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Comments

THE PROPOSED RULES OF CIVIL PROCEDURE FOR MISSOURI

[*Editor's Note:* The following comments discuss most of the rules included in the Rules of Civil Procedure proposed by the Missouri Supreme Court's Civil Practice and Procedure Committee. Rules involving no substantial change are not discussed. These comments have been prepared by student editors of the *Review* under the direction of Professor Carl C. Wheaton.]

TRIAL PRACTICE—RULES 1-18

The work of the Civil Practice and Procedure Committee of the Supreme Court of Missouri has now reached the point where proposed rules of civil pro-
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cedure have been formulated and offered to members of the profession for criticism and suggestion.

An effort will be made here to indicate and comment upon some of the more substantial changes made in the General Code of Civil Procedure by the proposed rules. References to section numbers in these rules are changed to rule numbers since there will no longer be section numbers to which reference can logically be made. Changes made at various places in punctuation and grammar to make easier and clearer reading are noted only in passing.

Upon becoming effective these rules will supersede all procedural provisions in the statutes and Supreme Court Rules having reference to process, service, venue, parties, pleading, discovery, procedure (both before and at the trial), referees and receivers, judgments and after trial motions, execution, appeal, appellant procedure, attachment, condemnation, declaratory judgments, divorce and alimony, ejectment, garnishment and sequestration, extraordinary legal remedies, land titles, change of name, partition and replevin.¹ This opens up the entire question of what is substantive law and what is procedural. This is often a difficult and vexing problem, but one that should be solved by the Supreme Court before it promulgates these rules.

Rule 1: In General²

Rule 1.03 covers service of papers subsequent to the original petition and a significant change is found in the methods enumerated for serving the attorney of record. Rule 1.03(b)(2) provides that service may be had "by mailing a copy thereof to such attorney. Such service or mailing may be affected by any person who would be a competent witness. Service or mailing shall be shown by acknowledgment of receipt or by affidavit." There is no like provision in the General Code except where the party and his attorney are non-residents and the attorney does not maintain an office in the state at which service can be made.³ It was undoubtedly thought that service by mail accords with common sense—men of business and government use the mails to transmit documents of the utmost importance—and so is a desirable departure from somewhat archaic service methods.⁴

Rules 1.03(g)⁵ and 1.03(h)⁶ refer to the time within which subsequent papers must be served and filed. Rule 1.03(g) provides that "When provision is made for the time of filing papers and none is made for the time of service thereof, copies shall be delivered in person, or by mail on the day of filing or as soon thereafter as can be done." This supplements 1.03(h): "All papers after the petition required to be served upon a party shall be filed with the court either before service or within five days thereafter." Rule 1.03(g) refers only to one

1. Proposed Rules of Civil Procedure, Rule 1.01

2. Superseding Mo. REV. STAT. §§ 1.190, 506.010, 506.040 and 506.060-506.100 (1949); Supreme Court Rules 3.03-3.05.

3. Supreme Court Rule 3.03(b). Retained as Rule 1.03(e).

4. See 9 Mo. L. REV. 47 (1949) for the arguments of Professor Atkinson along the same lines.

5. Supreme Court Rule 3.03(a).

6. Mo. REV. STAT. § 506.100-4 (1949).

special situation where time of filing is set forth and time of service is not. If both time of filing and time of service are provided for or if neither are provided for or if time of service is and time of filing is not set forth, 1.03(g) has no application. It would seem that either 1.03(g) or 1.03(h) could be eliminated in the interest of uniformity by consistently setting forth in the rules a time for filing papers and making the time for service dependent thereon or by setting forth a time for service and making the time for filing dependent thereon.

It has been suggested⁷ that there is a conflict between Rules 1.03(a)⁸ and 1.03(e)⁹ as to who must be served with papers subsequent to the pleadings. Rule 1.03(a) calls for service of papers upon "each of the parties affected thereby" while Rule 1.03(e) states that "where there are unusually large numbers of defendants . . . service of the pleadings . . . and replies thereto need not be made as between the defendants . . ." and that filing or service of any counter claim, cross claim or matter constituting an avoidance or affirmative defense upon the plaintiff constitutes due notice of it to the parties. This does not seem to be a serious matter as the later words of 1.03(e) would, no doubt, be deemed to prevail, but the matter could finally be laid to rest by inclusion in 1.03(a) of the words "except as hereinafter provided in Rule 1.03(e)."

Rule 1.04(b)(2) makes it clear that the court may, for cause shown "upon motion made after the expiration of the specified period" permit an act to be done which was required or allowed to be done at or within a specified time where the failure to act was the result of excusable neglect.¹⁰ Rule 1.04(b)(2) further provides: ". . . but it may not extend the time for taking any action under Rules 3.11, 23.02, 24, 26.01, 29.02, 33.04 and 33.07."¹¹ The one important change here is that the court may not extend the time for filing a motion for substitution of parties. This would seem to be a desirable inclusion since it rules out any possibility of a suit actually in the process of trial being suspended or delayed beyond the ample time provided for substitution.

General Code Section 6(c) which was thought "revolutionary" in 1943 by one writer,¹² has been retained in the new rules as Rule 1.04(c), with a significant addition. "The period of time for the doing of any act or the taking of any proceeding is not affected or limited by the *continued existence* or expiration of the term of court. The *continued existence* or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which

7. See 9 Mo. L. REV. 47, 70 (1944).

8. MO. REV. STAT. § 506.100-1 (1949).

9. MO. REV. STAT. § 506.100-3 (1949).

10. This is the effect given to Mo. REV. STAT. § 506.060-2(2) (1949) by *Clader v. City of Neosho*, 354 Mo. 1190, 193 S.W. 2d 620 (1946). The wording of 506.060-2(2) is: "Upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect."

11. 3.11—Substitution of Parties; 23.02—Proceeding After Motion for a Directed Verdict; 24—Procedure in Cases Tried Upon Facts Without a Jury; 26.01—Control of Trial Court Over Judgments; 29.02—Motion for New Trial; 33.04—Taking Appeals; 33.07—Taking Appeal After Time for Filing Notice Has Expired.

12. See 1 CARR, MISSOURI CIVIL PROCEDURE § 44, p. 105 (1947).

is or has been pending before it." The italicized words are new and were inserted to "prevent reliance upon the continued existence of a term of court as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules."¹³

*Rule 2: Venue Including Change Thereof*¹⁴

Rules 2.11, 2.14 and 2.25 omit any provisions for the election or payment of a special judge to try a case where the regular judge is interested or related to either party or shall have been of counsel in the cause or where application for a change of venue is sought for cause shown. This omission surely results from the doubt cast upon the constitutionality of election of special judges by the Constitution of Missouri (1945), Article 5, Sections 6, 15, 23, 25, and 29.¹⁵ It is doubtful if the deletion will be fatal to parties' right to a fair trial since the provisions for change of venue remain and the Supreme Court of Missouri may make temporary transfers of judicial personnel from one court to another as the administration of justice requires.¹⁶

Another change of note is the elimination in Rule 2.17¹⁷ of the provision that a party aggrieved by the clerk's failure immediately to make out a full transcript of the record and proceedings in a motion for change of venue and transmit the same to the clerk of the court to which the removal is ordered may recover, in a civil action, \$100 from the transmitting clerk. This omission is based upon the committee's conclusion that this deals with substantive law and has no place in rules for civil procedure.

The word "later" in Rule 2.21 is a change. Section 508.240¹⁸ reads: "If any clerk fail to transmit the transcript and papers . . . or if they be set and lost such loss or failure shall not operate as a discontinuance . . . but they may be filed *at the next term of said court.*" (Emphasis added) By changing "at the next term of said court" to "later" reference to terms of court is eliminated since, in this connection, there are no "terms of court" in Missouri now. It might have been better to say "at a reasonable later time" but this would be but one more indefinite term seeking definition.

Section 508.210 has not been included in the new rules. That section gives the

13. Notes of Advisory Committee on Rules, 28 U.S.C.A. 235, Rule 6. The quoted words refer to Federal Rule 6(a) which is identical in wording to Rule 1.04(c). An example will illustrate: Under Rule 26.01 the trial court retains control over judgments during a 30 day period after entry and may vacate, reopen, correct, amend or modify the judgment within that time. Rule 1.04(c) makes it clear that at the expiration of the 30 day period the courts power to vacate, reopen, correct, amend or modify the judgment is gone although the term of court is not ended but has many more days to run.

14. Superseding MO. REV. STAT. §§ 506.290, 508.010-508.200, 508.220-508.250 (1949).

15. See 2 CARR, *supra* n. 12 at p. 50, § 861.

16. MO. CONST. Art. 5, § 6 (1945).

17. Substantially MO. REV. STAT. § 508.170 (1949).

18. Unless otherwise noted, all section numbers herein refer to MO. REV. STAT. (1949). Italics are added.

clerk a civil action against a petitioner for a change of venue for all the costs and expenses attending a change of venue unless the change is sought because of prejudice of the inhabitants of the county and the application is controverted. Since this is substantive law, it has no place in the Rules of Procedure and, at any rate, Rule 2.20 sufficiently guards the clerk's right to recover the cost and expenses.¹⁹

Another omission from the Rules is Section 508.110 dealing with changes of venue from single county circuits having more than one judge. By this section a party cannot get a change of venue to a circuit court of another county because the judge is prejudiced or because the adverse party has undue influence over the judge, but in such a case the transfer is to another division of the same court. Rule 2.23 includes these provisions as to changes of venue in courts in the City of St. Louis. It is specifically stated that the word "county" as used in these rules should include the City of St. Louis and changes of venue shall be awarded to and from the judges of said city, but not to a court outside the city unless the application is based upon grounds applicable to all the judges of St. Louis courts or to all inhabitants of St. Louis.

*Rule 3: Parties*²⁰

Rule 3.08 conforms more closely to the old equity rule which is said to be the basis of class actions, since under the new rule one or more members of a class may sue or be sued on behalf of the class only "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court."²¹ Impracticability was the basis of the equity rule—if it was impractical to bring all members of a class before the court a class suit was allowed to avoid multiplicity of suits, inconvenience to the adverse party and delay in a final adjudication of the matter. Section 507.070-1, which Rule 3.08 supersedes, allows class suits "If persons constituting a class are very numerous or it is impracticable to bring them all before the court. . . ." This may have been saying the same thing twice for "very numerous" could be defined as so numerous as to make it impracticable to bring all parties before the court, so there may not be any great change in how many parties there must be before a class suit will be allowed.

A more significant change is the omission in the Rules of so-called "spurious class actions under Section 507.075-1(3). That section provides for class actions where the "character of the right sought to be enforced for or against the class is several and there is a common question of law or fact affecting the several rights and a common relief is sought." It will be noted that a spurious class action may be maintained, if the statute is read literally, although the common question of law or fact does not arise out of the same transaction, occurrence or series of transactions

19. Rule 2.20: "If such petitioner fail to pay such costs . . . such clerk shall make out a fee bill against him . . . and deliver the same to any sheriff, who shall levy and collect the same, with fifty per cent thereon for the use of the clerk, as other fee bills."

20. Superseding Mo. REV. STAT. §§ 507.010-507.200 (1949); Supreme Court Rules 3.06(b), 3.07(a), 3.07(b), 3.07(c), and 3.08.

21. See Federal Rule 23, 28 U.S.C.A. 82 for identical wording.

or occurrences, and thus a class action would be allowed in a class where joinder of parties would not be permitted. However, it is doubtful if there could be a question of law or fact common to many persons unless it arose out of the same transaction or series of transactions. These actions have been called spurious class actions because it is possible to have one plaintiff representing many in a unit where the only common interest is that of collecting money from the defendant—no derivative or secondary right being enforced and there being no joint interest of the plaintiffs, but many persons to whom the defendant is severally liable suing for damages.²² The present Supreme Court Rule 3.07(d) restricts the use of class actions under 507.070-1(3) to suits where “the judgement or decree will be binding upon all members of the class.” There is some speculation as to whether the meaning of Supreme Court Rule 3.07(d) is that persons not actually before the court in a spurious class action will not be bound by the judgment, but whether this is the effect or not, spurious class actions are not much used in Missouri under the general code²³ and are done away with entirely by the new rules. This elimination is not lamentable since the permissive joinder statute can be used as effectively.

Under Section 507.080 a defendant can move 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* (Emphasis added). Rule 3.09 provides that a defendant may “move . . . for leave as third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.”²⁴ While, under the code, the defendant may file a petition and serve a summons upon a person not a party who is liable to the plaintiff, it is optional with the plaintiff whether or not he will make the new party a defendant. The defendant cannot force upon the plaintiff as a defendant a person who is liable to the plaintiff, but who is not a party, but the plaintiff may voluntarily amend his petition to allege a cause of action or claim against such a third party.²⁵ The new rules would change this in that the defendant could not even offer as a defendant a person who is liable only to the plaintiff. This would seem to be a desirable change since, presumably, had the plaintiff wanted to assert his claim against the third party he would have joined him as a defendant in the original petition, and any interruption of proceedings for a motion by the defendant to bring in a third party who is liable to the plaintiff but whom the plaintiff need proceed against only if he voluntarily amends is a pointless delay. The defendant’s right to bring in a person not a party who is or may be liable to

22. Where a fire negligently started by a railroad inflicts wide-spread damage upon many property owners, the only common interest of the several plaintiffs is to get money from the tortfeasor and the latter’s obligation is a separate matter as to each plaintiff, but a class action may be had against the railroad. See 18 KAN. CITY L. REV. 113 (1950) for a discussion of spurious class actions in Missouri.

23. See 1 CARR, *supra* n. 12, at p. 171, § 68.

24. This change is in accord with Rule 14 of the Federal Rules of Civil Procedure, 28 U.S.C.A. 539, Rule 14.

25. State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W. 2d 127 (1948). See 1 CARR, *supra* n. 12 at p. 75 (1952 Supp.) for a criticism of State *ex rel.* McClure v. Dinwiddie.

the defendant of all or part of the plaintiff's claim against the defendant is in no way changed.

It is clear that if the plaintiff desires, he may, if the defendant brings in a person not a party who is liable to the defendant for all or part of the plaintiff's claim against him assert directly against the third party either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the defendant.²⁶ Rule 3.09(c)²⁷ is new and protects the third-party plaintiff except to the extent that the third-party plaintiff has paid a judgment for which the third-party defendant is liable over to the third-party plaintiff. The basis for the third-party defendant being in the suit is his liability to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff, so recovery from the third-party defendant is put upon analogous grounds—the amount the third-party plaintiff must pay the plaintiff.

Rule 3.10 allows intervention upon all the same grounds and conditions set forth in Section 507.090 with this addition: "When the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or *subject to the control of, or disposition by* the court or of an officer thereof." The underlined words are new and are inserted to take care of a situation where property is not in the custody of the court or officer thereof, but is subject to the control of or disposition by the court or an officer thereof.²⁸

Rule 3.11 contains some changes worthy of note. The present Supreme Court Rule 3.08(c) provides that limitation periods on filing a motion for a new trial or notice of appeal be tolled until substitution of parties is made "if suggestion of death is made within the time for filing such motion of notice." The last sentence of Rule 3.11(f) states: "In case of substitution of a party after judgment, limitation periods on all after-judgment motions, notices and proceedings in a trial court shall be tolled and shall begin to run again upon the date of substitution in accordance with the provisions of this rule." Rule 3.11(g) provides: "In all cases where the event which gives a right to substitute parties under this rule occurs after judgment has been rendered in a trial court, the time for filing after-judgment mo-

26. Rule 3.09 expressly states: "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . . ." See 1 MOORE, FEDERAL PRACTICE 356, 359 (1947 Supp.) for the interpretation of an identical provision in the Federal Rules.

27. "Where a third-party defendant is liable to the plaintiff, or to anyone holding a similar position under subdivisions (a) and (b) of this rule, on the claim on which a third-party plaintiff has been sued, execution by said third-party plaintiff on a judgment against said third-party defendant shall be permitted only to the extent that the third-party plaintiff has paid any judgment obtained against him by the obligee."

28. This change is patterned on Federal Rule 24(a), as amended, 28 U.S.C.A., Rule 24, p. 129. "The addition to subdivision (a) (c) covers the situation where property may be in the actual custody of some other officer or agency—such as the secretary of the treasury—but the control and disposition of the property is lodged in the court wherein the action is pending." From notes of Advisory Committee on

tions, giving after-judgment notices and all other after-judgment proceedings shall not begin to run until an order of substitution is made in accordance with this rule." It would seem that Rules 3.11(f) and 3.11(g) are repetitious and that one or the other of them is unnecessary. The first part of 3.11(f) refers to persons who have not been a party to the proceeding and the manner of serving the motion for substitution and notice of hearing upon them and, if the above-quoted part of 3.11(f) is read in such a context, it undoubtedly refers only to persons who up to the time of substitution have not been parties in the suit. But Rule 3.11(g) refers to all parties and provides that limitation periods affecting all parties (regardless of when they become parties) are tolled until substitution is made so it would seem that the last sentence of Rule 3.11(f) is unnecessary. An important item is that both 3.11(f) and 3.11(g) omit the provision found in the present Supreme Court Rule 3.08(c) relating to a suggestion of death as a prerequisite to tolling limitation periods for the filing of a motion for a new trial or of a notice of appeal prior to substitution.

*Rule 5: Issuance and Service of Summons or Other Process*²⁹

Section 506.150(3) has been reenacted into the new rules as Rule 5.06(c), but a substantial change has been made. The first part of 5.06 expressly refers to service of summons and petition upon a domestic or foreign corporation by "delivering within the state. . . ." This is substantially Section 506.150(3), but then a lengthy paragraph is added providing for service of papers³⁰ upon foreign corporations if a required agent is not appointed or maintained in the state or the agent cannot with reasonable diligence be found or if the certificate of authority of the foreign corporation has been forfeited. In any of the mentioned instances the Secretary of State is made an irrevocable agent and representative of the foreign corporation to accept service of process or papers.³¹

Rule 5.06(f) is broadened somewhat over Section 506.150(6). It provides that "in all cases where the person to be served or an agent authorized by him to accept service of summons petitions shall refuse to receive copies thereof, the officer . . . and such refusal, shall be a sufficient service of such summons and petition." This is but a minor change, the only difference being that Section 506.150(6) did not refer to refusal of service by "an agent authorized by him to accept service."³²

Section 506.160-4 regarding service by publication upon unknown defendants has been enlarged, as Rule 5.07(c), specifically to cover unknown and unborn defendants. A provision is made for the appointment of an attorney to represent the

29. Superseding Mo. REV. STAT. §§ 506.120-506.190 (1949) and Supreme Court Rules 3.09, 3.10 and 3.12. Rule 4, Institution of Civil Actions, is substantially the same as Mo. REV. STAT. § 506.110 (1949).

30. Not limited to service of summons and petition, but such process and "any notice or demand required or permitted by law to be served. . . ."

31. This method and procedure for serving the Secretary of State is specifically set forth. Compare Mo. REV. STAT. § 506.210-506.240, service of process upon non-resident motorists.

32. The inclusion of these words in 5.06(f) brings the wording of this rule into harmony with that of Rule 5.06(a) (same as Mo. REV. STAT. § 506.150(1)).

interests of such unknown and unborn defendants and judgment is as final and binding upon them as if they were personally served.

*Rule 6: Pleadings and Motions*³³

Rule 6.01 states: "There shall also be a reply to any answer referred to above if it contains a counter-claim or if any defense to such answer consists wholly, or in part, of affirmative defenses." This provision is added to the language of Section 509.010 to form Rule 6.01. There is a possible overlapping of Rule 6.01 and Rule 6.10 (Section 509.090) wherein it is stated that "In pleading to a preceding pleading a party shall set-forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." In construing Sections 509.010 and 509.090 the Kansas City Court of Appeals³⁴ has said: "Section 40 of the present code, *Missouri Revised Statutes* 1949, Section 509.090, authorizes and requires a reply affirmatively to set up fraud and other matters constituting avoidance or affirmative defense to matters set up in the answer." (Emphasis added) Although this interpretation of 509.090 has been criticized,³⁵ Rule 6.01 leaves no room for argument since it specifically states that an affirmative defense to an answer must be set out in a reply.

Rule 6.31 seems to be restricted in its operation as compared with Section 509.290, upon which it is based. Rule 6.31 provides that "the following matters may be raised by motion. . . ." The rule then enumerates ten specific matters. Section 509.290 provides that "the following *objections and other matters* may be raised by motion . . ." (Emphasis added) and it has been held that *res judicata* may be raised by motion although it is not specified in Section 509.290 in the list of objections which may be so raised.³⁶ But a literal reading of Rule 6.31 would seem to exclude by motion any other matters than the ones specifically enumerated. The same deletion is found in Rule 6.37 (Section 509.340) dealing with waiver by a party of matters available to him by motion. The omission of the words "objections and other" is probably a desirable change since it prevents raising by motion matters which more properly should be included in the pleadings. An examination of the ten specific matters which, by Rule 6.31, may be raised by motion will reveal that each is a procedural matter, attacking a party's right to proceed in a particular court or at a particular time or in a particular manner; not one of the items enumerated attacks the party's right to proceed at all. Matters going to the merits of a claim or defense are thus left to be raised by a pleading rather than a motion unless the Rules expressly allow presentation of the merits of a claim or defense by motion.³⁷

Rule 6.33 specifically sets forth what motions to use to raise objections of failure to state a claim or defense when the objections appear on the face of the pleadings.

33. Superseding MO. REV. STAT. §§ 509.010-509.400, 509.420-509.510 and 511.040 (1949). Supreme Court Rules 3.03(c), 3.13, 3.15 and 3.16.

34. *Hill v. Hill*, 236 S.W. 2d 394, 398 (Mo. App. 1951).

35. See 16 Mo. L. Rev. 430 (1951) in which "the writer believes that these two sections [509.010 and 509.090] should be read together and that affirmative defenses must be pleaded only when the affirmative defense is to the petition or when the court orders it to be pleaded in a reply."

36. *Hamilton v. Linn*, 355 Mo. 1178, 200 S.W. 2d 69 (1947).

37. As for instance, Rules 6.33 and 6.38.

These are motions to dismiss and to strike. This but makes express what before was implied since the two named motions are frequently used under Section 509.300, *Missouri Revised Statutes*, 1949, although not named in that section.³⁸

Prior to the General Code, bills of particulars were not favored, but were of limited scope. A return to that attitude is made by the new rules. Rule 6.34 (based upon Section 509.310) omits any reference to bills of particulars while retaining essentially the same provisions as to motions for more definite statements now found in the general code. The bill of particulars is directed toward discovery of issues upon which a case is to be tried, and it is undoubtedly thought that this has been adequately provided for without resort to a bill of particulars. If a party's allegations are too indefinite or uncertain, a motion for a more definite statement is proper; if the doubt is as to what facts a party is relying and proceeding on, recourse can be had to the discovery methods—interrogatories, depositions, entry upon land, examination of papers and documents, etc. The modern trend is toward simplified and streamlined pleadings and away from technicalities, detail and delay in joining the issue; the abolishment of the bill of particulars is in step with the modern trend.³⁹

Rule 6.48 is based on Section 509.460 *Missouri Revised Statutes*, 1949, but a change is made to allow a cross-claim "by one party against a co-party . . . relating to any property that is the subject matter of the original action." This same provision is found in Rule 13(g) of the Federal Rules of Civil Procedure.⁴⁰ In the notes of the federal advisory committee the rule is explained thus: "The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13."

*Rule 7: Interrogatories*⁴¹

Several changes worthy of note have been made. Any party may serve interrogatories upon "any other party" under the new rules; as the general code is written, interrogatories may be served upon "any adverse party." Section 510.020 provides for service of interrogatories upon "any officer, director, partner or managing agent" of a "public or private corporation or a partnership or association." Section 510.060⁴² refers only to "any party or an officer, or general manager of a corporation" and Supreme Court Rule 3.19 speaks of "a designated officer, director, general manager or managing agent." Rule 7 provides that any "officer, director, partner, general manager or managing agent of said corporation, partnership or

38. See 1 CARR, *supra* n. 12, p. 453, § 193.

39. *Id.*, § 194 at pp. 456-461.

40. 28 U.S.C.A., p. 514, Rule 13(g).

41. Based upon and superseding MO. REV. STAT. § 510.020 (1949).

42. MO. REV. STAT. § 510.060 (1949), motion for order compelling answer to interrogatory.

association who shall be described as such or by his name" may be required to answer interrogatories served upon a corporation, partnership or other unincorporated association. Another point is cleared up by Rule 7 in that it is now clear that the officer, director, partner, etc. required to answer interrogatories served upon a partnership, corporation or unincorporated association may be merely described as such without being named personally. Interrogatories may be served after the commencement of the action and without leave of court if not served within 30 days after the commencement of an action, but, in any case, notice must be given to the court, since a copy of the interrogatories with proof of service thereof must be filed with the clerk and the party upon whom interrogatories are served must file a duplicate of his answers also. Leave of court must be gotten upon motion and notice to serve interrogatories within 30 days after the commencement of an action. This last provision was evidentially drawn having in mind the 30 day period within which parties have to answer and in this respect is similar to Rule 33 of the Federal Rules.⁴³ One other change is that answers to interrogatories are deferred until 10 days after objections are determined; under the general code answers are deferred until objections are determined. There is nothing in the express wording of the proposed rules to change the scope of interrogatories as set down in *State ex rel Thompson v. Harris*⁴⁴ to the effect that it was the intention of the legislature to limit the scope of examination on interrogatories to that permitted by depositions and not to authorize discovery of matters not admissible in evidence even though such matters might aid in the preparation for trial.⁴⁵ A question might arise from the wording of the *Harris* case, *supra*, as to whether the courts will construe the scope of interrogatories to be as broad as that of depositions as defined in proposed Rule 8, but, it is submitted, had the committee intended the scope of interrogatories to be broadened, it would have included express provisions to that effect.

*Rule 8: Depositions*⁴⁶

It would seem that the scope of depositions in Missouri has been considerably broadened by the addition of Rules 8.01(b) and 8.01(c).⁴⁷ These two rules

43. 28 U.S.C.A. 245, Rule 33. Leave of court must be gotten to serve interrogatories within 10 days of the commencement of suit and leave of court may be gotten with or without notice.

44. 355 Mo. 176, 195 S.W. 2d 645, 166 A.L.R. 1425 (1946).

45. Compare Federal Rule 33.

46. Superseding Mo. REV. STAT. §§ 492.070-492.090; 492.110-492.460; 442.490-442.540; 492.560-492.590 (1949).

47. Rule 8.01: "Any deposition taken in a proceeding in this state may relate to any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial, if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

"(c) After notice is served for taking a deposition, upon motion reasonably

are substantially the same as Rules 26(b) and 30(b) of the Federal Rules. The scope of depositions under the General Code in Missouri is set out in *State ex rel Thompson v. Harris*.⁴⁸ "Our present Missouri Code does not authorize the use of depositions for the purpose of such broad discovery as now permitted by the Federal rules. . . ." The Federal Rules permit examination upon matters in themselves not admissible as evidence but which will lead to the discovery of such evidence, and that would seem to be the effect of the language of Rule 8.01(b): "It is not ground for objection that the testimony will be inadmissible at the trial, if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." This seemingly all inclusive sentence in 8.01(b) is tempered somewhat by 8.01(c) which provides that the court, upon motion made by any party or the person to be examined and for good cause shown, may order the deposition not taken or restrict the taking of it in time, place, manner, scope or substance. The court may also order a secret proceeding or that secret process or research need not be disclosed or any other order required to protect the witness from annoyance or injustice. It is clear that in the Federal Rules this limitation was inserted as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 8.01(b).⁴⁹

Rule 8.20 provides that any court authorized to grant a commission to take a deposition may order a subpoena to issue commanding the production of documentary evidence upon the taking of a commission to perpetuate testimony. This is a substantial change, since by the General Code production of documentary evidence can be demanded on the taking of a deposition only by the court in which a cause is pending,⁵⁰ and if no cause is pending production of documentary evidence can not be demanded. Another new provision is that providing for service of the application for a court order for the subpoena to issue upon the adverse party, or upon every known interested person or his agent or attorney, in case of a deposition to perpetuate testimony. Rule 8.19 provides that the officer or person authorized to

made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret process, developments or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

48. 355 Mo. 176, 195 S.W. 2d 645, 648, 166 A.L.R. 1425 (1946).

49. See notes of Advisory Committee on Rules, 28 U.S.C.A. 171, Rule 26; 28 U.S.C.A. 216, Rule 30. For the scope of interrogatories and depositories under the General Code, see *State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W. 2d 907 (1947) and *Belding v. Public Service Co.*, 205 S.W. 2d 866, 873 (Mo. App. 1947).

50. MO. REV. STAT. § 492.280 (1949).

take the deposition may commit to prison a person who refuses to produce documentary evidence or tangible things in compliance with a court order or subpoena. The new Rules have made a deliberate departure from the scope of depositions set down in *State ex rel Thompson v. Harris, supra*, and now authorize their use for the purpose of such broad discovery as permitted by the Federal Rules, and this is a desirable departure. Discovery is essential to preparation for trial and broad scope should be given to it, but such an inclusive power as given in Rule 8.01(b) can become vexatious and oppressive unless 8.01(c) is constantly applied when needed as a check.

Depositions of persons in military service on active duty may, by Rule 8.33, be taken by any commissioned officer, other than a commissioned warrant officer, of any of the armed forces of the United States on active duty. This rule, at face value, would allow a lieutenant in the army or an ensign in the navy to take depositions and an officer in one service may take a deposition of a member of a different branch of the service so long as they are both on active duty.⁵¹ This is a desirable change from the needless strictness of the rule that officers of one branch of the service may not take depositions of men in another branch since there seems to be no good reason for the rule as it existed. It is also in line with the unification of the armed services.

*Rule 9: Production of Documents and Other Tangible Things*⁵²

The court may order any party to produce, "at or before trial," documents, papers, books, letters, photographs, objects or tangible things to permit inspection, copying or photographing. This provision is new, since the General Code makes no mention of when the papers, etc. may be ordered produced. Rule 9 goes on, as does Section 510.030, to provide that the court may order a party ". . . to permit entry upon designated land or other property . . . for the purpose of inspection, measuring, surveying, sampling or photographing, ordered—whether "at or before trial"—as was provided for with reference to production of documents, etc. Whether this is an oversight or intentional is an open question, but, if an oversight, the matter can be cleared up by inserting the words "at or before trial" between "entry" and "upon." As a practical matter, entry upon land to be of any value, would probably have to be made before trial.

The last sentence of Rule 9 reads: "The order shall specify the time, place and manner of such measuring, surveying, sampling and *making the inspection and taking such copies and photographs* and may prescribe such further terms and conditions relating to said *inspecting, measuring, surveying, sampling or photographing* as are just." (Emphasis added) A question might be raised from the fact that the last enumeration of activities is exactly the same as that relating to entry upon land while no mention is made of "copying" which is referred to in the provision

51. Compare Mo. REV. STAT. § 492.070 (1949). Note also that § 492.070 has been amended to read as does Rule 8.33. See H.B. 152, 66th General Assembly, Vernon's Missouri Statutes Service, Laws 1951, p. 501.

52. Based upon and superseding Mo. REV. STAT. § 510.030 (1949).

for production of documents, papers, etc. One might wonder whether the court, by its order, may prescribe such further terms and conditions relating to inspection, copying and photographing of papers and documents also. From a literal reading it would seem not, although the court could specify the time, place and manner of such inspection, copying and photographing since these words are expressly included in the first enumeration of things the order shall specify.⁵³

*Rule 10: Admission of Genuineness and Truth*⁵⁴

This rule provides for the service of a request for the admission of genuineness of documents or of the truth of any relevant matters of fact pertaining thereto, upon any other party and for the filing of such request, with proof of service thereof with the clerk of the court.⁵⁵ Any document or fact pertaining thereto shall be deemed admitted by the other party unless such other party, within 15 days, serves a denial or objection to the request upon the first party. Under the General Code the other party has only 10 days within which to serve a denial. Also, instead of the "further time" the court could allow upon motion and notice to answer under 510.050, the court, by Rule 10, may allow such "shorter or longer time" as it deems fit upon motion and notice.

Rule 10(a)(2) provides that the party to whom the request for admission is made may make written objections to the request or to part thereof. The objections are to be accompanied with a notice of motion setting the objections down for the earliest possible hearing, and, if the objection is to part of the request only, the other part must be denied within the prescribed time or the document or facts will be deemed admitted. This last provision prevents an objection to a part of a request from holding up the answer to the remainder. This entire clause is patterned after, and follows closely, Federal Rule 36(a)(2)⁵⁶ and clears up a point of difficulty in the present statute, since there is no provision in the General Code nor any other authority for a determination by the court of the propriety of a request. Rule 10(a)(2) specifically sets forth the method by which a party served with a request may get a hearing by the court upon the grounds that the requested admissions are privileged or irrelevant or otherwise improper. It has been suggested that the code, which has no provision similar to Rule 10(a)(2), authorizes motions in the trial court to have the court determine in a particular case whether the request for admissions is proper or should be vacated as improper,⁵⁷ although there is no court authority for the proposition.

53. It may be that the last sentence of Rule 9 is intended to apply only to the order to permit entry upon land. If so, of what effect are the words, "The order shall specify the time, place and manner of . . . taking such copies . . ." since there is no provision for copying "in the entry upon land" clause of Rule 9.

54. Based upon and superseding MO. REV. STAT. § 510.050 (1949).

55. See Rule 7 for an analogous provision.

56. 28 U.S.C.A. 332, Rule 36. See the notes of the Advisory Committee on Rules and Commentaries, 28 U.S.C.A. 332 and 333.

57. See 1 CARR, *supra* n. 12 at pp. 762, 765.

*Rule 11: Physical or Mental Examination*⁵⁸

Under this rule the party examined gets a copy of the report without request while, under the present law, the examined party may have a copy of the report, but must make a request for it. After delivery of the report to the party examined, the examining party is entitled to a report of any examination previously or thereafter made of the same mental or physical condition at the request of the examined party. The General Code has been criticized some because the examined party could get the examining party's evidence without giving up to the examining party like evidence, but Rule 11 would seem to take care of this criticism. Indeed, a question is raised as to whether Rule 11 has not gone too far and taken away from the person examined his privilege to have the results of previous examinations made at his request suppressed. In a personal injury suit, for example, the defendant has but to request a court order that the plaintiff submit to a medical examination and, if the examination is ordered under Rule 11, he will be entitled to a report of any examination previously or thereafter made at the plaintiff's request, and this is so whether or not the plaintiff actually wants a report of the examination made at the defendant's request. Federal Rule 35 provides that by obtaining a report of the examination the plaintiff waives any privilege he may have in the action regarding the testimony of persons who have examined him in respect to the same physical or mental condition, but the plaintiff obtains a report only if he requests it, so that he waives his privilege only if he voluntarily asks for the defendant's report. Under proposed Rule 11, however, the plaintiff has no option whether or not to obtain the defendant's report. At first blush, Rule 11 would seem to give a defendant an undue and unjust advantage, because a report of the examination made at defendant's request will be of no very great value to the plaintiff other than as a guide to cross examination since the examination will, in many instances, be made a long time after the physical or mental condition complained of by the plaintiff has been incurred; yet, in return for this, the plaintiff must give up to the defendant a report of all previous examinations made of the plaintiff—a complete case history, so to speak, of the plaintiff's condition. The defendant need only have a rather cursory examination of the plaintiff made, then receive from the plaintiff any and all examinations previously made. But, it is submitted that when a plaintiff files suit which he knows will put his physical or mental condition in issue he should be deemed to waive any privilege he may have concerning the specific condition; that the object of a law suit is to get at the facts, and all the facts which may aid a jury in reaching a just determination of the matter; that a plaintiff may not deliberately raise an issue regarding the physical or mental condition of his person yet be privileged to withhold from the triers of fact whatever, and so much of the valuable evidence about that condition as he sees fit.⁵⁹

58. Based upon and superseding Mo. REV. STAT. § 510.040 (1949). See also Federal Rule 35, 28 U.S.C.A. 326.

59. See 1 CARR, *supra* n. 12, p. 758, n. 58.

*Rule 12: Enforcement of Discovery by Parties*⁶⁰

This rule states specifically who is referred to: "party, or, if the party served is a public or private corporation, a partnership or other unincorporated association, an officer, director, general manager, managing agent or partner thereof."⁶¹ Section 510.060-2(3) provides that if a party refuses to obey an order of discovery made by the court, the court may make an order staying further proceedings until the order is obeyed, but this provision is omitted from Rule 11. The reason for the omission is that an order of discovery is not appealable,⁶² and, if the order is not obeyed, the action might be suspended indefinitely. A party, however, could be held in contempt of court and punished for refusal to obey an order of discovery,⁶³ but here again there would be great delay if further proceedings were delayed while the contempt action was pending.

*Rule 16: Continuances*⁶⁴

The General Code provides for a continuance in all civil or criminal cases pending when the General Assembly is in session and it be made to appear to the court by affidavit that a party or his attorney is a member of either house of the General Assembly and in actual attendance and the attendance of the party or attorney is necessary to a fair and proper trial or other proceedings. Provision is made for the continuance of the suit and any and all motions or proceedings of every kind and nature. This provision, intended to serve the ends of justice by allowing a litigant to retain the attorney of his choice and have the benefit of his advice and presence in court even though such attorney may be temporarily pre-occupied at a session of the General Assembly, has more often than not backfired and given parties opportunity to impose vexatious delays and continuances upon adverse parties, thus thwarting the flow of swift, speedy justice. This section⁶⁵ has been construed to mean that when an application for a continuance is made the court may determine only if the application complies with the statute, and, if so, it is the court's duty to sustain the application. It is not for the court to determine whether or not sessions of the General Assembly were only skeleton sessions since courts take judicial notice of records of the General Assembly and to so determine would be to impeach the records. Nor does the court have authority to make the finding that the attorney was employed solely for the purpose of obtaining a con-

60. Based upon and superseding Mo. Rev. Stat. § 510.060 (1949).

61. See Rule 7, *infra*.

62. See Mo. Rev. Stat. § 512.020 (1949) as to who may appeal, also Stone v. Boston 218 S.W. 2d 783 (Mo. App. 1949), and 2 Mo. Dig. *Appeal and Error* 274, § 66 and cases therein cited.

63. Mo. Rev. Stat. §§ 476.110-150 (1949). See Federal Rule 37(b) (1) where it is expressly stated that a party or other witness refusing to be sworn or answer any question in the taking of depositions shall be considered in contempt of court.

64. Based upon and superseding Mo. Rev. Stat. §§ 510.080-120 (1949). Rules 13, 14 and 15 are substantially the same as the provisions contained in §§ 510.010, 510.070 and 510.200 Mo. Rev. Stat. (1949) and Supreme Court Rules 3.17(b), (c) and (d).

65. Mo. Rev. Stat. § 510.120 (1949).

tinuance, nor authority to hear evidence to contradict the recital in the application that the attorney's presence at the trial was necessary to a fair and proper trial.⁶⁶ Rule 16 is intended as a rectification of the abuse of this statute permitting a continuance on the grounds that an attorney of a party is a member of the General Assembly and in attendance at a session. Provision is made that if a continuance is sought and the attorney in attendance at the legislature was not an attorney of record for the party applying for the continuances at the time the party first came into the suit, the party applying has the burden of satisfying the court that the presence of the attorney in court is necessary to a fair and proper trial. It is obviously thought that the biggest abuse comes from parties deciding, after the suit is commenced, that a continuance is desirable and going out and hiring a lawyer in the General Assembly. If this new section be construed to mean that a court may consider evidence contradicting recitals in the application for a continuance that presence of the attorney is necessary to a fair proceeding and the party making application has the burden of proof throughout, this new part in Rule 16 should go far toward doing away with abuses of this particular section of the law. One other change is made by Rule 16. Even though a continuance is granted, the court is not deprived of the right to issue temporary writs in actions for extraordinary legal remedies, nor the right to make an order touching any bond given or to be given. Thus, action of the court is not suspended where alacrity is of the essence and where the matters acted upon are not final.

*Rule 18: Dismissal of Actions*⁶⁷

Rule 18.03 is a new provision in Missouri. It states that: "For the convenience of the parties and witnesses, in the interest of justice, under the doctrine of forum non conveniens, a Circuit Court or Court of Common Pleas may dismiss without prejudice any action wherein the cause of action arose out of this state." Whether the doctrine of forum non conveniens is, at the present time, applicable in Missouri is a matter of uncertainty. Two recent cases⁶⁸ have dealt with the application of the doctrine by the courts of Missouri to Federal Employers' Liability Act cases. The question of the application of the doctrine of forum non conveniens was fully briefed by counsel and the Supreme Court of Missouri, in an opinion by Judge Tipton, held that since Missouri allows its citizens to maintain Federal Employers' Liability Act actions in its courts it would violate Article 4, Section 2 of the United States Constitution not to allow citizens of other states to file like suits in the courts of Missouri. The court held that, since a trial judge of a circuit court

66. *State v. Thatch*, 355 Mo. 751, 195 S.W. 2d 106 (1946). This last statement is watered down some by *State v. Knight*, 356 Mo. 121, 206 S.W. 2d 330 (1947), in which it is said that the affidavit must state facts which would support a finding and conclusion by the court that presence of the attorney is necessary to a fair and proper trial.

67. Based upon and superseding Mo. REV. STAT. §§ 510.130-510.170 and 514.180 (1949). Rule 17 is identical to Mo. REV. STAT. § 510.180 (1949).

68. *State ex rel. At.T. & S.F. Ry. v. Murphy* and *State ex rel. Southern Railway v. Mayfield* both in 359 Mo. 827, 224 S.W. 2d 105 (1949).

has no discretion in determining whether to retain or dismiss a case brought under the Federal Employers' Liability Act solely on the grounds of forum non conveniens, "It is not necessary to discuss the Missouri law upon the subject." This decision of the Missouri Supreme Court was reversed on appeal to the Supreme Court of the United States,⁶⁹ Mr. Justice Frankfurter saying: "It (the Supreme Court of Missouri) should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law." So long as neither persons suing under the Federal Employers' Liability Act nor non-citizens of Missouri are discriminated against in the dismissal of suits by the Missouri courts, no violation of the Constitution of the United States is threatened although discrimination may be applied as against non-residents of Missouri. Since there is no constitutional question involved, the question is one purely of policy. Should Missouri adopt and apply, when called upon to do so, the doctrine of forum non conveniens where the cause of action arose outside of this state? The answer must lie in how the rule is to be applied if adopted. If the circuit courts and courts of common pleas may dismiss a cause of action arising outside the state upon a mere showing of such fact and, perhaps, the further showing that it is of some inconvenience to the defendant to defend the suit in Missouri, then the rule is undesirable and should be discarded. It will always be inconvenient for a defendant to defend a law suit, just as it is for the plaintiff to bring one, but the plaintiff has been wronged, or thinks he has, and broad attitude should be given him to determine where he shall seek redress. In this modern age much business is transacted by residents of Missouri outside of the state—contracts, insurance policies and real estate and business ventures of all kinds are continually being entered into by residents of Missouri all over the country and the world. To deny, rather summarily, access to the courts of Missouri to such people to enforce their contracts and adventures would be against all tradition and reason. But, the federal district courts use the doctrine of forum non conveniens, presumably without abuse. A leading case is *Gulf Oil Corporation v. Gilbert*⁷⁰ in which the Supreme Court of the United States affirmed a federal district court's right to apply the doctrine of forum non conveniens. In the course of the opinion Mr. Justice Jackson expounded some ideas of the doctrine which would make it a valuable and useful tool in Missouri procedure if he ideas were adopted and embodied in the application of the doctrine in Missouri. He said that the doctrine is designed to meet a misuse of venue. He continued: "The plaintiff may not, by choice of an inconvenient forum 'vex,' 'harass' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." There are many factors to be considered by the courts in determining whether or not to use the doctrine and dismiss the cause; they are, among others, accessibility to sources of proof, cost of obtaining attendance of willing witnesses and availability of compulsory process for attendance of

69. *State ex rel. Southern Railway v. Mayfield and State ex rel. A.T. & S.F. Railway v. Murphy*, 340 U.S. 1, 71 Sup. Ct. 1, 95 L.Ed. 3 (1950). Note that there were four dissents.

70. 330 U.S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947).

unwilling witnesses, possibility of a jury view, the burden of jury duty upon the people of a community having no relation to the litigation and litigation piling up in congested centers. Justice Jackson also points out that, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. If this last statement is used as a guiding light there is no reason why the doctrine of forum non conveniens should not be entirely acceptable in Missouri where the cause of action arises outside the state.

WALTER McQUIE, JR.

TRIAL PRACTICE AND APPELLATE PROCEDURE—RULES 19-35

Rule 20: Trial by Jury

Although there are some changes in the rule¹ from the present statute,² such changes are merely in form, and do not change the meaning. The different wording used in the rule would seem to clarify the meaning of the existing statute.

Rule 22: Verdicts

This Rule 22.02(b) is entirely new in Missouri. It provides for special verdicts. I not only question the soundness of such a procedure, but also the power of the Supreme Court to enact such a rule. Section 510.230, *Missouri Revised Statutes*,³ provides:

"In every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict.

Thus, the rule would be in conflict with this statute.

Then Section 477.010 provides:

"The Supreme Court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being."

Therefore, in view of these two statutes, the Supreme Court does not have the power to adopt such a rule as this.

Sub-section (a) of this rule is identical with Section 510.230, and provides for a general verdict in every issue for the recovery of money only. Then sub-section (b) of this rule provides for special verdicts at the discretion of the court. It would seem that the two provisions of this rule conflict, and would thus result in confusion.

How would this rule work in practice? First of all, the burden on the lawyers would be tremendous. Each side would have to have a complete set of questions ready in case the special verdict was used. This would mean countless hours or

1. All references to rules are to the Proposed Rules of Civil Procedure, unless otherwise stated.

2. Mo. REV. STAT. § 510.190-3 & 4 (1949).

3. All references to section numbers are to the Mo. REV. STAT. (1949) unless otherwise stated.

even days drafting questions that would be proper and that would cover the case. Then would come the presentation of the questions to the court for adoption. This would result in endless discussions, due to the great number of questions that would normally be submitted, and due also to the type of questions required. They cannot be "double barreled," suggestive of answers, questions asking for evidentiary facts, questions calling for conclusions of law, or ambiguous. The lawyers and judges would have to tread a narrow path with their questions in order to prevent reversal thereon. Many say our instructions today in Missouri are over-technical, but in practice special verdicts based on questions would create many times worse difficulties than we have today with our instructions.

Now assume the lawyers and judge have arrived at a set of questions for submission to the jury. What then? The great portion of the lawyer's time on argument would have to be spent explaining the questions to insure proper interpretations of them by the jury, for his case depends not only on the specific answers, but also on consistent answers. Now it becomes apparent how deadly any question is which is misunderstood by the jury and answered not as the jurors meant it to be answered. Also in this vein, one can see the very great additional burden which special verdicts would be placing on the jury.

From the foregoing, it appears to me that this sort of practice would not only slow down our trials, but would put an unreasonable burden on both lawyers and judges, and could well result in a miscarriage of justice rather than more perfect justice as is apparently intended.

Now, what happens on appeal? First of all the appellate courts would be full of cases alleging improper submission of questions, and inconsistent answers thereto. Not only would the appellate courts be overburdened even more than they are today, but the trial courts also would have more and more re-trials based on error in submission of improper questions. It appears to me that the additional burdens connected with such a practice would certainly outweigh the rather slim possibility of more even justice.

In theory the special verdict is good, but it is poor in use. Missouri had them as early as 1849, but in practice they failed so badly that they were abolished. Then not so long ago there was an attempt to re-establish them in a General Code of Procedure, and that failed. It would seem to be apparent that the bar of Missouri does not like the special verdict system, and prefers to maintain and perfect our system of general verdicts instead. I believe their choice in the past was a wise one, and it is urged that the Supreme Court refuse to adopt this practice as it is again proposed.⁴

Rule 22.03 contains the provisions of Section 510.270, which requires the jury

4. See the following references which substantiate the text of the comment: *Fralick v. Kansas City Public Service Co.*, 168 Kan. 134, 211 P. 2d 443 (1949); *Sayeg v. Kansas Gas & Electric Co.*, 156 Kan. 65, 131 P. 2d 648 (1942); I CARR ON MISSOURI CIVIL PROCEDURE § 7 (g) (1947); 7 Mo. L. REV. 142 (1942); 9 Mo. B. J. 1 *et. seq.* (Jan. 1953); 13 A.B.A.J. 715 (1927); 2 F.D.R. 138 (1943); 20 TEXAS L. REV. 32 (1941); 25 VA. L. REV. 261 (1939).

to assess the amount of money awarded to a winning party, as well as requiring the jury to state separately the amounts allowed for exemplary and punitive damages. The rule has, in addition, a requirement that the jury separately state the amounts allowed for personal injuries and for property damages.

This addition would not prejudice either party, nor would it in any manner obstruct the dispatch of the case. It would require very little extra work on the part of the jury. In fact, such a requirement would insure the separate computation of those separate injuries, and prevent an oversight on the part of the jury of either of the alleged injuries. The new addition is a good one, especially in view of the fact that our present statute requires the separation of punitive and exemplary damages. If the jury is required to separate those, then there is no reason why it would be unfair to require it to separate personal and property injuries and awards therefor.

Rule 23: Directed Verdict

Section 510.290 is identical with Federal Rule 50 (b). Both provide for an after-trial motion to have the verdict and judgment set aside and a judgment entered in accordance with a former motion for a directed verdict. This motion may be joined with a motion for a new trial in the alternative. They then give the trial court power to reopen the judgment and either order a new trial or enter judgment in accordance with the former motion for a directed verdict. The exact wording of the Missouri statute is contained in Proposed Rule 23.02 but additional provisions are also found. The first reads: "If the trial court sustain the motion for a directed verdict and enter judgment thereon and, on appeal, the appellate court shall reverse this judgment, such appellate court shall then consider and determine the issues presented by the motion for new trial if one was filed." The second pertains to the trial judge's power to deal with the judgment, and allows him to "set aside the verdict and dismiss the case without prejudice, if justice so requires," and supplements his present power to order a new trial or enter judgment in accordance with the motion for a directed verdict.

With the first change from existing procedural law, I am not in accord. The new provision directs the appellate court to rule on the motion for a new trial which was made in the alternative with the after-trial motion, if the latter motion was sustained by the trial court, and if, on appeal, the trial court's ruling was reversed by said appellate court. The way the provision is worded, I believe the fair interpretation is that the appellate court is to determine the issues presented in the motion for a new trial for the first time. This, of course, assumes the trial court has not ruled on the motion for the new trial, presumably because the trial court sustained the after-trial motion and deemed it unnecessary to rule on the motion for the new trial. This assumption is clearly erroneous in view of two decisions, one under the Missouri statute,⁵ and one under the identical Rule 50 (b)

5. *Johnson v. Kansas City Public Service Co.*, 358 Mo. 253, 214 S.W. 2d

of the Federal Rules.⁶ In both of those decisions, the court held that, when a party moved for a judgment in accordance with his former motion for a directed verdict, and in the alternative for a new trial, if the trial judge sustained the after-trial motion, he must also rule in the alternative on the motion for a new trial. These decisions undoubtedly were directed to take care of the situation this rule covers, but on a different level. These decisions force the trial court to rule on the motion for a new trial so that in the event the appellate court reverses the trial court's ruling, which sustained the after-trial motion, the alternative motion for the new trial has been ruled on and no further delay is required for a ruling on it. Apparently when the rule was drafted these cases were overlooked, and it was assumed the trial court might rule only on the after-trial motion, so that when and if it were upset on appeal the motion for a new trial in the alternative would be left pending. Why else would the rule require the appellate court to then rule on it for the first time. In view of the decisions referred to above, the appellate court cannot rule on the motion for a new trial for the first time, for those cases require the trial judge to rule on it at the time he rules on the alternative after-trial motion.

This addition to the proposed rule appears to be based on an oversight, and to be made to correct a defect that has already been corrected by the supreme court by case law. Thus, the change in the rule is not only unnecessary, but would be confusing if allowed to stand.

As to the latter addition, there is no reason why the trial court should not have the power to dismiss the case without prejudice, if justice demands, for it already has the power to change the judgment so that it is completely opposite to what it was when first entered; and it can order a new trial. One can imagine only a very few instances when justice would require the trial court to order a dismissal without prejudice, so the new provision would probably be little used. However, when such an order is needed, this provision will give the court authority to grant it.

Rule 24: Trial by Court

Rule 24.01 is essentially the same as Section 510.310, which, among other things, provide that the court, when sitting as the jury, shall rule on objections to evidence. It also provides that, even if the objection is sustained, the evidence which is held to be inadmissible may be taken down by the court reporter and preserved. To this existing law, this rule has added, "or with an advisory jury," which allows the same procedure when the court has called such a jury.

There appears to be nothing wrong with this addition, if the evidence which is taken down does not get to the advisory jury. I assume this would be done outside the hearing of the jury, and, if so, would be all right, for the appellate court would then have the evidence before it on review if it decides the exculsion was improper. Then with it's power to review and weigh the facts in a case tried before the judge, the appellate court could weigh the excluded evidence with all other

6. *Montgomery Ward and Co. v. Duncan*, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

evidence, and reverse, remand or affirm as the situation demanded. Thus, the addition would not be a serious change, would not prejudice any of the parties, and certainly would clarify the power of the court to allow such procedure when it has called an advisory jury.

Rule 25: Judgments and Orders

Section 511.060 limits the trial court's power to set aside a judgment of *non pros.* to the *term* in which it was entered. Our older procedure was geared to terms and vacations but, as is indicated by Article V, Section 14, Missouri Constitution, 1945, and Supreme Court Rule 3.04, our present procedure operates around definite numbers of days rather than terms. Rule 25.07 changes the time limit from the *term* to a definite thirty days. This is believed to be in keeping with our trend, and therefore a good change.

Rule 25.34 is essentially the same as Section 510.350, except for wording. The wording of the rule is more definite and clear than the existing statute, thus it should be commended. However, there is some serious question as to whether this rule and the statute from which it was adapted pertain to substantive law. Even though there is no change in the law from the statute to the rule, the Supreme Court of Missouri would be committing a grave error if it adopted a rule which deals with substantive law, for Article V, Section 5 of the Missouri Constitution of 1945 prohibits the Supreme Court from making rules affecting substantive law.

Rule 25.41 is entirely new and provides that the procedure for a writ of *scire facias* shall be the same as the procedure in ordinary civil actions. This change is a good one, for it standardizes procedure, and makes it unnecessary to know the separate and special procedure for that writ.

Rule 25.71 although worded differently, does not vary from the context of Section 511.440. Since there is no alteration in meaning, it is submitted that this rule is sound.

Rule 25.73, is again different in wording, but the same in meaning as the existing Section 511.460; therefore, it is believed to be all right.

Rule 25.79 is entirely new. It provides that, upon entry of a judgment, the clerk of the court shall notify every party "who is not in default for failure to appear," of said entry, excepting parties who were present when the judgment was entered. This is a fine rule, and will make actual notice of adverse judgments more probable in many cases. It is a little trouble for the clerk, but may in certain cases afford parties actual notice, when otherwise they might not receive any notice in time to take action thereon.

I would have one suggestion as to mechanics, and for the sake of clarity. The rule uses the language, "default for failure to *appear*" (italics added). The word *plead* should be substituted for *appear*, because in Missouri a party is not in default unless he fails to plead. Thus, a party cannot be in default for failure to *appear* in Missouri.⁷

7. This is definitely a minority rule, for in almost all jurisdictions a party is in default for either failure to plead or to appear.

Rule 26: Control of Judgments

Rule 26.01 combines the contents of Section 510.370 and of Supreme Court Rule 3.25, both of which deal with the powers of the trial court to alter its judgment within a thirty-day period. However, the power to *vacate* has been added to the present powers to "reopen, correct, amend or modify" the judgment.

So long as we give the trial court the power to alter its judgment, I believe it should have rather broad powers, for such powers are given so that errors can be corrected without the necessity of expensive and delaying appeals. It would be folly to give the trial court only a very limited power to correct mistakes, for the purpose would be defeated. Also, it must be remembered that the trial court can alter its judgment only "for good cause," which restricts it and insures against an arbitrary control over judgments. Thus, this added power to vacate for good cause would seem to be a good one. It is my opinion, however, that the added power to vacate would be used very little.

Rule 27: Executions and Exemptions

Rule 27.03 is derived from Section 513.070. It is submitted that the rule makes change in the present law, although it is substantially different in wording. The wording of this rule is a very great improvement over the statute for it makes the procedure much more clear and understandable. The drafters are to be commended for this.

Rule 27.08 is derived from Section 513.445. There are a few differences in wording, where statutes are referred to, but there is absolutely no alteration in meaning. Thus, this rule may be considered as adopting the present procedure exactly as it exists under our statute.

Rule 27.36 is derived from Section 513.205, but certain modifications have been made. That statute, and this rule, deal with the sale of real estate by the sheriff. The statute provides for sale "on some day during the *term* of the circuit court of the county where the same is situated." (Italics added) The rule has deleted this, and has substituted the phrase, "in the county where it is situated."

This alteration changes the existing procedural law somewhat, and I believe for the better. Under our old Constitution, courts sat in terms, but this was altered by Article 5, Section 14 of the Missouri Constitution of 1945. Since many of our statutes referred to terms and vacations, Supreme Court Rule 3.04 was adopted to harmonize those statutes with the new procedure and practice without terms. However, the implication of that Supreme Court Rule on Section 513.205 is that the sheriff can sell only on a day when the court is convened, which was not the original intent of the statute. The modification effected in this rule takes care of this defect, and would allow a sale on any day, whether the court is in session or not.

No serious implications are involved in the change, or there is little if any connection between the sheriff's sale and the court being in session.

Rule 27.41 is based on Section 513.240, and deals with the situation where the highest bidder at a sheriff's sale refuses to buy and pay for the property. The statutory wording of "to pay the amount *bid*" [italics added] has been changed to

"to pay the amount *charged*" (italics added). This change is uncalled for, and certainly does not clarify. The original word *bid* is the more exact term in this instance, for the sale is by auction, and should have been carried over to the rule.

Both under the present statute and this rule, the sheriff may resell the property when the first bidder refuses to pay the amount he bid, and if the property brings less on the second sale, the difference may be obtained from the first bidder. The statute provides for collection "by motion before any court or before any magistrate" provided jurisdiction is not exceeded. This rule, however, limits this recovery by motion to "the court out of which the execution was issued" or "the circuit court of the county in which the sale was held." Therefore, the courts in which the sheriff can recover the difference by motion are limited. This seems sound, because it is a harsh, summary type method of recovery, and should be sharply limited in practice. It is limited, in this newly proposed practice, to courts which are most likely to have some connection with the sale, and thereby to be better qualified to determine such a motion.

Rule 27.53 contains all of Section 513.315 except the following:

" . . . and for any failure or neglect to perform the duties therein imposed upon the former sheriff, such former sheriff and his sureties shall be subject to the like penalties, proceedings and judgments as if he still continued in office."

Article V, Section 5, of the Missouri Constitution of 1945 prohibits the changing of substantive rights by Supreme Court rules. The above-quoted portion of Section 513.315 deals with substantive rights, therefore it is properly omitted from this rule. Moreover, under Rule 1.01, this rule can only supercede the procedural section of the existing statutes, thus leaving the substantive portion of Section 513.315 intact.

Rule 27.58 is based on Section 513.350, which provides for:

1. The liabilities of a sheriff who fails to pay over the proceeds from an execution sale;
2. three methods of collection by the judgment creditor from the sheriff;
3. execution in case of judgment obtained by any of these methods of collection; and
4. the liability of any officer who defaults in said execution.

Of course, provisions 1 and 4 deal with substantive law, and are properly omitted from this rule in view of Article 5, Section 5, of the Missouri Constitution of 1945. Provisions 2 and 3 of the statute are substantially set out in the rule; however, the wording is slightly confusing.

The rule starts: "A proceeding under Section 513.350 of the *Revised Statutes of Missouri*, 1949, to recover from an officer the purchase price of property sold under execution *shall be by motion*, . . ." (italics added). Now, Section 513.350 provides for *three* methods of recovery, only one of which is by motion. The use of *shall* in the rule would seem to be mandatory, and require a regular civil action to be handled by motion. Perhaps the rule was meant to allow such recovery by motion if desired, but to leave the regular methods of recovery by civil action if the party desired to use them. The word *may* would give such a meaning to the

rule. On the other hand, if the use of *shall* was intended, then the rule changes the existing law by taking away the choice of remedies. Such a change is unwarranted, and should not be made. It is all right to give the aggrieved party the additional remedy by motion, but I do not believe his regular civil remedy should be taken away.

Also, the rule provides that the court shall render judgment for the amount due, "with interest and damages *aforesaid*" (italics added). This is the wording used in Section 513.350, in which the measure of interest and damages is also set out, and are truly *aforesaid*. However, the rule contains no previous mention of damages, so the word *aforesaid* would seem to be incorrectly used, and possibly misleading. If "with interest and damages" is to be qualified, then it should be done with, "as provided for in *Missouri Revised Statutes*, 1949, Section 513.350," or something similar. This would avoid any ambiguity.

Section 513.420 provides:

"Any officer or officers of any such town or city, failing, refusing or neglecting to comply with any such order, of court, shall be deemed guilty of a misdemeanor, and shall be fined and imprisoned as for a contempt of court."

Rule 27.70 merely states that such officer "shall be cited for contempt of court," with no mention of its being a misdemeanor.

The statute would seem to declare the offense involved to be a misdemeanor (which would be substantive law), to be prosecuted according to the procedure and sanctions of a contempt proceeding. If this interpretation be correct, then the provision with reference to its being a misdemeanor could not be contained in the rule, in view of Article 5, Section 5, Missouri Constitution of 1945, for it is substantive. However, the contempt provision of the statute is procedural, and is contained in the rule. Therefore, the rule has adopted as much of the statute as is procedural, and without change. This would seem to be proper.

Rule 28: Costs

Section 514.170 provides:

"Upon the plaintiff dismissing his suit, or defendant *dismissing* the same for want of prosecution, the defendant shall recover against the plaintiff his costs;" (italics added)

Rule 28.17 provides:

"Upon the plaintiff dismissing his suit, or *the court dismissing* the same for want of prosecution, the defendant shall recover against the plaintiff his costs;" (italics added)

The italicized portions differ, but it is believed that the result and meaning is identical. The statute is somewhat vague and confusing when it refers to a defendant dismissing, for technically it is impossible for the defendant to dismiss for want of prosecution. Actually, the defendant moves for dismissal, and the court does the dismissing.⁸ Thus, the rule is more accurate in its language, and does not alter the present statutory rule even though it is different in wording.

8. *St. Ferdinand Sewer Dist. of St. Louis County v. Turner*, 208 S.W. 2d 85 (Mo. 1948).

Rule 29: New Trials

Section 510.360 declares the procedure for basing a motion for new trial on affidavits. Rule 29.03 retains the same procedure, but broadens its application to all after-trial motions.

This is a definite change, but it is believed to be a good one, for it standardizes and clarifies the procedure for *all* after-trial motions when they are based on affidavits.

This rule also provides for presentation of depositions and oral testimony in connection with all after-trial motions. This too is believed to be a very good addition, for it makes possible the presentation of evidence in support of the motion. For instance, if a motion were made to reopen the case on the ground that new evidence was now available, evidence could be presented to the court to substantiate the motion. This would seem to be a very fair practice, and setting it out in the rule would clarify the fact that it could be used.

Rule 30: Objections to Rulings

Rule 30.03 is taken from Supreme Court Rule 3.23. The references to code sections in the Supreme Court Rule have been changed to rule numbers, which is necessary.

Supreme Court Rule 3.23 provides that all allegations of error, to be preserved for appellate review, must be raised in a motion for new trial, *except*:

1. Questions of jurisdiction over the subject matter;
2. Questions as to the sufficiency of the pleadings to state a claim or defense;
3. Questions of the sufficiency of the evidence to support the judgment in cases tried as provided by Section 510.300.
4. Questions authorized by Section 510.290 to be presented in a motion for judgment;
5. Questions authorized by Section 510.300 to be presented in a motion to amend the judgment and opinion; and
6. Questions under Section 510.130-2, authorized to be presented in a motion to set aside a dismissal.

This rule has omitted Number 6, which means that those questions would have to be raised first in a motion for a new trial in order to preserve them for appellate review; whereas, now, they may be raised for the first time on appeal. This is a definite change, and it is hard to find a reason for such a change. The only one that is plausible is that the trial court should have a second opportunity to correct the alleged error in dismissing. This argument would seem to justify the change, if it were not for the fact that the same argument would apply equally well to several of the other exceptions, especially Number 5. I do not believe, therefore, that this argument stands up. Also, we must bear in mind that, if the attorney thinks there is a chance the trial court will change its mind, those questions may be raised in a motion for new trial if desired. He does not have to wait and raise them first on appeal. Our existing procedure is working well, and I believe that it should be continued.

Rule 33: Appeals

Rule 33.04 is identical with Section 512.050, except for the following changes or additions.

The rule extends the time for filing a notice of appeal to fifteen days. This gives the lawyer five more days than he has under the present procedure, and for that reason it is believed to be a good change. Five extra days is not so long that the appeal will be unduly delayed, yet the extension can be extremely beneficial to the busy lawyer.

The rule also suggests that the trial court can extend time limits on further steps in the process of appealing, apparently without notice to the respondent. This provision undoubtedly is based on Rule 33.18, which provides for the extension of original time limits. This practice, for the reasons stated in the comment on Rule 33.18, is believed to be a poor one.

The rule also makes provision for an extension of time to be granted by the appellate court for good cause shown. This provision is all right, because it requires good cause to be shown before the appellate court can extend the time. This is not like the provision allowing the trial court to extend time limits, which does not even require cause to be shown.

Rule 33.14 is essentially the same as Supreme Court Rule 1.04 (e). However, the rule provides that only one set of the copies of the transcript shall be served on any group of adverse parties who are all represented by the same attorney. This is a good provision, for it keeps the cost of appeal down somewhat, and does not hinder the respondents, for all of their lawyers will have copies.

The rule also makes it clear that the stated number of copies will be served on *each* respondent, while Supreme Court Rule 1.04 (e) is not clear when it states that so many copies shall be served on "adverse parties." Does this mean so many for all of them, or for each of them? An extensive search has revealed no cases or comments on this apparent ambiguity. It is well that the rule has clarified this problem.

Rule 33.18 is drawn from Section 512.140 and Supreme Court Rule 3.26 and is not materially changed. References are changed to rule numbers rather than statute numbers.

However, as mentioned in the discussion of Rule 33.04, I do not believe the arbitrary method of allowing the trial court to extend time while in chambers is at all good. There is too much opportunity for abuse of discretion and resultant delays on appeals. For such an extension of time, there should be required, a motion for same, notice to adversary, good grounds shown, and a hearing, before the trial court could grant such extension. This would prevent any abuse of such powers by the trial judge, and therefore be much more fair for both parties.

Rule 34: Procedure in Appellate Courts

Rule 34.17 is identical with Supreme Court Rule 1.20, except that the rule provides that the cost of *all* transcripts required by the rules will be taxed as part

of the costs. This is a substantial change, for Supreme Court Rule 1.20 only allowed the two copies required in Section 512.110 to be taxed as costs.

This is a fair rule, for it puts the cost of the appeal on the loser. It, of course, puts a heavier burden on the loser, but I believe that is better, since he made the expense of appeal necessary.

SAM R. GARDNER

PARTICULAR ACTIONS—RULES 36-37

Rule 36: Attachments

Rule 36.02 concerning attachment on demands not due and exceptions thereto, states: ". . . attachment may issue on a demand not yet due in any of the cases mentioned in the preceding Rule 36.01,¹ except the first, second, third or fourth, but no judgment shall be rendered against a defendant until the maturity of the demand."² This seems to be the same rule as is now in effect,³ but it is set forth in a little clearer manner by referring to the exceptions as separate units rather than subsections, as is done at the present time.

Rule 36.03 states that "an affidavit alleging any one of the causes set forth in the several subdivisions of Rule 36.01,⁴ in the language of such subdivision shall be held good and sufficient."⁵ This is in line with the present rule,⁶ but the word "subdivisions" is put in the place of "subsections" to conform with the grammatical changes set forth by the preceding paragraph. There seems to be no basis for saying the above changes would alter the present practice concerning the procedure in this field, but the changes will provide grammatical clarity and will conform with the way the present rules are practiced.

Rule 36.20 provides the same rule as to the time and manner of issuance and return of writs of attachment as does the comparative rule in the present statutes.⁷ However, this rule goes farther and incorporates a provision as to the form of summons—"The summons to any defendant in an attachment action in a court of record shall be in substantially the same form as the summons in other forms of actions."⁸ This addition provides the same rule that is now provided in the first clause of Missouri Supreme Court Rule 3.02 (d). This should make quite clear that a summons in an attachment action should be issued and returned just like an ordinary writ and be in the same form. This should reduce the questions that have arisen as to forms of writs of attachment,⁹ without in substance changing the

1. Rule 36.01 is the same as Mo. REV. STAT. § 521.010 (1949), with the grammatical change from 14 subsections to 14 separate paragraphs.

2. Proposed Rules of Civil Procedure (hereafter referred to as Proposed Rules) Rule 36.02.

3. Mo. REV. STAT. § 521.020 (1949).

4. See footnote 1 above.

5. Proposed Rule 36.03.

6. Mo. REV. STAT. § 521.030 (1949).

7. Mo. REV. STAT. § 521.150 (1949).

8. Proposed Rule 36.20.

9. See CARR, MISSOURI CIVIL PROCEDURE § 133 (1947).

rules that are now in effect.¹⁰ This proposed change will merely consolidate the requirements as to summons forms within this one rule.

Rule 36.40 concerning proceedings in an attachment action, the burden of proof, judgment, appeal and effect of appeal, is a rule based upon Section 521.420 of the *Missouri Revised Statutes* (1949). This proposed rule is very similar to the present statute but is re-worded in order to make it clear that the intent of the rule is to have but one appeal upon the merits and upon a motion to dissolve an attachment and to state the process by which this one appeal can be carried out, in so far as it is a procedure peculiar to attachments.

The present law “. . . upon the trial of the case upon the merits, either party may appeal, the plaintiff from the finding on the plea in abatement, or on the merits, as he may elect, or both; the defendant, if at all, on the whose case . . .”¹¹ This language has led to some question as to whether there can be an appeal on the plea of abatement after trial on the merits only,¹² or whether there can be an appeal of the abatement plea before the trial on the merits,¹³ thus allowing the possibility of two appeals in the case—one on the abatement plea and one on the merits after they are tried. It seems clear that the great majority of the cases¹⁴ have held that there can only be an appeal after the trial on the merits, thus just one appeal. The purpose of this proposed rule is to clarify this situation by using the following language: “Upon the trial of the case upon the merits, there shall be incorporated in the judgment rendered in the cause, as a part of such judgment, a finding and judgment either that the attachment be dissolved and the sureties thereon be released, or that the attachment be sustained, such finding to be in accordance with the action of the court theretofore taken on the motion to dissolve the attachment.”¹⁵ This will not change the way that the present procedure was intended to operate but will remove any question as to whether there can be two appeals.

Rule 36.46 regarding how attachments may be dissolved and how affidavits may be amended, sets forth substantially the same rule that is now in effect.¹⁶ The proposed rule eliminates the words “or before magistrates” now present in the statute. The rule reads “attachments in courts of record may be dissolved on motion made. . . .”¹⁷ This change merely eliminates surplus words since magistrate courts are recognized as courts of record.¹⁸ The other change set forth in this rule provides that a defendant’s bond in an attachment suit is conditioned on the defendant paying to the plaintiff the amount which is adjudged to the plaintiff within 30 days after the judgment shall be rendered. This is a change from the

10. Mo. Rev. Stat. § 521.150 (1949) and Missouri Supreme Court Rule 3.02 (d).

11. Mo. Rev. Stat. § 521.420 (1949).

12. *First Nat'l. Bank of Milan v. Kibble*, 273 S.W. 148 (Mo. App. 1925).

13. *Metzenberger v. Keil*, 31 Mo. App. 130 (1888).

14. Mo. Rev. Stat. Ann. § 1479 (1939).

15. Proposed Rule 36.04.

16. Mo. Rev. Stat. § 521.480 (1949).

17. Proposed Rule 36.46.

18. Mo. Rev. Stat. § 517.050 (1949).

present rule, in that the present statute¹⁹ provides that the judgment shall be paid on or before the first day of the next term after that in which judgment has been rendered. The change to a definite period of 30 days is in line with the now prevalent practice of eliminating the old set term of court. This will provide a definite time for payment and will prevent any question from arising as to what was the term of court or when the new term starts. These changes would seem to be more of words than substance and should make the procedure fit the modern day thoughts on terms of court and courts of record.

Rule 37: Condemnation

Rule 37, "Condemnation Proceedings," is an entirely new rule. The rules committee set out this rule with the thought that it would be wise to have just one set of rules for all condemnation proceedings. All the various methods in the present statutes were put together and an attempt was made to combine the best and most necessary features of all the statutes into his one over-all rule. The committee was greatly aided in this revision by the Acting Chief Counsel of the State Highway Department of Missouri, a person who has had great experience in this field for many years.

The first section of this rule, 37.01²⁰ shows the intent of the proposing committee. This section states that this rule will apply to *all* condemnation proceedings, except where there are present, or when there are future, special provisions to the contrary provided for by charters or ordinances of cities which have contrary provisions in effect at the date these rules become affective. By this provision all the varied procedures set forth throughout the statutes would be superceded by one rule that could work for any situation.²¹ It should be pointed out that provisions were taken from all the condemnation statutes and included within this one rule. Therefore it seems quite clear that this is in fact just a condensed form of all the scattered statutory provisions, all of which had generally the same basic procedure with variations for the particular subject that each covered. These scattered provisions are as much an historical development as anything else, each independent section being added as the need for it grew. Therefore it would seem that there could be no serious objection to setting up a central rule to cover every situation. The central rule, as mentioned before, would not supercede present special procedures set up by city charters and ordinances.²² A short discussion of each section of this proposed rule will not add a great deal to this analysis, except it will exemplify how the rule was made up of a conglomerate of the scattered statutory provis-

19. MO. REV. STAT. § 521.480 (1949).

20. Proposed Rule 37.01.

21. Principle examples of statutes superceded would be MO. REV. STAT. (1949) Ch. 523 on general condemnation procedure; Ch. 88 on cities condemnation procedure for public works; §§ 393.030 to 393.100 concerning procedure for water companies; §§ 74.503 to 74.530, an alternative form of procedure for first class cities.

22. Troost Ave. Cemetery Co. v. Kansas City, 348 Mo. 561, 154 S.W. 2d 90 (1941) states that charter provisions of cities are entirely separate from general code procedure.

ions and will indicate that this rule would certainly be a step toward uniformity and clarity of procedure which would be a valuable achievement.

Rule 37.02 is a venue section and merely states that the condemnation proceeding must be brought in the circuit court of the county where the property to be condemned is located.²³ This simply states in one paragraph what the present statutes repeat many times.²⁴

Rule 37.03 is the section pointing out the possible parties to the proceedings.²⁵ This rule states that individuals, village trustees, corporations or organizations, private or municipal, which have authority to bring condemnation proceedings shall be plaintiffs in such proceedings. This one short phrase can include all persons that the substantive law provides may bring condemnation proceedings. This phrase allows all to be parties who could be parties under the present statutory provisions. The next phrase states who may be defendants and this again includes all that could be defendants under the present statutory provisions. The last part of the rule is taken from present statutory provisions²⁶ and provides for the persons that must be made parties in an action. The whole tenor of this provision, as of the whole rule, is to provide essentially the same procedure in one broad rule by incorporating the essential provisions from all the pertinent statutes.

Rule 37.04 gives a description of the necessary petition and its contents.²⁷ This rule is made up of a combination of two of the present statutory rules that are the most common and generally used.²⁸ This rule is not arranged in such a way that the requirement of all the present statutory provisions must always be satisfied, but, rather, it is set up to cover any situation and only those requirements must be satisfied in a particular petition that are within the factual situation of the particular proceeding, the various requirements being set up in an alternative manner.

Rule 37.05 is the provision for summons and publication. This is exactly the same rule that is now present in the general condemnation chapter²⁹ with the one exception that this rule does not specifically state that the summons must be served by the sheriff of the county, as does the present statutory rule.³⁰ This rule merely states that the summons shall be served in the manner provided for by these rules in ordinary civil cases. The fact that service must be the same as in ordinary civil

23. Proposed Rule 37.02.

24. See footnote 21 above.

25. Proposed Rule 37.03.

26. See MO. REV. STAT. § 523.010 (1949).

27. Proposed Rule 37.04. "Petition: Contents. The petition shall contain a description of the property or right which the plaintiff desires to acquire, use, or extinguish; if a dam is to be constructed . . . petition shall contain . . . ; the names of the owners of the property to be condemned . . . ; a statement of the foundation of the plaintiff's right . . . ; a general statement of the nature of the business . . . ; a statement either that the condemner or owner can not agree . . . ; if any right of way be sought, the location . . . ; when property will be benefited by an improvement . . . , a map of the benefit district . . . ; a prayer for the appointment of three disinterested freeholders. . . ."

28. See MO. REV. STAT. §§ 88.013 and 523.010 (1949).

29. MO. REV. STAT. § 523.030 (1949).

30. Note 29 above.

cases would seem to eliminate the need for specifically requiring the sheriff to serve and would prevent any doubt as to proper service in case the sheriff is not available to serve and other ordinary methods are relied upon to acquire service.

Rule 37.06 sets up a method of appointing commissioners, points out the commissioners' duties and sets a standard of damages. This includes parts of about every present statutory provision on the subject,³¹ but the result is an over-all rule that will cover any situation. The general basis of this rule is the comparable provision in the general condemnation chapter of the present statutes.³² Added to this general provision, for the appointment of commissioners and their duties, is a special provision relating to proceedings in connection with water supply projects.³³ Also there is a provision setting up the procedure when private property is appropriated by a municipality.³⁴ As a final result there is a rule setting out general provisions for the appointment of commissioners, their duties and the standard of damage they will use, with additional provisions for the special situations where additional procedural rules are necessary. There is no drastic change for any one particular factual situation but there is one rule that can be relied upon rather than the historical collection we now have.

Rule 37.07 provides that the owners of any number of tracts may be joined in one petition.³⁵ This is shorter than its counter-part in the present statute,³⁶ which has the added requirement that the owner must be residents in the same county or circuit. As a practical matter this would seem to be mostly an elimination of excess words. By Rule 37.02 above, the proceedings must be brought in the county where the land lies. Therefore to satisfy the venue rule the owners would have to have the land in the same county to be joined. However, when you have the situation of a non-resident landowner then the new rule could make a material difference. The non-resident could be joined with the resident landowner whereas under the present statute they would at least have to be residents of the same circuit.³⁷ This new rule then has a broader joinder provision, but it seems that there is nothing particularly undesirable about it because a separate action could be brought against the non-resident, and joining him with resident owners would seem to make no material difference. It would make easier the condemnation of long strips of land that cut across land of many different owners. If we can say this condemnation is allowed for the general public welfare and advancement, then this broader joinder rule, which makes condemnation procedure easier, would seem to be desirable.

Rule 37.08 contains provisions for the giving of notice of the filing of the commissioner's report by the clerk of the court, for the filing of exceptions to the report of the commissioners by any party, including the methods of filing these exceptions

31. MO. REV. STAT. § 88.013, 88.047, 88.050, 393.050, 393.070, 523.040 and 523.050 (1949) and State *ex rel.* State Highway Comm. v. Deutschman, 346 Mo. 755, 142 S.W. 2d 1025 (1940).

32. See MO. REV. STAT. § 523.040 (1949).

33. MO. REV. STAT. § 393.050 (1949).

34. See MO. REV. STAT. § 88.013 (1949).

35. Proposed Rule 37.07.

36. MO. REV. STAT. § 523.020 (1949).

37. Missouri Pacific Ry. v. Carter, 85 Mo. 448 (1885).

and for later proceedings. This proposed rule³⁸ is taken from the present general statutory provision with very little change.³⁹ This rule does add the express provision that on the trial, the court or jury, within the direction⁴⁰ of the court, may view the property involved. This would seem to be merely an express provision of a general rule of evidence.⁴¹

Rule 37.09 provides for costs in the condemnation proceeding and by whom the costs are to be paid. This rule is taken directly from the present statutory provision in the general condemnation chapter.⁴²

This general regrouping of the present statutory provisions as set out above is an attempt to set up one method for condemning most property. This appears to be a solution that will cover all objects of condemnation that might arise and provide a fair and uniform procedure. This would be a very desirable step in this period when there is a growing conviction that all procedural matters should be as clear and fair as possible in order that there can be a just, final decision on the merits of the question involved.

WILLIAM E. GLADDEN

PARTICULAR ACTIONS—RULES 39-44

Rule 39: Divorce and Alimony

Rule 39.03 deals with alimony and maintenance. It is a combination of Section 452.070 and Section 452.080.¹ The new rule omits the part of Section 452.070 that refers to the wife's alimony and maintenance. It includes the first sentence of Section 452.080 which covers the alimony to the wife which merely repeats that part of Section 452.070 that is omitted. It would not seem to make any difference in the present law as to the meaning to be attached to alimony or maintenance although the new rule omits "maintenance" as applied to the wife. The Missouri courts have said that in a divorce decree alimony relates to the support of the wife,² and maintenance relates to the support of minor children.³ Thus it would seem that any mention of maintenance relating to the wife would be of no effect under Missouri law once a divorce decree had been entered. Alimony, as construed by the courts, includes and is maintenance of the wife.

There is some change in the wording of the new rule as compared to Section 452.070. The insertion of the first sentence of 452.080 prior to the provision of the

38. Proposed Rule 37.08.

39. Mo. REV. STAT. § 523.050 (1949).

40. "Director" is the word used in the rule. Undoubtedly "discretion" was intended.

41. *State ex rel. State Highway Comm. v. Baumhoff*, 230 Mo. App. 1030, 93 S.W. 2d 104 (1936).

42. Mo. REV. STAT. § 523.070 (1949).

1. Mo. REV. STAT. (1949). All references to sections will be to the Mo. REV. STAT. (1949), unless otherwise specified.

2. *Marley v. Marley*, 356 Mo. 870, 204 S.W. 2d 261 (1947); *Hageman v. Pinska*, 225 Mo. App. 521, 37 S.W. 2d 463 (1931).

3. *Marley v. Marley*, 356 Mo. 870, 204 S.W. 2d 261 (1947).

new rule allowing the court to order the husband to give security if the wife gets the divorce will result in no change in the present law. What was done was to split Section 452.070 and insert the first sentence of 452.080 into that section. It makes it quite clear that the wife must be awarded the divorce and that when she has been awarded the divorce, the court may order the husband to give security for the payment of alimony.

The change in the new rules to allow payment from "period to period" would seem merely to follow the courts' construction of the statute as it now reads, "from year to year." The period to period provision would seem to include any arrangement the court felt was necessary. However the courts have directed alimony to be paid on a weekly⁴ or monthly⁵ basis. The courts have said that this is payment by the year. They total the payments to find the yearly alimony and then make it payable by installments.⁶

Thus it would seem that the new rules merely give specific power to the courts to do what they have been doing all the time. It may allow more freedom in the future if special periods are sought by the wife. Unusual or special periods would seem to be authorized under the new rule, and will probably result in freer use of the periodic method of paying alimony.

Rule 39.06 concerns appeals in cases of divorce, alimony, maintenance, or custody of children. It is taken from Section 1524, *Missouri Revised Statutes* (1939), although the wording is somewhat different. This section was repealed in 1949,⁷ leaving Section 452.110⁸ governing this action. Section 452.110 says that a petition for review of any judgment of divorce shall not be allowed. This is carried over to the new rules in Rule 39.07. In interpreting the petition for the review under Rule 39.07 it seems that it includes an appeal,⁹ and bars statutory and equitable rights as to review.¹⁰

Rule 39.07 would seem to nullify the right to appeal in actions of divorce where the appeal attacks the divorce decree.¹¹ Therefore it follows that Rule 39.06 sets up the procedure for appeal in those cases enumerated in Rule 39.07.

The method of appeal becomes the ordinary procedure in civil cases, as is found in Rule 33 of the new rules. This is a healthy change because there is no need to have special rules for appeals in certain special actions. The appealing party can be made to protect the other¹² party, and the standardization of procedure is to be sought. This change will help clear up confusion on this subject and

4. *Tureck v. Tureck*, 207 S.W. 2d 780 (1948).

5. *Merrick v. Merrick*, 5 Mo. App. 123 (1878); *Wagner v. Wagner*, 6 Mo. App. 573 (1879) (memorandum).

6. *Merrick v. Merrick*, *supra* n. 5.

7. 1949 Mo. Senate Bill 1128.

8. Proposed Rule 39.07 with some abbreviation in the wording.

9. *State ex rel. Coonley v. Hall*, 296 Mo. 201, 246 S.W. 135 (1922), taken only for the use of "appeal," as being barred.

10. *Smith v. Smith*, 48 Mo. App. 612 (1892); *Cole v. Cole*, 89 Mo. App. 228 (1901).

11. *Conant v. Conant*, 221 Mo. App. 300, 278 S.W. 90 (1924).

12. Proposed Rule 33.09(a) and 33.09(b), 28 Mo. App. 37-41.

is a desirable clarification, because of the lack of any present law on the procedure of appeal in divorce actions.

Rule 40: Ejectment

Rule 40.17 deals with appeals in ejectment actions. It is taken from Section 524.150, which comes from the revision¹³ of Section 1547, *Missouri Revised Statutes* (1939). The only thing that is done is to reword the first phrase of 524.150 to clarify it. It will make no substantial change in the granting or denying of a supersedeas. The new rule is somewhat clearer than the present law, Section 524.150, but even so the change does not seem necessary because Section 524.150 is perfectly clear. There is no advantage in the way the rule is reworded.

Rule 40.21 is concerned with the right of the plaintiff in an ejectment action to relinquish the land and recover the value thereof, less any improvements. This rule is taken from Section 524.190¹⁴ and adds "in the ejectment action" and "to the action brought to recover the value of improvements" to that section. The new proposed rule will not affect the present law on this particular proceeding, other than to make it very clear that what is meant is that the winning plaintiff can relinquish the land to the losing party for the value of the land, less the improvements, but that this can be done only in the answer to the losing party's suit for the value of improvements.¹⁵ Section 524.190 is somewhat ambiguous and although the court has interpreted the section as it now reads it seems desirable to have the rule clearly stated as it is in this new rule. There is no chance for misinterpretation as the new rule reads.

Rule 41 (a): Garnishment

Rule 41.02 is concerned with summoning garnishees. It is very similar to the present law on this subject, Section 525.020. The new rule drops "feri facias" and adds "execution" in its place and then makes a further addition of "or a writ of attachment shall be placed in the hands of an officer for service." The switch from "feri facias" to "execution" will have no effect on the present law, because feri facias is a writ of execution¹⁶ and in construing this statute the courts speak of execution¹⁷ rather than the more technical term.

The addition of the provision concerning the writ of attachment adds nothing to the present law because it was included in the statute dealing with attachment.¹⁸ It is also dealt with under the new rules on attachment which refer to this rule.¹⁹ This change is of value because it brings all the garnishment proceedings together

13. 1949 Mo. House Bill 2126.

14. For purposes of comparison, § 524.190 reads, "The plaintiff may in his answer ask for leave to relinquish the land to the occupying claimant, and to recover the value thereof aside from the improvements."

15. *Cox v. McDivit*, 125 Mo. 358, 28 S.W. 597 (1894); *Stump v. Hornback*, 94 Mo. 26, 6 S.W. 356 (1887).

16. *BOUVIER'S LAW DICTIONARY*, Vol. I, p. 1217 (1949).

17. *Dinkins v. Gottselig*, 90 Mo. App. 639 (1901); *Dinkins v. Grunden-Martin Woodenware Co.*, 91 Mo. App. 209 (1901).

18. Section 521.170(2).

19. Proposed Rule 36.21(2).

and consolidates them into one rule. It is easier to use the new rule because of this and ease in the use of the rules is to be desired.

The change to service of summons as "in the ordinary civil actions" from service as made in the present law of attachments²⁰ makes the law uniform. No longer will it be necessary to make an oral declaration of attachment as is now necessary.²¹ The proposed rule will make no special provision for service of the summons and it seems highly desirable to have a uniform method of service of summonses in order to avoid delay caused by overlooking technical requirements of no real value. The garnishee can read or get someone to read to him. The old provision added an unnecessary and troublesome technicality and it should be removed.²²

The addition whereby the summons directs the garnishee to appear and answer any interrogatories served on him by the plaintiff puts into the summons part of what the sheriff is supposed to do under the present law. Under the present law the sheriff is to tell the garnishee to appear and answer interrogatories.²³ Under the new rule the directions are included within the summons and there is no chance of "forgetting." It puts these directions into writing and makes a permanent record. This is a good change because there can be no argument with regard to whether the garnishee was directed to appear and answer the plaintiff's interrogatives.

The whole rule is much more satisfactory because it brings together the methods of proceeding in garnishment into one section and broadens the rule to meet modern standards.

Rule 41.04 dealing with how a summons is served on a corporation is taken from Section 525.050. There is a modification made in the introduction by changing "Notice of garnishment" to "The summons to the garnishee." This will have no effect on the present law because the notice of garnishment under Section 525.050 has been construed by the courts to mean service of the summons on the garnishee.²⁴ The summons is notice of garnishment and it is a matter of choice as to which phrase is to be used.

There is also a change which requires that service of notice on a railroad corporation be on the "nearest station or freight agent of such corporation in the county in which the cause of action is pending." This is an addition to Section 525.050 and puts back into the statute what was amended out of it in 1945.²⁵ Prior to 1945 the court had said that it was necessary to show that service had been

20. Note 18, *supra*.

21. *Fletcher v. Wear*, 81 Mo. 524 (1884); *Kansas and T. Coal Co. v. Adams*, 99 Mo. App. 474, 74 S.W. 158 (1903); *Hopkins v. Henson*, 205 Mo. App. 384, 224 S.W. 119 (1920).

22. *Ibid.*

23. Note 18, *supra*.

24. *Robertson v. Ackermann Co.*, 173 Mo. App. 103, 155 S.W. 877 (1913). The construction is mainly by the interchanging use of summons under this section as well as notice. Both terms are used so it would seem no difference will be effected in this circumstance.

25. Mo. Laws 1945, p. 649, § 1564.

made on the nearest station of freight agent.²⁶ This had to be clearly shown or the return was void.²⁷

Under Section 525.050 it is only necessary that one serve any station or freight agent.²⁸ This seems too broad. It is better to have the railroad served with notice within the county which has jurisdiction of the action and on the nearest station or freight agent.

Rule 42: Habeas Corpus

Rule 42.04, dealing with the writ of habeas corpus, is taken from Section 532.060. The only change made in this rule is changing the reference from "chapters" under the present law to "rules" under the new Proposed Rules of Civil Procedure. It will make no difference in the present law. The only purpose here is to make the reference applicable to the rest of the rules.

Rule 42.15 changes the distance from 20 to 100 miles for granting an extra day or days for the return of this writ. This modernizes the present law,²⁹ making it more in conformity with today's needs and capacities. Also it speeds return of the writ which seems desirable in this remedy.

Rule 42.48 deals with an order of discharge and is taken from Section 532.530. The only change in the new rules is to make the reference to "rule" rather than "chapter" as under the present law. It will have no effect on the present law except that the writ will be granted pursuant to the provisions of this rule rather than the provisions of the present law. It is done to make the wording consistent, which is necessary.

Rule 43: Injunction

Rule 43.01 is taken from Section 526.040 and deals with injunctions. There are a few changes in the wording. The new rule says, "to any injunction" while Section 526.040 says "to the Injunction herein provided." This appears to narrow the right to an injunction. However, the change of wording merely conforms to the legal interpretation given the present statute.³⁰ It puts what is meant into a more readable form, and will have very little effect on the present law.

There is some rearrangement of the wording of the new rule concerning where the petition is to be filed. The proposed rule reads: ". . . he shall have filed in the circuit court having jurisdiction of the suit, or in the office of the clerk thereof, . . ." Section 526.040 reads, ". . . he shall have filed in the circuit court, or in the office of the clerk thereof, having jurisdiction of the suit, . . ." The rearrangement merely clarifies the present law.

26. *Antonelli v. Basile*, 93 Mo. App. 138 (1902); *Werries v. Missouri Pacific Ry.*, 19 Mo. App. 398 (1885); *Farmer v. Medcap*, 19 Mo. App. 250 (1885); *Mangold v. Dooley*, 89 Mo. 111, 1 S.W. 126 (1886).

27. *Masterson v. Missouri Pacific Ry.*, 20 Mo. App. 653 (1886).

28. Section 525.050.

29. This rule was taken from Section 532.170 and has endured in its present form since 1825. It is found in the Mo. REV. STAT. § 1, p. 420 (1825).

30. *State ex rel. Association for Convalescent Crippled Children v. Corneli*, 152 S.W. 2d 83 (Mo. 1941).

Also in Rule 43.01 there is a change by omitting "or judge thereof" when referring to the magistrate court in vacation. The omission of "or judge thereof" would seem to be undesirable because it would appear to require all magistrates to sign such an injunction if issued in vacation. This is the reason for adding "or judges" with reference to who shall sign the injunction.

Also the reference in Section 526.040 to "the circuit judge in vacation" seems to present the same problem. The circuit court in several counties has more than one circuit judge.³¹ This provision should read "a circuit judge in vacation" to avoid the possibility of requiring all circuit judges to sign where the circuit court is divided in divisions. The defect is also found in Section 526.040, so a change in the present law as well as the proposed rule is to be sought.

Rule 43.14 is taken from Section 526.060 and deals with the overruling of an application for an injunction by a judge in vacation. The proposed rule reads "any circuit judge or magistrate in vacation." Section 526.060 reads "magistrate court or by the judge of the circuit court in vacation." This proposed rule includes what Rule 43.01 should contain. There is no possibility of requiring all magistrates to act when in vacation, nor would it require all circuit judges in the larger counties to act when in vacation. This is a highly desirable change and clearly states the law as it should be.

It is clear that there is an inconsistency between proposed Rule 43.01 and 43.14. There is also an inconsistency between Sections 526.040 and 526.060 of the same nature. This inconsistency should be remedied and proposed rule 43.01 should be made to read ". . . shall be granted by a circuit judge in vacation, or by the magistrate court, or judge thereof, in vacation. . . ." This provides a more flexible rule and avoids the difficulty pointed out above, as well as making rules 43.01 and 43.14 consistent.

The new rule omits that part of the present statutes which grants a certificate of the denial to the defendant. The certificate granted the defendant is not necessary but it helps to protect him and to make it easier for the judge or magistrate to know whether the application has been denied. The old statute provides an added safeguard to the defendant with no particular hardship and it would seem desirable to keep this provision. The omission does no harm, but it would be better to retain this provision.

The rewording of the last phrase of Section 526.060 is a clarifying one. It adds nothing other than clearly expressing that the judge or magistrate shall not issue an injunction on the application while they are in vacation, once an injunction has been denied on the application.

It is a good change because it does clarify what is meant although it will have no effect on the present law.

Rule 43.19 is taken from Section 526.140. The only changes made here in wording and substitution of a minor nature. The substitution of "court" for "court, judge, or judges" consolidates into one term what the present law means.

31. *E.g.* St. Louis City St. Louis County v. Jackson County. Mo. REV. STAT. § 478.337 *et. seq.*

Rule 44: Land Title

Rule 44.03 concerns the proceeding in a suit to perfect title by limitation. It is taken from Section 527.180. The principal changes are the omission of the reference in Section 527.180 to the service of process under Section 506. The provision for service of process is taken care of however by Rule 44.04. It is an entirely new rule and includes what is taken out of Section 527.180. In Rule 44.04 service is taken care of by providing that Rule 5.07 is applicable. Rule 5.07 is taken almost directly from Section 506. Thus by a round about method the service of process ends up the same under the new rules as it now is. It may be to the advantage of clarity that the service of process is separated from the rest of Rule 44.03. It will not change the law by putting into a different section the provision for service of process.

Rule 44.04 is a new rule. The first portion of this rule is similar to the first part of Section 527.160, which governs the procedure in actions arising under Section 527.150. This latter section provides for suits to quiet title. Rule 44.04 covers the procedure in actions under Rule 44.01, which is similar to Section 527.150, and under Rule 44.02 which deals with costs in cases of default. It would seem that Rule 44.04 adds nothing to the procedure under actions arising under Rule 44.01, but may add something with reference to Rule 44.02, since Section 527.160 does not specifically cover Section 527.170 from which 44.02 is taken. However, if Sections 527.150 through 527.170 are read together, they probably do not differ substantially from proposed Rules 44.01 through 44.04.

Rule 44.04 is again a clarifying rule. The part of Rule 44.04 that applies to service of process was explained in relation to Rule 44.03. The changes here result in a better expression of what the law is, for there is less confusion in Rule 44.04 using the term "ordinary civil procedure" than was found under Section 527.160 and its reference to procedure governing actions affecting real property. The new rule is clearer and provides a single procedure which also seems desirable. The change provides a better arrangement and is generally more satisfactory than the present statutes.

Rule 44.06 is a redraft of Sections 527.200 and 527.210 and only changes those sections by eliminating the reference therein to terms. Rule 44.07 relates to cases in which a court may modify its decrees rendered under Rule 44.06 and is taken from Section 527.220. The only difference between the rule and the statute is that the rule, instead of referring to Sections 527.200 and 527.210, refers to Rule 44.06.

There is also a requirement for 30 days notice under the new rule rather than 20 days notice as under Section 527.220. This is an added convenience to the defendant. It gives more time to prepare and gather evidence which may be widely dispersed. To allow 10 days extra will cause no hardship to the mover who can wait up to two years. It is a satisfactory change.

LYNN EWING, JR.