted, the party pleading them shall establish on the trial the facts conferring jurisdiction."
As to all of the short-cuts in the new Code discussed above, it must be borne in mind that although they shift the burden of pleading they do not shift the burden of proof. Experience has shown that when a general denial is filed and proof is offered in support of such allegations, it is seldom that any conflicting evidence is offered by the opposing party. If conflicting evidence is offered, it nearly always goes to some one specific point. It is necessary that the answer point out the particular in which issue will be joined, but the object is not to impose any burden of proof upon the defendant but merely to narrow the scope of proof which the plaintiff must produce and vice versa.

A very important provision of the new Code prescribes that whenever the pleading contains averments indicating that the law of another state is relied upon, the courts of the forum shall take judicial notice of the public statutes and judicial decisions of that state. The Supreme Court of Missouri has announced a rule that allegations which show that the cause of action arose under the laws of another state shall have the same effect.

However, when a party relies upon the law of a foreign state, he often relies upon court decisions of that state, and sometimes upon the law as reflected not by one decision but by many decisions. In such a case, it is necessary to plead the jurisdiction of the courts that rendered the decisions, the names of the cases, enough of the statement of facts to indicate what the courts were passing upon, and then to quote at length all of the language from all of the decisions upon which the pleader intends to rely. It is obvious that if the court of the forum depends only upon pleaded cases to determine the law of a foreign state, it will ob-

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24 Section 54 in sub-section (b) thereof reads: "In every action or proceeding wherein the pleading states that the law of another state is relied upon, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

This part of Section 54 does not take care of the attitude which the courts of Missouri should take with regard to foreign law as distinguished from the law of sister states, unless the words "another state" were intended to include foreign states as well. On the general subject of proof of foreign law, see Nussbaum, The Problem of Proving Foreign Law, 50 Yale L.J. 1018. Collateral thereto and with regard to official foreign documents see Butler, Proving Foreign Documents in New York, 18 Form. L. Rev. 49.

25 Rule 3.14 of the Supreme Court of Missouri. It reads: "A pleading shall be considered sufficient to authorize the court to take judicial notice of the law of another state if it either alleges that the party filing it relies upon the law of another state or contains allegations which show that the law of another state must be applied. The court may inform itself of such laws in such manner as it may deem proper, and may call upon counsel to aid it in obtaining such information."
The New Missouri Code

It is not to the interest of the party who pleads the law of a foreign state to plead any decision except one which is in his favor. If there are distinctions or variations of the rule which he invokes which are against him, the temptation is to fail to plead the cases which make the distinctions. If the court knows that the rights of the parties are to be determined by the foreign law, then justice requires that the foreign law should be determined the same way as domestic law, by examining the foreign decisions and the foreign statutes to the extent necessary to determine the true law.

The federal courts have always followed the rule concerning the law of foreign states not by virtue, however, of a provision in the Federal Rules of Civil Procedure, but rather by the view taken by the Supreme Court of the United States that the law of every state of the union is the law of a part of the territory within the sovereignty that established the federal courts. A federal judge has always been required to take judicial notice of the law in each and every one of the forty-eight states of the union because the territory in which that law exists is within the territory subject to the United States Government. This section of the new Missouri Code brings the Missouri practice in line with the federal practice.

The new Code also provides that when a claim is founded upon a written instrument and the same is set out at length, the execution of such instrument shall be deemed confessed unless the party charged to have executed the same shall specifically deny the execution thereof. This will not shorten the pleading but it does away with unnecessary proof. Heretofore, like statutes provided that when a pleading was founded upon an instrument charged to have been executed by the opposing party, the execution thereof would be taken as confessed unless the execution is demed under oath. The necessity for verification has been abolished by the new Code. It retains as much of the old practice as

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27 Section 56 of the Code provides: "When any claim or counterclaim shall be founded upon any written instrument and the same shall be set up at length in the pleading or a copy attached thereto as an exhibit, the execution of such instrument shall be deemed confessed unless the party charged to have executed the same shall specifically deny the execution thereof."
is in keeping with the new theory of permitting short cuts, both in pleading and in proof, but does away with verification for the same reasons applicable to allegations of incorporation and partnership. A verified pleading is never required except by certain sections applicable to special proceedings which were not repealed by the new Code, for example a petition for divorce.

Exhibits and Pleadings *in haec verba*

One of the provisions of the new Code states that whenever a claim, including a counterclaim or a defense, is founded upon a written instrument, it may be pleaded, either according to its legal effect, or it may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.\(^2\) The object of this statute was not to do away with any existing statute but to do away with two lines of decisions in the state. The Missouri courts have held that an instrument may not properly be pleaded *in haec verba* but must be pleaded according to its legal effect. Later the Supreme Court of Missouri held that to plead a contract *in haec verba* was permissible in an equity suit, notwithstanding the fact that then existing code governed pleading both in actions at law and suits in equity.\(^2\)

The Missouri courts have held that instruments must be pleaded according to their legal effect because to set out the entire contract meant pleading the evidence instead of ultimate facts. However both under the old code and under the new Code, when a pleading is based upon a written contract alleged to have been executed by the opposing party, its execution stands admitted unless specifically denied. If it be not specifically denied, it will not be introduced in evidence and will only appear once in the record. Under the old law which required pleading an instrument according to its legal effect, it was not only necessary for the plaintiff's conception of the legal effect to appear in the pleadings, but it was also necessary that the whole contract be introduced in evidence, whether its execution was admitted or

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\(^2\) Section 55: "Whenever a claim, defense or counterclaim is founded upon a written instrument, the same may be pleaded according to legal effect, or may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit."

\(^2\) 159 Mo. 322 at p. 328, 60 S.W 126 (1900).
denied, unless the defendant agreed that the petition properly construed the contract.

It is certainly proper that a contract that is the subject of an action should be before the court. If so, there is no reason why it should not be presented in its entirety when suit is filed or as soon as it becomes a matter of defense. The court must consider the whole contract to determine its true meaning. The provision therefore relating to the pleading of contracts and other instruments in haec verba is an improvement over past practices.

Many courts have also held that an exhibit is no part of a petition. They have refused to follow the rule which they have followed in construing every other writing. Statutes which make their meaning clear by reference to the provisions of other statutes have always been upheld. A deed which refers to the description of property contained in another deed has always been held sufficient. Contracts which provide that they incorporate the provisions of another contract or instrument have been uniformly sustained. But the courts have refused to follow this rule in construing pleadings. Of course the reason for condemning pleadings in haec verba is the reason for ignoring an exhibit in determining what constitutes the pleading.

If the construction of an instrument is involved, if it is intended that such instrument can be pleaded in haec verba, it follows that it should be permissible to plead the same by attaching a copy of the instrument as an exhibit. This enables the pleader to present a shorter and clearer picture of his claim or defense than if all of the provisions of a voluminous instrument were included in the consecutive statement of the cause of action or defense.

Pleadings under the new Code

Under the new Code the only pleadings are the petition and an answer. An exception exists in case the lawsuit includes

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30 Section 32: "There shall be a petition and an answer; and there shall be a reply if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim, a third-party petition if leave is given to summon a person who was not an original party; and there shall be a third-party answer, if a third-party petition is served. No other pleading shall be required except that the court may order a reply to an answer or a third-party answer."

An interesting question can be raised with reference to that portion of this
such pleadings as counterclaims, crossclaims and third-party petitions. The Federal Rules of Civil Procedure provide that there shall be two pleadings unless a reply to an answer is ordered by the court. The new Missouri Code provides that no reply to an answer needs to be filed unless such a reply is ordered by the court. It does not prohibit, however, the filing of a reply to an answer. If the plaintiff elects to file a reply to an answer he is confined to his allegations in his petition but if he elects not to file a reply and none is required by the court then he can offer any new matter that he may have in opposition to the defense set up in the answer. Under the new Code the reply will usually be an answer to a counterclaim.

However other pleadings may be filed under the new Code, by reason of the fact that one defendant may sue another defendant in certain circumstances and that third parties may be brought in by third party petitions. Therefore, in addition to petitions and answers, replies to counterclaims and replies to answers, when ordered by the court or when the party elects to file the same, the new Code provides for crossclaims and third party petitions.

The only difference between a crossclaim and a third party petition is that the former is the statement of a cause of action by one party against a co-party, that is, one who is already a party to the suit, whereas the latter states a claim against one who is not yet a party to the action. In either case the claim must arise out of the transactions or occurrences which are the subject matter of the original action or counterclaim. If the party against whom the claim is to be asserted is already a party to the suit, there is no necessity for making him a party. If he is not the original opposing party, of course the claim cannot properly be called a counterclaim, and for that reason it is designated a crossclaim.

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section which requires the filing of a reply in the event the answer contains a counterclaim. The statute says that a reply is necessary if the answer contains a counterclaim denominated as such. Does this mean that if the answer contains a counterclaim but is not labeled a counterclaim, then the necessity of filing a reply is dispensed with?

31 Ibid.
32 Fed. R. Civ. P 7
33 Section 32, supra note 30.
34 Ibid.
35 Ibid.
36 See Sections 20, 77, supra notes 4, 5.
Crossclaims and third party petitions provide the means by which the court is enabled to clean up all of the litigation and determine all of the rights and liabilities arising out of the transactions which the court is called upon to consider, either by reason of the statement of claims by the plaintiff in his petition or by the statement of claims of the defendant in his counterclaim.

If third parties are brought into the case, they have the right to file crossclaims and counterclaims to the same extent as the original parties.\textsuperscript{37} When they assert their crossclaims and counterclaims they may thereby furnish the foundation for further crossclaims and counterclaims by other parties, whether they are plaintiffs, defendants, or third party defendants. Once in the case the same forms of pleadings are available to them that were available to the original parties to the action.

Thus the new Code provides for petitions, answers, replies to answers, if ordered by the court, permissive replies to answers, even though not ordered by the court, crossclaims and third party petitions. There is a reference in the new Code to answers to third party petitions but, of course, they are merely answers to petitions.\textsuperscript{38}

Motions

All other matters must be raised by motion. The new Code provides that demurrers and pleas in abatement shall not be used.\textsuperscript{39}

While the new Code provides that demurrers may not be used, it provides that objection to a petition which fails to state a claim upon which relief can be granted shall be by motion.\textsuperscript{40}

\textsuperscript{37} Supra note 30.
\textsuperscript{38} Ibid.
\textsuperscript{39} Section 59 provides: "Demurrers and pleas in abatement are not to be made." The legislature made a substitution of labels. What was formerly known as a demurrer or a plea in abatement is now identified as a motion. The work of the lawyer has not changed one iota, although office routine may have been disturbed by legislative legerdemain.
\textsuperscript{40} Section 62: "The objections of failure to state a claim upon which relief can be granted or to state a legal defense to a claim may be raised by motion when these objections appear on the face of the pleadings."

This is as of old when defects which were grounds for demurrer had to be taken advantage of in that manner, if they appeared upon the face of the petition. Otherwise they were treated as waived. Of course if the petition failed to state facts to constitute a cause of action, or if it appeared that the court was without jurisdiction, the defect was deemed so radical that the defendant was allowed to take advantage thereof at any time.
Motion shall also be used when a pleading fails to state a legal defense. If the grounds for the motion appear on the face of the pleading there is no difference in effect between the old demurrer and the motion under the new Code. The difference is one of label. The old demurrer is now a motion.

The old practice of sustaining a demurrer three times before dismissing the action has been abolished. There is no new statute that compels the court to sustain a motion to dismiss on the ground that the petition does not state facts which justify relief or that an answer states no defense. The court may in its discretion grant the plaintiff or the defendant leave to amend and will undoubtedly do so if the petition or the answer indicate that the party intends to state a cause of action or a defense but has overlooked an allegation necessary to that statement. On the other hand, if the court, after hearing the arguments, is convinced that the plaintiff has misconceived what constitutes a cause of action, or the defendant has misconceived what constitutes a defense, then the court is not compelled to go through the useless process of allowing the plaintiff or defendant to make three attempts before dismissing the cause of action or defense.

If the plaintiff is attempting to state a good cause of action or the defendant a defense, the court should allow more than three efforts so long as he is convinced that the cause of justice is served. Under the new Code, therefore, a petition or a defense will be dismissed out of court as soon as it becomes obvious that it should be dismissed, but not before.

Any objections other than those mentioned in the foregoing paragraphs, which could have been raised by the old demurrer, can now be raised by motion.

The Motion To Strike

The right to strike redundant, immaterial, impertinent, and scandalous matter has been preserved by the new Code. The substance of Rule 12 (b) of the Federal Rules of Civil Procedure has been adopted in Missouri by providing that every defense in law or in fact shall be asserted in the responsive

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41 Ibid.
42 Section 64: "A party may move to strike any redundant, immaterial, impertinent, or scandalous matter from any pleading."
pleading if one is required, except that at the option of the pleader the following defenses may be made by motion:

(1) Lack of jurisdiction over the subject matter;
(2) Lack of jurisdiction over the person;
(3) Improper venue;
(4) Insufficiency of process;
(5) Insufficiency of service of process;
(6) Failure to state a claim upon which relief can be granted.\(^\text{44}\)

In addition to the foregoing the following objections and other matters may be raised by motion, whether or not the same may appear from the pleadings:

(1) All of the defenses named in Federal Rule 12 (b) except failure to state a claim upon which relief can be granted which is covered by another section of the new Code;
(2) That plaintiff should furnish security for costs;
(3) That plaintiff has not 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 claims have been improperly united;
(6) That the counterclaim or crossclaim is one which cannot properly be interposed in the action.\(^\text{45}\)

The new Missouri Code is likewise different from Rule 12 of the Federal Rules because other matters than those specifically named may be raised by motion. The Federal rule and the new statute are alike in this respect: the matters specifically mentioned may be raised whether or not the objections appear from the pleadings and the grounds thus urged by motion may be supported by affidavit and controverted by opposing affidavit.

The Missouri statute deals separately with the objection of failure to state a claim upon which relief can be granted or to

\[^\text{44}\] Section 61. Attention is called to the fact that this section permits the raising of the objections enumerated therein by motion whether or not the same may appear from the pleadings and other papers filed in the cause. Sections 61 and 62 would seem to overlap, for any objections which can be raised under section 62 can be raised by section 61, for section 61 makes reference both to the enumerated objections "and other matters." For example, if an action is barred by the statute of limitations, the objection on that ground may be raised under section 62 if it appears from the face of the petition that time has run and it may also be raised by section 61 even though the objection does not fall within any of the 10 categories specified since the ground can be classified in the general category of "other matters."

\[^\text{45}\] See Section 61,
state a legal defense, providing that the objection must appear on the face of the pleading. While the Federal Rule does not use that language, it seems obvious that the objection that a pleading fails to state a cause of action or a legal defense can appear only from the face of the pleading.

It is necessary to note the difference between the Missouri statute and Federal Rule 12 (b) The legislature has purposely and intentionally departed from the language of the Federal Rule and it must be presumed therefore that the legislature intended the law to be different.

The new Code specifically provides for motions for a more definite statement, for a bill of particulars, for a motion to strike and for a judgment on the pleadings, in addition to the provisions contained in the section just referred to. The new Code does not provide what orders shall be made if a motion is sustained. Of course the provision for a motion for a judgment on the pleadings necessarily implies that a judgment shall be rendered; a motion to strike implies that the order will strike certain matters from a pleading. Likewise a motion for a more definite statement implies that the order shall point out specific matters that shall be amplified or added by amendment. These motions were all well known before the new Code went into effect and their function and nature is no different under the new Code. It follows that all of the objections specified in the applicable provision of the Code call for the same orders that were invoked in the case of similar motions under the old code.

The federal courts in following the federal rule have entertained the same motions and have in general made the same orders thereon as they have before the adoption of the Federal Rules of Civil Procedure. It would seem that, with the exception of motions based upon the ground that a pleading does not state a cause of action or defense, motions are the same as they always were.

In disposing of the motions the procedure is different. All available motions must be made within the time allowed to the

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Section 63 states: "A party may move for a more definite statement or for a bill of particulars of any matter contained in a petition, answer or reply which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleadings or to prepare generally for trial when a responsive pleading is not required."
party for pleading, or if the last pleading has been filed, then within twenty days after service of the last pleading.\textsuperscript{47} They may be filed simultaneously with the pleading filed by the same party, and the filing of a motion is without waiver of the matters contained in the pleading.\textsuperscript{48}

When a party files a motion, he may join with it all other motions then available to him without waiver of the objections in any of the motions. If he is overruled he does not waive his objections by pleading over. However a party does waive all of the objections which might be raised by a motion by failure to assert the same within the time permitted.\textsuperscript{49} There are two objections which are not waived by failure to file a motion or by pleading. One is failure to state a cause of action or defense and the other lack of jurisdiction over the subject matter.\textsuperscript{50}

\textit{Bill of particulars}

Under the new Code only ultimate facts need be alleged. An ultimate fact is a conclusion of fact. There are instances in which the pleadings, because of peculiar circumstances, do not give the opposing party the information that he should have in order to prepare his defense. They sometimes leave the defendant in the dark. He may not know where to go to get his evidence. He may have difficulty producing witnesses at the trial.

Whenever the court can see that the circumstances are such that this is likely to happen, a bill of particulars may be required under the new code even though the petition states a cause of action.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{47} Section 65: "All motions made shall be made within the time allowed for responding to the opposing party's pleading or, if no responsive pleading is permitted, within 20 days after the service of the last pleading. Motions and pleadings may be filed simultaneously by the same party without waiver of the matters contained in either."
\item \textsuperscript{48} ibid.
\item \textsuperscript{49} Section 66: "A party who makes a motion may join with it the other motions provided for and then available to him. No objection is waived by being joined with one or more other objections in the motion, nor shall pleading over or entering into the trial of the merits be deemed to waive any objection properly raised by motion. A party waives all objections and other matters then available to him by motion by failure to assert the same by motion within the time limited by section 65, except (1) failure to state a claim upon which relief can be granted, or failure to state a legal defense to a claim, and except (2) lack of jurisdiction over the subject matter."
\item \textsuperscript{50} See note 47 \textit{supra} for content of section 65; see note 39 \textit{supra} regarding waiver.
\item \textsuperscript{51} ibid.
\end{itemize}
It should be emphasized that the provision for a bill of particulars does not take the place of a motion to make more definite and certain. The new Code provides specifically for such a motion.\(^2\) A clear example of the proper use of a bill of particulars is to be found in the case of an action on an account where the sum claimed by the plaintiff represents the aggregate amount of a number of claims without distinctly specifying any of them. A bill of particulars would require the plaintiff to specify with particularity the individual claims involved.

The bill of particulars is an instrument whereby the defendant is enabled to prepare his defense.

A motion to make more definite and certain envisages a series of statements in the nature of ultimate facts contained in the pleading which do not state clearly the cause of action or defense. For example the courts frequently sustain motions to make more definite and certain in negligence cases where only a general allegation of negligence is made. If a distinction is to be drawn between a bill of particulars and the motion to make more definite and certain it is on the ground that the latter lies when the precise nature of the charge is not apparent, while the former lies when the pleading completely and perfectly states a cause of action or defense.

**Inconsistent theories**

Under the new Code a party can ask for relief upon inconsistent theories or in the alternative.\(^3\) The new Code does not authorize the pleading of inconsistent statements of fact. Statements of fact may be made in the alternative but inconsistent statements of fact are not expressly authorized. No doubt they would be subject to a motion to make more definite and certain.

**Immature causes of action**

One of the innovations in pleading is the provision that one may allege a cause of action based upon the hypothesis that relief

\(^2\) See note 46 supra.

\(^3\) Section 42 reads: "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the
will be given on trial.  Strictly speaking one who is secondarily liable upon an instrument has no cause of action against the person who is primarily liable until a judgment has been rendered against the party secondarily liable and such judgment paid. The surety on a bond has no cause of action against the principal until a judgment against the surety on the bond has been paid. However, under the new Code if a surety is sued upon a bond he may by a crossclaim or third-party petition sue the principal upon the bond. He cannot obtain a judgment upon his crossclaim or his third-party petition unless judgment is rendered against him, but if it is he may obtain a judgment in the same action. Thus, a party may obtain a judgment for exoneration, contribution, or under the doctrine of subrogation in the action wherein his cause of action is created by the judgment rendered against him. This simplifies procedure but it does not settle the question as to how the rights of the person primarily liable are to be protected in the event the party first sued fails to pay the judgment against him.

Accrual of cause of action

It is still necessary that a cause of action shall have accrued before suit can be brought. However it is only necessary that the cause of action set forth in the counterclaim shall have accrued at the time the counterclaim is filed if it arises out of the transactions or occurrences constituting the subject matter of the claim of the opposing party. The only other condition is that the counterclaim not require the presence of third parties of whom the court cannot acquire jurisdiction. Even after a counterclaim has been filed, a further claim which has matured or was acquired may with the permission of the court be presented as a counterclaim by a supplemental pleading.

\[\text{alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, whether based on legal or on equitable grounds or on both.}\]

\[\text{See notes 4 and 5 supra; see Zickel v. Knell et al., 357 Mo. 678, 210 S.W 2d 59 (1948), Niednghaus v. Zucker, 208 S.W 2d 211 (Mo. 1948).}\]

Suppose that defendant's counterclaim is based on the filing of the very action by plaintiff against him, is this the kind of immature cause of action contemplated by the Code?

\[\text{Section 75 reads: "A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading."}\]

\[\text{Ibid.}\]
The new Code provides that upon reasonable notice and upon such terms as are just any party may serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. However, while the Code provision applies to petitions as well as to counterclaims it does not state that a cause of action which accrued after the original petition was filed may thus be set up. The provision in question would seem to apply to transactions or occurrences which further affect the extent to which the plaintiff is entitled to relief for the same cause of action, e.g. pleading additional matter by way of aggravation of damages.

Concluding remarks

The new Code went into effect on January 1, 1945. A number of decisions have construed its various provisions. By and large they have heeded the directive of the legislature as enunciated in the second section of the Code providing that the Code shall be construed to secure the just, speedy and inexpensive determination of every action. Another directive is contained in section 57 of the new Code which provides that all pleadings shall be so construed as to do substantial justice.

Since nearly all of the provisions applicable to pleading have been taken from the Federal Rules of Civil Procedure, the Missouri courts in building up a body of decisions under the new Code have relied upon federal cases rather than the existing state decisions to determine the meaning of the new sections. Of course in determining whether federal decisions may be relied upon to construe the provisions of a state code it is necessary to observe whether the legislature has adopted language which is the same as or different from that contained in the Federal Rules. It is the usual rule of construction that whenever a legislature adopts language different from the model act, the legislature intended to enact a different law. This, however, is not an inflexible rule. For example, changes often appear in the later legislation which are obviously mere improvements in draftsmanship. Such slight changes do not evidence an intent to change the law.

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57 Ibid.
58 Section 2: "The Code shall be construed to secure the just, speedy, and inexpensive determination of every action."
59 Section 57: "All pleadings shall be so construed as to do substantial justice."
One observation which is pertinent relates to the general purpose which the legislature had in mind in adopting a new Code. The general purpose has been mentioned once or twice in these pages. It bears on the notion that the object of the Code is the proper administration of justice and that the sporting idea of a lawsuit has no place in present day society.

It is gratifying to learn that another jurisdiction, Kentucky, is prepared to follow in the footsteps of other states that have adopted in whole or in part the Federal Rules of Civil Procedure. The relaxation in the highly conceptualistic attitudes of the courts by legislation has brought about a healthy change in pleading and practice.