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PARTIES AND PLEADINGS IN THE MISSOURI PROPOSED CODE OF CIVIL PROCEDURE

THOMAS E. ATKINSON*

At the request of Mr. Kenneth Teasdale, chairman of the Missouri Supreme Court Committee on Civil Procedure, who has read the foregoing article¹ by Mr. Henry in manuscript, I will comment briefly on some of the ideas expressed therein. Mr. Teasdale has not read my comments and is not in any way responsible for anything which may be said. Having acted as technical adviser to the committee, I do not bring a fresh viewpoint toward the product of the committee; still Mr. Henry's able article is stimulating even to one whose mind has been close to the subject matter.

Mr. Henry is right in saying that Missouri, except in a few instances,² has failed to modernize her civil procedure since the adoption of the Field Code nearly a century ago. Indeed in some respects, principally lying outside the topics covered by his paper, our present procedural statutes go back much further than 1849.³ Again he is right in saying that Plan II has been largely adapted from the new Federal Rules of Civil Procedure. While it is difficult if not impossible to form a numerical criterion, I would estimate that about 80 per cent of the Federal Rules provisions are included within Plan II.

What then are the Federal Rules? Of course, they come from a number of different sources. Basically the code procedure such as that under which Missouri now operates is probably the most important of these. Also of prime importance are the various provisions in force in many code and non-code states, adapted from the modern English procedure, which in 1873 went a long way beyond the principles of the Field Code. The Federal Equity Rules were drawn upon in certain respects. Finally there were certain new provisions and many improvements in form and phraseology over earlier statutes and rules.

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1. Henry, *Missouri's Proposed Code of Civil Procedure, Parties and Pleadings* (1942) 7 Mo. L. REV. 1.

2. See note 56, *infra*.

3. See Chandler, *Some Code History* (1939) 10 Mo. BAR J. 209.

What is the fundamental philosophy behind the Federal Rules? In a nutshell, it is that common sense should prevail over the technicalities which grow up under the common law and code systems. It aims to direct a fair pattern of the procedural steps to be taken but to permit flexibility where the ends of justice will be subserved. The framers of the Federal Rules recognized, as those of the Field Code did not, that absolute certainty and flexibility cannot be effected by any code for these qualities are direct opposites when carried to their logical extremes. A balance between these two factors is probably the greatest contribution of the Federal Rules. Definiteness, when desirable and attainable, is secured through the highest quality of draftsmanship. Flexibility is manifested in many parts of the rules both expressly and by implication. It sometimes takes the form of permitting counsel to take optional courses, sometimes by lodging discretion with the court, and again by the use of such obviously non-technical terms as "claim" or "occurrence" in place of the technical, baffling "cause of action," "subject of the action" and the like.⁴

I share Mr. Henry's regret that Plan II departs as much as it does from the provisions of the Federal Rules. Primarily, this feeling is due to the superiority of the latter as a whole to any other American procedural system as well as the superiority or equality of almost all the individual provisions thereof. Of secondary, but still of great importance are the advantages which would be secured through more uniformity between federal and state procedures. The Federal Rules are here and they are here to stay. Anyone practicing in the federal courts must be familiar with them and it will be a distinct advantage to be able to apply the same knowledge to practice in the state courts. Moreover, from the jurisprudential standpoint, any procedural system which is in force in all courts operating in a single physical territory is that much stronger than a system peculiar to one set of courts. Courts, lawyers and litigants all profit from the good and the bad decisions of other courts. All other things being equal it seems both convenient and wise to follow the Federal Rules in the state procedure. However, to considerable extent in scope and to a lesser degree in the particular provisions, a state code calls for different treatment from demands of the federal practice. Then, too, the chance of making improvements over the Federal Rules should not be overlooked. Uniformity should not be made the major premise.

4. See HENRY, *op. cit. supra* note 1, at notes 43 to 48, 79 to 84.

The departures and divergencies in Plan II from the Federal Rules are of several different types. In the first place there are the cases where attempt has been made to either rephrase a provision in the interest of clarity or emphasis, or to work an actual change which is thought to be an improvement. Mr. Henry does not oppose changes of this nature, for in pointing out the illiberality of Missouri decisions with reference to fusion of law and equity, theory of the case, and real party in interest, he advocates that the language of the Federal Rules, which does not depart materially from existing Missouri provisions, should be changed so as to insure a more liberal interpretation.⁵ This is at least a debatable point. On the whole I believe that these particular changes are not necessary. The Missouri courts have been coming to a more enlightened view with regard to these matters. This tendency will undoubtedly be quickened by the entire spirit of Plan II. Loopholes for departure from past illiberal decisions can be found in the slightly altered phraseology in which the provision with regard to union of law and equity, theory of the case, and real party in interest, he advocates that the Rules and Plan II. However, I do favor a number of other departures in Plan II from the Federal Rules because they seem to constitute improvements. Those relating to parties and pleadings will be pointed out in the succeeding pages; without doubt there are others which could well be made.

A second type of differences from the Federal Rules is the inclusion in Plan II of certain materials not contained in the Federal Rules at all. In part, this is due to the fact that such subjects as venue, change of venue and certain aspects of appellate procedure lay outside the jurisdiction of the Federal Rules Committee. Then also the Federal Rules occasionally adopt the state practice by general reference thereto.⁶ In framing a state code or set of rules, such topics should be included for the sake of convenience and harmonization. In this respect, the Colorado Rules which completely cover the subject of civil procedure seem vastly superior to the Arizona Rules⁷ which contain little except the Federal Rules and which are necessarily superimposed on pre-existing statutes leaving many of the latter still in effect. Arizona gains something by preserving the numbering of the Federal Rules but it thereby loses more by dividing its rules with reference to civil procedure into two formally unrelated parts.

5. See HENRY, *op. cit. supra* note 1, at notes 15 to 29, 40, 41.

6. Rules 4 (d) (2), 62 (f), 64, 69 (a).

7. Cf. Sunderland, *Arizona's New Rules of Civil Procedure* (1940) 23 J. AM. JUD. SOC. 215.

Another variation of this general type of difference between the Federal Rules and Plan II is the case in which the Federal Rules might have dealt with a point but in the interest of brevity did not. An example of this is the provision relative to continuances⁸ upon which subject the Federal Rules have little to say.⁹ There are numerous other examples which will be pointed out under the topics of Parties and Pleadings.¹⁰ It is perhaps debatable whether such provisions should be included in a code which otherwise follows the Federal Rules in the main. The points covered are usually of comparatively minor importance and it is possible to get along without them. They add to the length of the code and to some extent prevent flexibility and the exercise of discretion. In spite of these considerations, if they have worked well in the past and present no problems in interpretation and application, I believe that it is wise to include them. For one thing they afford a sort of continuity during the period of transition between an old and a new procedure.

The third distinct type of difference between Plan II and the Federal Rules is the former's rejection of large parts of the latter and the retention of existing relevant statutes, or something closely approximate thereto. Mr. Henry deplores these instances and several times calls attention to the Missouri Supreme Court Committee's emasculation of several important provisions contained in the draft prepared by the Sub-committee on Suggestions and Plan. These included not only the provisions relative to the necessity for demands of jury trial and those concerning parties and pleadings mentioned by Mr. Henry, but also many other provisions falling outside of his consideration. For example, the present Missouri provision relating to voluntary nonsuits was virtually continued except that a second nonsuit is not permitted after the jury is empanelled, or evidence has been introduced.¹¹ The provisions for special verdicts and for general verdicts accompanied by answers to interrogatories were deleted.¹² This is likewise true of much of the article on depositions and discovery¹³ and the entire articles on judgments¹⁴ and referees (called masters in the federal practice).¹⁵

8. MO. PROP. CODE, art. 9, § 3-6.

9. See, however, Rules 15' (b), 56 (f).

10. See note 34, *infra*.

11. MO. PROP. CODE, art. 9, § 10.

12. *Id.* art. 9, §§ 15, 16. See note 17, *infra*.

13. *Id.* art. 8.

14. *Id.* at pp. 67-68.

15. *Id.* art. 11.

It may not be amiss to point out how these changes came about. As Mr. Henry relates, the Sub-committee on Suggestions and Plan offered two schemes for revision: Plan I, designed to remedy about a dozen trouble-spots in our procedure, involving real change in a comparatively small number of sections of the present statutes and minor harmonizing amendments in a considerable number of others; and Plan II, a completely revised code which was based very largely upon the Federal Rules. In its consideration of the drafts of Plan II, the Committee, or a majority of those present, reverted at times to the philosophy of Plan I. Hence the present Missouri provisions were retained on the theory that they were not trouble-spots and were good enough. Sometimes specific objections were made to the new provisions, but just as often none were voiced except that they were new. The result is that Plan II, if enacted in its present form, will not bring about as much uniformity between state and federal procedure in either phraseology or effect as would have been brought about by the Sub-committee's draft. There is also a partial loss of formal symmetry in Plan II and the amalgamation of parts of the old and parts of the new procedure may cause some legal difficulties. Finally, there is a loss of the beneficial effect of many of the omitted Federal Rules provisions.

It is interesting to notice that in the printing of Plan II the Missouri Supreme Court calls attention to at least two of these instances *viz.*, the elimination of the summary judgment provision which has a close connection with other parts retained¹⁶ and of the provisions for special verdicts and interrogatories which the court has printed side by side with the present statute as alternative proposals.¹⁷

PARTIES

Mr. Henry's excellent discussion of the liberal provisions for party joinder, intervention and interpleader which follow the Federal Rules calls for no further comment. Attention may perhaps be called to a new provision¹⁸ requiring court approval for compromise of actions to which infants or incompetent persons are parties and providing for the payment of sums realized for such persons to their natural guardians if no general guardian has been appointed and the amount is under \$500. The next section preserves

16. *Id.* at pp. 38, 67-68. See Clark, *Summary Judgments and a Proposed Rule of Court* (1941) 25 J. AM. JUD. SOC. 20.

17. MO. PROP. CODE, p. 52.

18. *Id.* art. 2, § 4.

the substance of the existing statutes with reference to parties to actions arising outside of the state.¹⁹ A slight departure has been made from the Federal Rule provision with reference to class actions or representative suits.²⁰ Literally, the Federal Rule²¹ authorizes representative suits only "when the persons constituting the class are so numerous as to make it impracticable to bring them all before the court." Actually class actions are, or at least should be, permitted though the persons are not numerous, if for some other reason it is impracticable to bring all of them before the court. Hence Plan II provides for class actions where the persons "are very numerous or it is impracticable to bring them all before the court." This will result in no change in effect but it is a clearer statement of the general law with reference to representative suits.

The Committee eliminated the provision²² of the Federal Rules that, when persons are not indispensable but ought to be parties if complete relief is to be given, they may, at the court's discretion, be summoned to appear in the action.²³ This elimination was prompted by the spirit also manifested elsewhere²⁴ that the attorneys should run the lawsuit and that the trial court should remain in the background. Actually not a great deal of harm is done by this particular elimination for the absent parties can come or be brought in by intervention, interpleader or under third party practice. Moreover, in the place of this provision was inserted the existing Missouri statute²⁵ permitting the court to order parties brought in "when a complete determination of the controversy cannot be had" without them. If broadly construed this statute stands as the substantial equivalent of the eliminated provision.²⁶

Finally should be mentioned the inclusion of the Federal Rules provision that misjoinder or nonjoinder of parties should not be ground for dismissal

19. *Id.* art. 2, § 5.

20. *Id.* art. 2, § 13.

21. Rule 23 (a).

22. Rule 19 (b).

23. MO. PROP. CODE, art. 2, §§ 7 and 8.

24. In *Id.* art. 9, § 14 (a), the Committee omitted the provision at the end of the second sentence that the court shall instruct the jury after the arguments are completed. As this section stands however there is nothing to prevent the judge from charging the jury after the argument if he so desires; indeed the first part of this sentence seems to assume that argument precedes the charge. See text at notes 32 and 33, *infra* for other examples of minimization of the trial court's functions.

25. MO. REV. STAT. (1939) § 972.

26. See *Crockett v. St. Louis Transfer Co.*, 52 Mo. 457 (1873); *McKee v. Downing*, 224 Mo. 115, 124 S. W. 7 (1909); *Merrill v. City of St. Louis*, 12 Mo. App. 466 (1882), *aff'd*, 83 Mo. 244 (1884).

of the case but that parties may be dropped or added by order of the court on motion made at any time.²⁷ This highly sensible attitude comes as a complete reversal of the common law practice and greatly liberalizes the existing Missouri code provision.²⁸ The procedure connected with motions raising objections to parties will be considered in connection with objections to pleading.²⁹

PLEADING

When a discussion must be restricted to a part of a code of civil procedure, the choice of the topic of pleading is indeed a wise one. It constitutes the heart of any procedure system and reaches out in many ways to commencement of the action, discovery, trials and appeals. This has been demonstrated by Mr. Henry, and, were there any point in doing so, he could have given other illustrations. On the other hand we should not make too much of pleading as has been done in times past. By this is meant that we should not attempt to make pleading do the things which experience has demonstrated that it cannot do successfully. Thus the idea, more or less prevalent in the Missouri decisions, that pleadings should be jurisdictional in the sense that the parties cannot, even by consent, litigate questions outside the issues raised would be dissipated by Section 52 of Article 6 of Plan II. Again the idea, frequently entertained when speaking of functions and rules of pleading but seldom indulged in in actual practice, that pleadings may be a substitute or an alternative for discovery is behind the shorter, more general form of pleading which Plan II like the Federal Rules contemplates and which Mr. Henry so ably discusses. Of course the question is one of degree—pleadings should tell what the case is about and in some instances they may furnish all the information which parties need from the other side in advance of trial.³⁰

In this specific connection it should be pointed out that Plan II gives the supreme court authority to suggest forms of pleadings.³¹ These forms, when supplied, would indicate the degree of generality which is to be per-

27. MO. PROP. CODE, art. 2, § 11.

28. Nonjoinder and even misjoinder of parties is ground for demurrer in Missouri. MO. REV. STAT. (1939) § 922. Cf. notes 25, 26, *supra*, for the rule when the party objection appears at the trial.

29. Notes 42, 49, *infra*.

30. Still it may be advisable to take depositions in order to "tie down" witnesses.

31. MO. PROP. CODE, art. 1, § 17 (a).

missible just as do the forms which accompany the Federal Rules. An extensive collection of forms does not seem desirable but there might well be a few more examples than are appended to the Federal Rules. More than in any other way the forms which may be so promulgated will serve to bring about a general manner of pleading which is contemplated under the Federal Rules and Plan II.

Mr. Henry seems quite correct in regretting the elimination in Section 5 of Article 1 of the provisions of Federal Rule 5 (b) which permit the service of pleadings, etc., by mail, and the inclusion, in lieu thereof, of the present statutory provision for personal service upon the party or attorney, or leaving it at the usual place of abode. The philosophy of this change was that attorneys might falsely claim that they sent, or that they had received, the documents. The possibility of such disputes cannot be entirely eliminated even in case of personal service. In everyday affairs important documents are customarily sent by mail. Laymen will think it very strange that the law refuses to adopt the conveniences which all persons, including lawyers, utilize in non-judicial transactions.

The elimination of two sentences in Section 3 of Article 6 to the effect that the signature of an attorney to a pleading constitutes a certificate that he has read and believes there is good ground to support the pleading and that it was not interposed for delay and further providing that wilful violators are subject to discipline, seems a mistake. This omitted matter indicates a reasonable basis of ethical obligation and appropriate method of enforcement. The same attitude was taken in the elimination of provisions in Section 6 (a) of Article 8 of Plan II which would have permitted charging expenses to an attorney who without substantive justification advises a person to refuse to answer an interrogatory. The person refusing to answer may be charged with the expenses but an attorney advising the same is apparently answerable only to his conscience and the bar committee. It is the more remarkable that the court probably has inherent power³² to discipline an attorney in both these cases and that no statute could take this power away. Why should not an ethical attitude be manifested in the code of civil procedure and not merely buried in the code of ethics and in the occasional decisions of the courts?

In Section 9 of Article 6, the list of defenses which must be pleaded

32. See text following note 33, *infra*.

affirmatively in the answer is eliminated. The bare rule remains that any matter constituting an avoidance or affirmative defense must be pleaded. The idea of this elimination is that one can detect an affirmative defense by *a priori* reasoning. This is an illusion, as anyone who has studied the matter will realize. For some years I practiced in a jurisdiction having a similar statutory provision. The list was a great help in drafting the answer. If the defense amounted to any one of the things listed, one of course pleaded it to comply with the statute. In cases where the contemplated defense was not specifically included in the list, one could usually reason by analogy—or, at any rate, plead the matter affirmatively as a matter of precaution. There were practically no cases upon the subject because the provision was too workable to involve the point in litigation.

Mr. Henry points out that the Committee eliminated from Plan II³³ the fifth and sixth categories of the matters which may be considered at the pre-trial conference under Federal Rule 16. The sixth is the very important general provision: "such other matters as may aid in the disposition of the action." As he says, this, at least, should be reinstated. Perhaps the omission does not actually limit the scope of the conference for there is nothing to prevent a trial judge from calling a pre-trial conference for any reasonable purpose even in absence of any statute or general rule therefor. Possibly, however, the enumeration of four matters to be considered might be thought to eliminate all others. At any rate the existence of broad statutory provisions for pre-trial is extremely desirable both to give the judge a general pattern to follow and to encourage him to indulge in the practice.

Pre-trial has been generally a success where it has been tried. In a few courts it has been largely a perfunctory affair and almost a waste of time. It should be borne in mind that it is at the discretion of the judge whether to call the conference. If he does not believe in the process he should not, and usually does not, follow the pre-trial practice. The attitude of counsel toward the conference also has much to do with its success. In some parts of the state, judges and lawyers will be in sympathy with the practice, and there cases will be tried more quickly and more easily. If the local attitude is against it, the conferences should not be held at all.

There are a number of instances in which the substance of existing Missouri pleading statutes has been woven into Plan II though the Federal

33. MO. PROF. CODE, art. 6, § 55.

Rules have no corresponding provisions.³⁴ In fact, no topic covered in the present pleading statutes is left out of Plan II though the nature of the provision is often changed. A provision³⁵ with reference to pleading instruments may be said to be new in the sense that they are not found in either the Federal Rules or in the Missouri Statutes. Being adapted from the existing Illinois provision, it permits a written instrument either to be pleaded according to legal effect, set up at length, or attached as an exhibit.

Federal Rule 12 (e) provides that a party may move for a bill of particulars when the matter "is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading *or to prepare for trial.*" The italicized words may be taken to indicate that the motion is properly used to obtain discovery.³⁶ While the pleading should disclose the general positions to be taken by the respective parties, discovery through pleadings has never been a success. Adequate means of discovery exist both under the Federal Rules, Plan II and the present Missouri procedure.³⁷ Hence the italicized words have been omitted in Plan II.

This brings me to the most stimulating point in Mr. Henry's paper—his discussion of the manner of raising objections to pleadings. He approves the single motion stage and believes that this constitutes an improvement over Federal Rule 12 under which a defendant may, for instance, make first a motion to dismiss because of lack of jurisdiction over his person, and after this motion has been decided against him then make a motion for more definite statement, or to strike matter from plaintiff's petition, or to dismiss for failure to state a claim.³⁸ Mr. Henry objects, however, to permitting objections specified in Section 31, which are substantially the grounds of demurrer in the existing Missouri practice, to be raised by motion. Indeed Section 35 requires these matters to be raised by motion under penalty of

34. Mo. PROP. CODE, art. 6, § 5 (amount of monetary relief must be specified in petition); *id.* § 7 (action on original claim may be united with claim to set aside release thereof for fraud in obtaining release); *id.* § 15 (denial of partnership must be specific); *id.* § 22 (allegations in defamation actions); *id.* § 23 (pleading private statutes and foreign law); *id.* § 24 (denial of execution of instruments); *id.* § 50 (counterclaims to assigned claims).

35. Mo. PROP. CODE, art. 6, § 24. See also *id.* § 13.

36. See MOORE, FEDERAL PRACTICE (1938) (Supp. 1940) 145-153 for a discussion of interpretations of Rule 12 in this regard.

37. See Mo. PROP. CODE, art. 8 and note on p. 43 indicating that the provisions on discovery and depositions are a combination of some of the provisions of the Federal Rules, somewhat revised, and certain of the existing Missouri statutes.

38. See MOORE, FEDERAL PRACTICE (1938) 638-649.

waiver, except failure to state a claim or defense, which matters of course are never waived. The basis of his objection is that Section 31 preserves the idea of the demurrer with its technicality and its ability to raise questions which go merely to the form of the statement in the pleading.

I hold no brief for the demurrer as it developed at common law or under the typical code provisions. The faults with it are twofold. First it is utterly unable to deal with the situation where there is an uncontrovertable defense in law, such as the bar of the statute of limitations, but where this defense does not appear on the face of the pleadings. This objection has been met in modern procedural systems including the Federal Rules by the motion for summary judgment, provision for which is not in Plan II though included in the Sub-committee's draft.³⁹ The other broad objection to the demurrer is that it permits objections to the form of pleading, which have nothing to do with the merits and which can not dispose of the controversy. A demurrer can reach a "conclusion of law," which is nothing in the world but an over-generalized statement of fact and distinguishable from the indefinite statement—reachable only by motion—by an exceedingly thin and indefinable line.

However, there is a certain basic philosophy about the demurrer idea that is both beneficial and inevitable as long as claims or defenses are supposed to be stated in pleadings. If a pleader states matters which show that he has no valid claim, or if some matter essential to his claim is lacking, he cannot recover and the sooner this is determined the better. The Federal Rules permit motions for failure to state a claim, and indeed this point can be made in the English procedure, though it is there raised in the responsive pleading.⁴⁰ Whether it is called a demurrer or a motion, or is only a component part of the answer, and regardless of the stage at which the point is determined, we cannot escape the fundamental demurrer idea unless we are prepared to adopt the extreme notice-pleading practice.

Let us see how the provisions of Plan II operate in this regard. After the petition is filed, defendant may raise by motion lack of jurisdiction over the subject matter or over the person, improper venue, insufficiency of process or service thereof, or failure to furnish security for costs, regardless of whether these objections appeared on the face of the petition.⁴¹ In a like category

39. See note 16, *supra*.

40. ANNUAL PRACTICE (1941) Order XXV, rules 1-4.

41. MO. PROP. CODE, art. 6, § 30.

are motions for misjoinder or nonjoinder of parties⁴² and motions for change of venue.⁴³ If the objection appears on the face of the petition he can also raise the points of failure to state a claim, lack of plaintiff's capacity to sue, another action pending in this state for the same cause, or improper union of claims.⁴⁴ Finally he can also move for a more definite statement or for a bill of particulars or to strike out redundant, immaterial, impertinent or scandalous matter in the petition.⁴⁵ All of these matters can be raised by motion at the same time and without waiver of any matter so asserted by motion,⁴⁶ Furthermore, with three exceptions, all such objections not raised by motion, regardless of whether any motion is made, are deemed waived.⁴⁷ The exceptions are failure to state a claim, lack of jurisdiction over the subject matter both of which are never waived,⁴⁸ and misjoinder or nonjoinder of parties which can be raised by parties or the court at any stage provided that the trial is not delayed.⁴⁹ The matters raised by the preliminary motion will be heard and determined before trial upon application of either party, except that the court may order the postponement of the same until the trial.⁵⁰ Thus a way is provided for the disposition of all the foregoing matters in advance of trial.

It seems appropriate to illustrate the very common situation where a defendant is in doubt as to whether the petition fails to state a claim or whether merely a more definite statement thereof should be required. In this situation the defendant will ordinarily move both to dismiss on the first ground and to require a more definite statement or bill of particulars. These motions will be made⁵¹ and ordinarily heard together. If the court holds that the petition is sufficient he will overrule both motions and defendant will be obliged to answer. If the court holds that the petition fails to state a cause of action he will sustain the motion to dismiss, and dismissal will follow unless plaintiff amends his petition. If the court believes that the petition states a claim but that the defendant is entitled to further infor-

42. *Id.* art. 2, § 11.

43. *Id.* art. 7, p. 42.

44. *Id.* art. 6, § 31.

45. *Id.* art. 6, §§ 32, 33.

46. *Id.* art. 6, § 35.

47. *Ibid.*

48. *Ibid.*

49. *Id.* art. 2, § 11.

50. *Id.* art. 6, § 38.

51. *Id.* art. 6, § 35, provides however that each motion must be made on a separate document. This is an inconvenience to all parties and to the court; also it will tend to cause one or more motions to be overlooked at the hearing.

mation, the court will order that plaintiff do so by filing an amended petition, or a bill of particulars, or either at defendant's option, as seems meet in the particular case.

This is a common-sense way of dealing with a situation which is constantly recurring. Under Plan II defendant is forced to take these steps in this manner unless he chooses to waive the objection of lack of definiteness in a petition which does state a claim. Under the Federal Rules a defendant may and possibly must,⁵² adopt this course in this particular situation. There are plenty of examples, however, of situations where under the Federal Rules defendant can make two successive preliminary motions with the effect of increasing costs and delaying the trial.⁵³

I do not share Mr. Henry's concern with regard to the dangers of slipping back into the old demurrer difficulties by allowing motions based upon objections appearing on the face of the pleadings, nor do I believe that in this regard the Federal Rules are appreciably different. For one thing the objection of failure to state a claim or defense will account for probably 95 per cent of the objections (aside from those going merely to indefiniteness) which will arise on the face of the pleadings. Failure to state a claim is recognized as a ground of motion to dismiss under the Federal Rules.⁵⁴ It must be conceded that difficulty may arise as to whether the objection appears on the face of the pleading but this difficulty is no more apt to arise with reference to lack of capacity to sue, other action pending, etc., than with reference to the question of statement of a valid claim. Moreover, these other matters are appropriate and traditional ones to be disposed of in limine.

It is true, as Mr. Henry says, that Section 36 of Article 6, providing for motions searching the prior pleadings, is reminiscent of the demurrer. I cannot be sure whether he mentions this merely to show that the demurrer principle has been retained in Plan II, or whether he also objects to the searching qualities of the demurrer. I have always supposed this quality to be a beneficial one, on the theory that the defect reached in the searching process is always substantial and one which would prevent the pleader from winning his case—hence, the sooner the ruling to that effect the better for all concerned. My only criticism of the orthodox searching process has been that there were certain restrictions upon it, based upon traditional common

52. MOORE, FEDERAL PRACTICE (1930) 639, 661.

53. See note 38, *supra*.

54. Rule 12 (b) and (h).

law pleading theory *viz.*, that the demurrer only opened up the branch of the pleading which it terminated, and that a demurrer would not reach back of a plea in abatement. These restrictions are removed by the wording of Section 36.

Mr. Henry regrets that Plan II does not permit defendant, if he so desires, to omit the motion stage altogether and raise all preliminary objections in the answer along with defenses going to the merits. This involves a debatable question of policy. The philosophy which lay behind the drafting of the relevant provisions of Plan II was that preliminary matters should be raised, and ordinarily disposed of, before trial. The trial would involve only the merits with other things put out of the way. This was my original position and it was accepted by the Sub-committee and the full Committee. It still seems to me a tenable point of view. On the other hand there are strong arguments on the other side. Sometimes defendant is more anxious than plaintiff to bring a case on for trial. The preliminary objections often involve questions of law and fact common to points going to the merits. By the time that trial is reached, a defendant often is willing to waive preliminary objections though he is loath to do this at the pleading stage. The provision of the Federal Rules that the trial court may, in its discretion, determine in advance of trial preliminary objections raised in the answer is adequate to take care of situations where this might operate to advantage. Altogether these considerations now preponderate in my mind over those which prompted the drafting of the relevant sections of Plan II.

The same matter has been forcefully called to my attention by Judge Charles E. Clark, the reporter of the Federal Rules Committee. Upon examination of Plan II, Judge Clark expressed the view that its avoidance of the dual motion stage constituted a marked advance over the Federal Rules. He urged however, as a minimum, that the defendant be permitted to dispense with all motions and raise all objections in the answer with provision that the court could in its discretion determine such objections before trial as it saw fit. This plan could be effected by comparatively slight amendments to Sections 35, 38 and 41. The alternative change which Judge Clark would favor even over this change is that Sections 30 and 31 be eliminated; that it be provided that all such objections should be raised by the responsive pleading and not by motion; that Section 38 be amended so as to allow the judge in his discretion to hear before trial such objections of law as would dispose of all or part of the case.

Ceasing now to quote from Judge Clark's letter, I will elaborate further

on his second suggestion. It would result in the elimination of all preliminary motions except those to bring in or strike out parties, for change of venue, and for a more definite statement or bill of particulars, or to strike part of pleading. With the possible exception of the last, all these matters are ones which should be passed on before trial. Everything else would be raised by answer and determination thereof postponed for trial unless set down for preliminary hearing, or conceivably disposed of at the pre-trial conference if one were had.

This method of procedure may at first consideration seem "radical," but can any idea so common-sense be discarded merely because it constitutes a departure from the present practice? It is substantially the scheme in force in England.⁵⁵ Missouri has blazed the trail before in procedural matters. It was the first state after New York to adopt the Field Code and it did so almost before the ink was dry on the New York legislation. So far as I am aware, Missouri was the first state to pass a law⁵⁶ permitting alternative pleading which was a deadly sin at common law. Is it too much to expect that Missouri, after a long period of inactivity, will again take its place in the vanguard of procedural improvement?

CONCLUSION

In any event I agree with Mr. Henry that the Plan II in its present form constitutes a distinct improvement over the existing procedure. It is not a piecemeal reform such as is Plan I or the recently adopted Texas Rules.⁵⁷ I would hope however that at least some of the more vital omitted Federal Rules provisions could be reinserted. Furthermore there may well be some advances in form and substance over the Federal Rules. Finally there are still minor flaws in Plan II.⁵⁸ Some of these have already been detected and others will come to light in the study and discussion which is now proceeding.

55. See note 40, *supra*.

56. See MO. REV. STAT. (1856) § 46, now contained in MO. REV. STAT. (1939) § 950.

57. The new Texas Rules consist of the pre-existing procedural statutes and rules, somewhat revised, with perhaps a fifth of the Federal Rules provisions engrafted thereon. See Clark, *The Texas and the Federal Rules of Civil Procedure* (1941) 20 TEX. L. REV. 4, 6-8. For a discussion of this manner of dealing with the problem, see Clark, *Dissatisfaction with Piecemeal Reform* (1940) 24 J. AM. JUD. Soc. 121.

58. It should be made clear, as in Federal Rule 12 (h), that the objections of failure to state a claim or defense and lack of jurisdiction over the subject matter, while they are never waived, cannot be made the subject of a preliminary motion not otherwise provided for. Cf. MO. PROP. CODE, art. 6, § 35.