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COMMENCEMENT OF ACTIONS

RUBEY HULEN*

The major change in civil procedure, provided under Plan II of Proposed General Code of Civil Procedure, with respect to commencement of actions, service and return of process, appears in connection with Section 27 of article 6 of the Proposed Code. Section 27 provided that a defendant shall serve his "answer" on the opposite party or his attorney within twenty days after service of summons, or forty-five days after first publication of notice, in case personal service is not had. The effect of this provision is to eliminate terms of court insofar as commencement of actions is now governed by terms of court and the provisions of the Proposed Code on the subject of Commencement of Actions, Service and Return of Process should be considered with Section 27 of article 6 for that reason.

Bearing directly upon this subject is Section 11 of article 1 to the effect that the expiration of a term of court shall not affect the period of time provided for the doing of any act set forth in the Proposed Code. Section 14 of the same article provides that courts shall be deemed always open for the purpose of filing any pleadings or making interlocutory motions, orders and rules. By Section 16 of article 1, every term of court commences at the time fixed by statute and continues open "at all times" until the day preceding the first day of the next term, without any order of the court.

The outright abolishment of terms of circuit court cannot be affected by legislative enactment because of provisions of the Constitution of Missouri.¹

Upon the filing of a petition and delivery of summons to the sheriff, service is forthwith made upon the defendant, notifying him of the time (not term) when he is required to appear and defend. There are several minor changes in the Proposed Code as to the manner of obtaining service. These will be found in article 5.

Section 4 authorizes, in addition to service of process by sheriff or his deputy, that the court where suit is pending, may appoint someone to serve process. Under existing law, service of process is limited to the sheriff, his deputy or the coroner, if the sheriff is disqualified.

Service of process by leaving a copy of the summons and petition, with

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1. Mo. CONST., art. II, § 22.

a member of defendant's family over the age of 15 years, at the residence or usual place of abode of the defendant, is not authorized until a reasonable effort has been made to personally serve the defendant.

The present law contains no provision regarding service of process on persons under disability and infants. The Proposed Code directs that if the infant or incompetent person has a curator or guardian, service shall be upon such representative. If there is no curator or guardian, then service shall be had by serving the infant or incompetent person and, in addition, service upon the parent or person having charge of such infant or incompetent person.

Service upon a corporation or unincorporated association (where by law it may be sued as such) may be had by delivering a copy of the summons and petition to an officer, partner, managing or general agent or any other agent authorized by appointment or by law, to receive service of process. It should be observed that this proposal² omits the provision of our present statute for service on a corporation by leaving a copy of the summons and petition with an officer or agent "in charge of any office or place of business" of the corporation. New to the practice in Missouri is the proposed provision for service by mail. Such service is authorized only in those cases where service by publication may be had. The enumeration of actions in which substituted service is proper is the same under the Proposed Code as under existing law. The Federal Rules do not provide for substituted service. Substituted service (either by mail or publication) must be preceded by a motion setting forth the reason why personal service cannot be obtained and then can be had only on an order of the court after hearing on such motion.

Conclusiveness of the officer's return of service, now established as the law in Missouri, is abolished to the extent that such return is subject to a direct attack or in an action brought to set aside a judgment rendered by default—"except as to persons who in good faith have paid out money or transferred property" relying upon such return.

All pleadings, such as the original petition, notices, appearances and other papers, unless the court otherwise orders, are required to be served on each of the parties affected thereby.

The trial court is given power to extend time for acts required to be done within a specified time, except the court has no power to extend time for filing a motion for a new trial or taking an appeal.

2. MO. PROP. CODE, art. V, § 5(c).

Section 4 of article 2 regulates the settlement and disposition of judgments in cases where the rights of minors appear. No action of an infant or incompetent person may be settled except on approval of the court. Under the present law, approval of settlement of claims of minors is lodged in the probate court. By the same section, the payment of expenses and attorney's fees incurred on behalf of an infant or incompetent person, with respect to litigation, must be approved by the court and disposition of funds due the minor or incompetent person is directed to the guardian, or in case the fund does not exceed \$500.00, the court may order such balance paid to the natural guardian or person by whom the minor or incompetent person is maintained, for the use and benefit of the minor, with the right in the court to require a bond from the person receiving such funds.

Section 17 of article 1 of the Proposed Code gives to the supreme court general power to direct the forms of writs and processes in addition to providing forms of pleadings, motions, orders, notices, instructions and to promulgate general rules for all courts of the state, provided such are not contrary to or inconsistent with laws in force at the time.

The Proposed Code abolishes the present forms of action and provides "there shall be one form of action to be known as Civil Action." This follows Federal Rule 2.

Procedure for joinder of persons having joint interest in a cause is enlarged under the proposed law by Sections 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19 and 20, of article 2. Without setting forth in detail the provisions of the Proposed Code on the subject of joinder, it can be stated generally that it is the purpose of the Proposed Code on this subject to permit the adjudication in one action of all claims by persons entitled to relief.

Section 6 requires that all persons having a joint interest shall be made parties to the cause. Section 7 authorizes the court to require additional parties to be brought in when necessary to complete determination of the cause. Section 9 provides that all persons may join in one action if they assert "any right to relief jointly, severally or in the alternative to the subject of the action." Under this section, a plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded in the cause, and judgment may be given for one or more of the parties according to their respective rights.

By Section 10, the court may order separate trials on different claims and otherwise make such orders with respect to procedure as will prevent

a party to the cause from being put to expense or delay by the inclusion of a party against whom he asserts no claim.

By Section 11, it is provided that misjoinder is not grounds for dismissal of an action and that parties may be added or dropped from the cause by the court on its own motion at any stage in the action and any claim may be severed and proceeded with separately.

The provisions of Federal Rule 22 on interpleader are set forth in Section 12. This section provides that persons having claims against a plaintiff or defendant may be joined in a cause where the claims are such that plaintiff or defendant is or may be exposed to multiple liability.

The provisions of Federal Rule 23(a) for class actions will be found in Section 13 of article 2. This section provides that if persons constituting a class are so numerous that it is impractical to bring them all before the court, such of them as will fairly insure representation of all may be sued, when the right sought to be enforced is a common one. A class action cannot be dismissed or compromised without approval of the court and notice to all members of the class.

The provisions of Federal Rule 14, for bringing in a third party defendant is contained in Section 16 of article 2, and in effect provides procedure for defendant to bring in a person as a party to the action—"who is or may be liable" to the plaintiff or the defendant for all or part of plaintiff's claim against the defendant. Section 17 of article 2 extends the same rights to the plaintiff, when a counter-claim is asserted by the defendant, involving liability of a third person, that are accorded to the defendant under Section 16.

Sections 18, 19 and 20 of article 2 provide the conditions upon which a party may be permitted to intervene in an action. Such intervention is restricted to cases where a statute confers the right to intervene or the applicant's interest is not adequately represented and the applicant is or may be bound by the judgment, or where the applicant is so situated as to be adversely affected by a distribution of property in the custody of the court. In the discretion of the court, permissive intervention is authorized in cases where the applicant has a question of law or fact in common with that of one of the parties to the original litigation.

Sections 21, 22, 23 and 24 of article 2 provide for substitution of parties in cases of death (where the claim is not extinguished thereby) incompetency, transfer of interest and actions by officers where there is a change in office during the pendency of the action.