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TRIAL UNDER THE PROPOSED NEW CODE
OF CIVIL PROCEDURE

J. T. MARTIN

The purpose of this article is to discuss, from the standpoint of a practicing lawyer, the changes which would be made in our present trial practice by the adoption of the proposed new code, and to suggest constructive criticisms of the present draft of certain of the proposed provisions.

Many of the proposed changes are not entirely new to our present Missouri practice and represent but an extension of existing equity rules to include law cases or the extension of existing appellate rules to trial practice. No substantial change which is proposed enters an entirely new and unexplored field, as each such suggested change has its counterpart in present practice under the new rules governing federal procedure. As is indicated by the committee notes appended to the Federal Rules, some of the apparent innovations had been previously included in code revisions undertaken by some of the states and had been proved practicable and desirable.

In those respects where no change was contemplated in the existing practice, the committee which drafted the proposed new code was careful to follow the language of our present statutes, so that the decisions of the courts construing such statutes would be applicable to the new provisions and would continue to control.

PLACE OF TRIAL, TRIAL SETTINGS AND CONTINUANCES

Those provisions of the proposed new code relating to the place of trial, trial settings and continuances make no consequential changes in the existing practice.

Under the proposed new code it would be required that trials upon the merits be conducted in open court, so far as convenient in the regular court room, and, in no event, outside the county except by agreement of all parties affected. This requirement, however, would not limit the court in its disposition of preliminary matters in advance of trial, it being elsewhere pro-
vided that the court might hear and rule upon such matters at such places and on such notice as it might fix.

Our present statutes delegating to circuit clerks the duty of making up the trial dockets and the arranging of trial settings are so outmoded that in many circuits the provisions of these statutes are completely ignored, while in others they are followed as a mere matter of form. The provisions of the proposed new code directing that the setting of trial dockets be left to the rules and practice of the particular court are merely declaratory of the practice now generally followed.

The existing statutory provisions governing applications for and the granting of continuances are incorporated in the proposed new code, excepting some merely declaratory of the court's inherent power to grant continuances "for good cause"; also excepting those requiring a continuance as a matter of right where an attorney is a member of the legislature and files the designated affidavit.

CONSOLIDATION AND SEPARATE TRIALS

Under our present statute a trial court's right to order the consolidation for purposes of trial of suits pending before it is limited to suits "founded alone upon liquidated demands . . . by the same plaintiff, against the same defendant . . . or by the same plaintiff against several defendants." This statute is restrictive of the provisions of the common law authorizing consolidations and to such an extent that it is of small aid to the court in the dispatch of its trial work. However, our courts have ruled that this statute is without application to suits in equity and that a court of equity has the inherent power to order the consolidation of suits pending before it whenever the court in its sound discretion deems such consolidation desirable. The proposed new code would in effect extend the equity rule to law actions and would authorize the court, on its own motion or otherwise, to order "a joint hearing or trial of any or all matters in issue" in pending actions

7. See case cited in Mo. Digest, Continuance, Key 7.
11. Owens v. Link, 48 Mo. App. 534 (1892); Manchester Iron Works v.
involving "a common question of law or fact" whenever the court in its discretion deemed it expedient to do so.\textsuperscript{12} It is to be assumed that the discretionary powers so granted would be limited by those considerations which have been held to limit the power to order consolidations under the common law.\textsuperscript{13} The court would be further empowered to make such additional orders in respect to cases so consolidated as would tend to avoid unnecessary costs and delay. This proposed rule conforms to the Federal Rule on the subject.\textsuperscript{14}

The provisions of the proposed new code granting to the trial court, in the furtherance of convenience or to avoid prejudice, power to order separate trials as to any separate issue or claim or any number of separate issues or claims involved in any pending action\textsuperscript{16} are but a restatement of the provisions of our current statute.\textsuperscript{18} The Federal Rule is the same.\textsuperscript{17}

\textbf{Jury Trial of Right}

The proposed new code undertakes no change whatever in the right of trial by jury as now existing; it being expressly provided that "the right of trial by jury as declared by the constitution\textsuperscript{18} or as given by a statute shall be preserved to the parties inviolate."\textsuperscript{19} The inclusion in the proposed new section of the provisions of our present statute authorizing a jury trial of any issue as to whether a release, composition or discharge of plaintiff's original claim was fraudulently or wrongfully procured,\textsuperscript{20} eliminates any possible question regarding the continuance of the right of a plaintiff to litigate in an action at law the validity of any release asserted as a bar to his claim without having first to resort to a proceeding in equity for the cancellation of such release.

\textbf{Trial by Jury or by the Court}

The proposed new code would make no change in the prevailing practice with regard to the waiver of jury trials, it being provided that the parties

\begin{footnotesize}
\begin{enumerate}
\item Wagner Construction Co., 341 Mo. 389, 107 S. W. (2d) 89 (1937).
\item Mo. Prop. Code, Art. 9, § 7(a).
\item 1 C. J. 1124, \textit{et seq.}
\item Federal Rule 42(a).
\item Mo. Prop. Code, Art. 9, § 7(b).
\item Mo. Rev. Stat. (1939) § 1102.
\item Federal Rule 42(b).
\item Mo. Prop. Code, Art. 9, § 8.
\item Mo. Rev. Stat. (1939) § 934.
\end{enumerate}
\end{footnotesize}
shall only be deemed to have waived a jury (1) by failing to appear; (2) by filing written consent; (3) by oral consent in open court entered on the minutes; or (4) by entering upon a trial before the court without objection. The first three grounds specified are but a repetition of those now provided by statute and the fourth is but a declaration of the rule now fixed by court decision. The failure to incorporate in the proposed new code provisions comparable to those included in the Federal Rules whereunder an automatic waiver of a jury trial is brought about in the absence of a written demand therefor, filed within a specified time, has given rise to some criticism, which does not appear to the writer to be well-founded. If our procedure were such that a failure to demand a jury trial before a proceeding had reached a certain stage would inconvenience or disrupt the orderly transaction of the business of the court, then there would exist a justifiable basis for requiring a jury trial to be demanded of record in advance of the time the proceeding had progressed to that stage. On the other hand, if no such reason exists, and I see none, any requirement that a jury trial should be waived unless a demand therefor be made at some time arbitrarily fixed, would amount to nothing more nor less than a trap for the unwary. Some would justify such a requirement solely on the ground that the trial of issues of fact by the court is preferable to trial by jury. If that be the general view, the end should be attained by direct action looking to the abolition of the right of trial by jury, not by indirection. As our constitution preserves to litigants trial by jury as a matter of right, that right should not be infringed upon unnecessarily.

In authorizing the trial court in non-jury cases, on motion or on its own initiative, to try any issue with an advisory jury, the provisions of the proposed new code are but declaratory of our present statute and present equity rule. However, an innovation in the present equity practice is contemplated by the further provision "that the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been as a matter of right."

The proposed new code provisions dealing with voluntary dismissals\textsuperscript{27} undertake two major changes in the current practice: First, a reasonable limitation is placed upon a plaintiff’s present unlimited right to voluntarily dismiss his case without prejudice at any time before final submission; and, second, the present involuntary non-suit rule which permits an appeal from a judgment not affecting the merits is abolished.

The present statute\textsuperscript{28} in no wise restricts a plaintiff’s unlimited right to voluntarily dismiss his suit at any time before it is finally submitted to the jury, or to the court, or to the court sitting as a jury. It is of no consequence that a plaintiff may have exercised such right in any number of prior suits filed by him upon the same cause of action. In this situation the door is opened wide to an abuse of that privilege by the plaintiff and no protection is afforded a defendant against undue harrassment. The draft of the proposed new code provision\textsuperscript{29} retains the precise language of the aforementioned statute but, in addition, includes provisions to the effect that where a plaintiff has once voluntarily dismissed his action and thereafter files the same anew, he shall not be allowed to dismiss without prejudice after the jury has been impaneled or evidence has been introduced in a non-jury case, except (1) by filing a stipulation executed by the opposing party, or (2) on order of the court made on special motion setting forth the grounds therefor and supported by affidavit. In its present form the proposed new section is open to the following criticisms:

(a) No saving clause as to pending counterclaims is incorporated; that is to say, it is not specified that a voluntary dismissal by plaintiff of his cause of action shall have no effect upon the defendant’s right to proceed with the disposition of any counterclaim asserted in his answer. We now have a statute expressly providing that a voluntary dismissal by plaintiff shall leave unaffected any pending counterclaim,\textsuperscript{30} which statute the proposed provision ignores and apparently would supplant. Prior to the enactment of such saving statute in 1889, it was the rule in this state that a dis-

\textsuperscript{27} Mo. Prop. Code, Art. 9, § 10.
\textsuperscript{28} Mo. Rev. Stat. (1939) § 1111.
\textsuperscript{29} Mo. Prop. Code, Art 9, § 10(a).
missal by plaintiff carried with it any counterclaim of the defendant.\textsuperscript{31} The Federal Rule of comparable nature\textsuperscript{32} relating to voluntary dismissals, omits any saving provision of the type suggested, but it is to be borne in mind that the Federal Rule does not permit a voluntary dismissal to be taken after service of the defendant's answer. Possibly the committee felt that the rule enunciated in such cases as State ex rel. Big Bend Quarry Co. v. Wurde-
man,\textsuperscript{33} and Pioneer Cooperage Co. v. Bland,\textsuperscript{34} would take care of the difficulty, as these cases hold that a voluntary dismissal will not be permitted if it would prejudice or unduly affect the interests of the defendant. However, it is debatable whether the rule announced in these cases is well grounded in view of the holding in the great majority of the cases that a plaintiff has an absolute right of dismissal regardless of the attitude of the court in the premises.\textsuperscript{35}

(b) In the case of the second ground of exception, to-wit, the one permitting the dismissal without prejudice on order of the court made on motion, it would be preferable if the court were granted more latitude than the authority to merely order a dismissal and if it were empowered to make such order, "upon such terms and conditions as the court deemed proper." The Federal Rule is to this effect.

(c) While in its present form the proposed provision inferentially indicates that voluntary dismissals are to be made "with prejudice," it is not positively and unequivocally so asserted and the use of the phrases "with prejudice" and "without prejudice" is not a pleasing choice. The writer has been unable to find any Missouri case satisfactorily and pointedly defining these terms. If it is intended that a dismissal "with prejudice" should stand as an adjudication on the merits and a final disposition of the case, barring the right to bring or maintain a later case on the same claim or cause of action, which obviously is the intent, it is difficult to understand why the committee did not expressly so state, using the language of the Federal Rule. Possibly this objection is hypercritical. A dismissal with prejudice

\textsuperscript{31} Nordmanser v. Hitchcock, 40 Mo. 178 (1867); Fink v. Bruihl, 47 Mo. 173 (1870); See also Lanyon v. Chesney, 209 Mo. 1, 106 S. W. 522 (1907); Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095 (1900).
\textsuperscript{32} Federal Rule 41a (b).
\textsuperscript{33} 309 Mo. 341, 274 S. W. 380 (1925).
\textsuperscript{34} 228 Mo. App. 994, 75 S. W. (2d) 431 (1934).
\textsuperscript{35} State ex rel. Hahn v. Anderson, 269 Mo. 381, 190 S. W. 857 (1916); Brandenburger v. Puller, 266 Mo. 534, 181 S. W. 1141 (1916); Lavignon v. Dietzel, 34 S. W. (2d) 92 (Mo. 1931).
has been held in other jurisdictions\textsuperscript{36} to be an adjudication on the merits and a bar to the bringing or maintenance of a subsequent action.

Few members of the bar will have any objection to the move to abolish the device of involuntary non-suits. Professor Rudolph Heitz, of the University of Kansas City, is the author of an excellent article discussing the involuntary nonsuit rule in Missouri which appeared in a recent issue of the \textit{Missouri Law Review}.\textsuperscript{37} In that article he properly characterizes the rule as a judicial invention, the origin of which cannot be traced to any statute and points out the inconsistencies which inhere in it. An involuntary nonsuit is defined by our courts as a judgment of dismissal entered on the solicitation of a plaintiff as the result of an adverse ruling of the court of such character as to preclude any substantial recovery.\textsuperscript{38} The judgment entered on the taking of an involuntary nonsuit is a mere judgment of dismissal which does not preclude a plaintiff from reinstating his action with the same ease as though he had voluntarily dismissed.\textsuperscript{39} The only thing finally settled by such a judgment is that the plaintiff must pay the accrued costs. Nevertheless, under the present practice the plaintiff is permitted to appeal.\textsuperscript{40} But in order to perfect his appeal he must first seek a new trial \textit{(the right to which he already has)} by filing a motion to set aside the nonsuit.\textsuperscript{41} If such motion be overruled he may appeal and on such appeal runs no risk of an adverse decision on the merits. The only question which can be decided on such appeal is whether the trial court erred in failing to grant the plaintiff a new trial.\textsuperscript{42} On the other hand, if plaintiff's motion to set aside the involuntary nonsuit be sustained, the defendant may appeal and on defendant's appeal the court decides whether error was committed in granting the new trial.\textsuperscript{43} Bearing in mind that the plaintiff may ignore the judgment of involuntary nonsuit and secure a new trial by instituting his

\begin{footnotes}
\item[37] Heitz, \textit{Voluntary and Involuntary Nonsuits in Missouri} (1940) 5 Mo. L. Rev. 131.
\item[38] Hogan-Sunker Heating Co. v. Bradley, 320 Mo. 185, 7 S. W. (2d) 255 (1928).
\item[40] Bonanomi v. Purcell, 287 Mo. 456, 230 S. W. 120 (1921); Stith v. Newberry Co., 336 Mo. 467, 79 S. W. (2d) 447 (1934).
\item[41] Whitfield v. Union Electric Light \& Power Co., 271 S. W. 52 (Mo. 1925).
\item[42] Chouteau v. Rowse, 56 Mo. 65 (1874); Chouteau v. Rowse, 90 Mo. 191 (1886).
\end{footnotes}
case anew, as a practical matter, all that is finally solved by a burdensome appeal of this nature is whether the plaintiff or the defendant shall bear the costs in the dismissed case. The proposed new code would rectify this anomalous situation by abolishing appeals after dismissals taken by plaintiff following an adverse ruling preventing recovery. Under its provisions if a plaintiff wished to question any ruling of the trial court which denied him a recovery, he might do so by permitting judgment to go against him and then appeal. On the other hand, at the time any such adverse ruling was made, if the plaintiff was doubtful of his case he would be privileged to dismiss and start anew, but in that situation he would have to carry the burden of the costs which had accrued and this seems only fair. The involuntary nonsuit rule has been unduly burdensome upon defendants but, on the other hand, it has at times been resorted to by defendant for the sole purpose of delay. There can be no logical reason for permitting any appeal from a judgment not determinative of the merits, so that, if on appeal the judgment of the trial court be affirmed, there will be a final end to the litigation.

b. Involuntary dismissals

In providing that the trial court may order the dismissal of any case for failure on the part of the plaintiff to comply with the provisions of the code or any order of the court, the proposed new code follows the language of the present statute. Independent of statute our courts have the inherent power to dismiss a case for failure of the plaintiff to comply with the rules or orders of the court or to prosecute his claim with reasonable dispatch. The defect in the proposed provision as now drafted is that it does not provide that any such dismissal by the court shall be with prejudice or, preferably, shall operate with the force and effect of an adjudication upon the merits, marking a final end to the controversy. Again the committee has failed to follow the provisions of the similar Federal Rule. Absent such provision there is no authority in the trial court to do more than dismiss the case without prejudice. The omission is undoubtedly attributable to the

44. Mo. Prop. Code, Art. 9 § 11.
46. Guhman v. Grothe, 142 S. W. (2d) 1 (Mo. 1940).
47. Federal Rule 41(b).
48. Scott v. Rees, 300 Mo. 123, 253 S. W. 998 (1923), holding that where a plaintiff failed to appear and prosecute his claim the court was powerless to adjudicate the merits and deprive the plaintiff of his right to bring another suit.
thought that plaintiff might be unjustly deprived of his rights by arbitrary action of the court. If needs be, the rule could be reframed to afford any needed protection against such contingency.

The proposed new code provision under discussion treats of another type of involuntary dismissal on order of the court, to-wit, a dismissal by the court on motion of the defendant at the conclusion of plaintiff's evidence, on the ground that plaintiff has failed to make his case. Obviously, this provision has application only to the trial of non-jury cases; for where a jury is utilized in the trial of an action at law, the proper motion for the defendant to file would be a motion for a directed verdict, for which provision is elsewhere made. As a motion for a dismissal is the proper motion to raise the question of the sufficiency of plaintiff's evidence in an equity case, it seems evident that what is here undertaken is an extension of the present equity rule to include the trial of actions at law wherein a jury has been waived. In equity a judgment of dismissal is the proper judgment entry where the merits are determined in defendant's favor and such judgment is res adjudicata as to defendant's claim. If this analysis of the intent of the new proposal be correct, then it will prove enlightening to consider the situation in an equity case where a motion for a dismissal is filed at the conclusion of plaintiff's evidence. In the comparatively early case of Leeper v. Bates, our supreme court held that a defendant in an equity case should have an opportunity to challenge the sufficiency of the case made by plaintiff without waiving his right to put in his evidence if the court ruled plaintiff's evidence sufficient. The proposed new code provision conforms by providing that any such motion to dismiss shall not operate as a waiver of defendant's right to offer evidence in the event the motion is not granted. Does this provision against waiver afford adequate protection to the defendant and guarantee him his right to put on evidence in support of his defense? The answer is, "No." A consideration of the defendant's position in an equity case if the trial court sustains his motion to-dismiss and the plaintiff appeals will prove enlightening. The case of Fullerton v. Fullerton, de-

49. Jacobs v. Cauthorn, 293 Mo. 154, 238 S. W. 443 (1922); Troll v. Spencer, 238 Mo. 81, 141 S. W. 855 (1911), holding that demurrers to the evidence fulfill no office in an equity case.
50. 34 C. J. 788.
51. 85 Mo. 224 (1884).
52. 345 Mo. 216, 132 S. W. (2d) 966 (1939). See also Troll v. Spencer, 238 Mo. 81, 141 S. W. 855 (1911); Jacobs v. Cauthorn, 293 Mo. 154, 238 S. W. 443 (1922).
cided by the Supreme Court of Missouri in 1939, was an appeal from a judgment in a proceeding in equity entered in defendant's favor at the conclusion of plaintiff's evidence on defendant's motion challenging the sufficiency thereof. The court held that the effect of such motion was to voluntarily submit the case on the evidence adduced and thus authorize the appellate court to review the merits de novo and enter a final decree in plaintiff's favor if in its view plaintiff's evidence entitled him to the relief prayed. An amendment of this proposed section to remove the hazard suggested would seem in order. This could be accomplished by requiring the remand for a new trial upon the reversal of any judgment of dismissal entered in a non-jury case pursuant to a motion tendered at the conclusion of plaintiff's evidence.

c. Miscellaneous

Under the proposed new code the aforementioned provisions relating to the dismissal of plaintiff's actions would be made applicable to the dismissal of counterclaims, cross-claims, and third party claims. It would be provided further that any plaintiff who had once dismissed an action in any court and who thereafter instituted a new action upon or including the same claim against the same defendant, might be ordered by the court to pay the costs in the first action before being permitted to proceed in the new one. While this is an expression of the Federal Rule on the same subject, its adoption would work no substantial change in our existing practice. Our courts have the inherent power to stay such a second suit until the costs in the first action have been paid where the circumstances support the charge that the second proceeding is vexatious. It would only extend the court's inherent power by permitting an order staying the proceedings where the dismissed action had pended in the courts of a foreign state or in the federal courts, and by authorizing the court to order the payment of the costs in the former case and dismiss plaintiff's case in the event of non-compliance.

Instructions to Juries

The adoption of the proposed new code would bring about a very material change with regard to the preservation of the point on appeal that

55. Federal Rule 41(d).
error was committed by the trial court in the giving of instructions. Under the current practice, in order to preserve the right on appeal to object to the giving of an instruction on any ground, it is only necessary that a formal, general exception be taken at the time the instruction is given, without the necessity of indicating the ground for objection.\textsuperscript{57} It is, of course, necessary to further preserve the point by charging in the motion for a new trial that error was committed in the giving of the instruction, but again the charge may be general and without a specification of the ground for objection.\textsuperscript{58} The provisions of the proposed new code would require that objections to instructions, with a distinct statement of the grounds thereof, be made in the course of the trial before the jury retires to consider its verdict, and would deprive a party of the right to complain on appeal of the giving of any instruction on any ground not included in such objection.\textsuperscript{59} This innovation would bring to our Missouri practice the Federal Rule relating to objections to instructions as it existed prior to the adoption of the new Federal Rules and as it is now embodied therein.\textsuperscript{60}

Our present practice as above outlined is one of the major factors contributing to the delays and uncertainties of our present system. It is common knowledge that a large percentage of reversals on appeal come as the result of errors in instructions. If a party is forced to disclose his objections at the time the instruction is given, then the trial court is at least given an opportunity to correct the objectionable matter. At present there are many cases in which a party, by failing to point out defects in the instructions given, can safely permit a case to be submitted to the jury and take his chances on a favorable verdict without risking an unfavorable verdict which will stand. Many times an appeal can be taken with like security. The federal practice has worked satisfactorily in the federal courts and there is no reason why the same practice should not work satisfactorily in our state courts. Probably we would accept the suggested change with less hesitation if the new provisions required the trial court to afford attorneys reasonable time and opportunity to study the instructions of the opposition for the purpose of framing their objections. However, it cannot be doubted that under the provision as it now stands the failure of the trial court to grant

\textsuperscript{57} Harding v. Missouri Pac. Ry., 232 Mo. 444, 134 S. W. 641 (1911).
\textsuperscript{58} Wampler v. Atchison, T. & S. F. Ry., 269 Mo. 464, 190 S. W. 908 (1910).
\textsuperscript{59} Mo. Prop. Code, Art. 9, § 14.
\textsuperscript{60} Federal Rule 51.
to the parties a reasonable opportunity to study the opposition’s instructions would afford grounds for reversal on appeal.

**Alternative Provisions as to General and Special Verdicts and Interrogatories**

The writer has been requested to omit from this paper any discussion of the alternative provisions suggested by the committee in the matter of verdicts and interrogatories, but it is not possible to pass the matter without voicing the opinion that a grave mistake will be made if we fail to include in the proposed revision the equivalent of the Federal Rules on this subject. Under such rules, where a case is submitted to a jury for a general verdict, it is required that the jury answer special interrogatories on the issues of fact necessary to support any general verdict. Unless the facts found in answer to the interrogatories substantiate the general verdict returned, that verdict cannot stand. The Federal Rule requires nothing more than that the jury actually perform its theoretical duty, to-wit, the determination of the issues of fact. Our present practice of permitting general verdicts, unsupported by any specific findings of fact, is the greatest weakness in our system, and no other circumstance contributes more to the uncertainties of litigation.

**Motions for Directed Verdicts**

Under the proposed new code demurrers to the evidence and motions for peremptory instructions would be abolished and in their place would be substituted motions for verdicts, to be used in the same manner and to fulfill the same office. This change is not one of substance. However, a very material change would be made in the present practice relating to the disposition of such motions. It would be provided that the court might reserve its ruling on any such motion tendered at the conclusion of all the evidence, send the case to the jury, and later, during the pendency of a motion to set aside the verdict and enter judgment for the defendant, reconsider the question of law presented. At the time such motion is ruled upon, if the court should be then of the opinion that the motion for a directed verdict should have been sustained, it could, in its discretion, either grant a new trial or enter judgment for the defendant, setting aside any verdict to the contrary. The change proposed is one more to be desired.

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61. Federal Rule 49.
Under our present practice the trial court, in the confusion and press of a trial, is asked to rule hastily upon the questions raised by a request that a case be taken from the jury. Often nice questions of law are presented which first come to the trial court's attention when the request is made. Although the court may feel that the defendant's position is well taken, there is the knowledge that such impression is not founded upon conclusions reached through deliberate study and there is a resulting hesitancy to take the case from the jury, influenced by the knowledge that if such action should later prove ill-considered, the damage could not be rectified except through a new trial, with its attendant expense both to the plaintiff and to the county. After a case wherein the defendant's demurrer should have been sustained has been sent to the jury and a verdict for plaintiff returned, in passing on the motion for a new trial, the trial court finds itself in a dilemma. At present its authority is limited to the granting or overruling of the motion for a new trial. If the motion be granted, a new trial and all the expense it entails is in the offering, though the court may know that the plaintiff cannot make a case. While, on the other hand, if the motion is overruled, the burden of an appeal to correct the error is thrown on the defendant. But the latter course offers the most satisfactory solution of the problem, for then the responsibility can be shifted to the higher court which has the power, if it concludes that plaintiff's case is insufficient, to reverse the case outright and order the entry of a judgment in defendant's favor, thus putting an end to the litigation. What is proposed is nothing more nor less than the extension of the present appellate rule to trial court practice, through the granting to the trial court of the same power and authority now exercised by the appellate court on appeal.

There is only one just criticism which can be made of the proposed change and that is that it would operate to deprive the plaintiff of his right to voluntarily dismiss upon learning of the adverse view of the court on the law. But this objection has been made regarding the appellate court rule and after full consideration has been disallowed.

The power to reverse outright will not be exercised by the appellate court whenever it appears that the plaintiff might be able to supplement his proof and make up the deficiency, if given another trial, and in such situa-

65. See note 64, supra.
tion the court will reverse and remand the case for a new trial. With like effect the proposed new code would grant to the trial court power in its discretion to grant a new trial and undoubtedly its discretion would be limited by such consideration. Its abuse of discretion in entering judgment for the defendant, rather than granting a new trial which would enable the plaintiff to supplement his proof, would afford grounds for an appeal and the reversal and remand of the case.

A motion of the character under discussion, that is, a motion after verdict to reconsider the ruling of a motion for a directed verdict, could be joined with a motion for a new trial and with relief prayed in the alternative. While the requirement is made that any such motion must be filed within ten days after the rendition of verdict or the discharge of the jury, there is a question as to whether the court, under other provisions of the proposed new code, would be empowered to enlarge such ten day period. The provisions of the proposed new code conform to the Federal Rule.67

**Findings by the Court**

By present statute, on any trials by the court wherein a jury has been waived, either party may request the court to state in writing its findings of fact and conclusions of law. The provisions of this statute have been carried into the proposed new code, with a change in the language to make the provision cover all actions tried upon the facts without a jury, those at law as well as those of equitable cognizance. As construed by the court, the statute has no application to suits in equity wherein the trial court is privileged to enter a general judgment irrespective of the demands of either party litigant.70

The suggested provision under discussion undertakes a further change of marked significance in regard to the practice in law actions tried by the court without a jury, in that on appeal the appellate court would be authorized and empowered to review the trial court's findings of fact and, should it find them clearly erroneous, to set the same aside. The findings of the

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70. Walther v. Null (banc), 233 Mo. 104, 134 S. W. 993 (1910); Fruin v. O'Malley, 241 Mo. 250, 145 S. W. 437 (1912).
trial court, whether made generally or specially, and irrespective of any request for special findings, would be subject to such review on appeal. What is here undertaken is the extension of the reviewing power of the appellate court in equity cases\textsuperscript{71} to law cases tried without a jury. What is proposed is an adoption of the new Federal Rule on the subject\textsuperscript{72} which in turn reflects a reform previously undertaken in a number of the states.\textsuperscript{73}

At present the findings of fact made by the trial court in jury waived cases are binding upon the appellate court with like force and effect as a jury verdict.\textsuperscript{74} On appeal the court cannot now disturb the trial court's findings if there is any evidence in the record to support them. Under the present practice the waiver of a jury in a law case in practical effect may amount to an agreement that whatever decision the trial judge may reach will be accepted as final. This consideration has been a great deterrent to the waiver of juries in law cases. The change proposed should encourage parties to waive jury trials, as it would give them the assurance that any obvious injustice done by the trial court could be corrected through an appeal. In appeals in equity cases the appellate courts have shown no hesitancy to correct obvious miscarriages of justice.

A further change in the practice is contemplated by the proposed code in that it would authorize the trial court, following the entry of judgment in a non-jury case, upon motion filed within ten days after the entry of judgment, to amend its findings or make additional findings and amend its judgment accordingly, and such motion could be included in a motion for a new trial. This conforms to the Federal Rule.\textsuperscript{75} Under our present practice the trial court has full authority to change or amend any judgment at any time during the term and for any reason.\textsuperscript{76} The change proposed is merely to extend the time during which the court may exercise such authority by eliminating the restriction that the court must act during the term and in its stead providing that such action may be taken at any time during the pendency of such motion. The Federal Rule has been construed as depriving

\textsuperscript{72} Federal Rule 52 (a).
\textsuperscript{73} See committee notes appended to Federal Rule 52.
\textsuperscript{74} Idalia Realty & Development Co. v. Norman's Southeastern Ry., 219 S. W. 923 (Mo. 1920); Meinhardt v. White, 341 Mo. 446, 107 S. W. (2d) 1061 (1937).
\textsuperscript{75} Federal Rule 52 (a).
\textsuperscript{76} Savings & Trust Co. of St. Louis v. Skain, 345 Mo. 46, 131 S. W. (2d) 566 (1939).
the trial court of the power to make any such change or amendment after an appeal had been taken, unless the cause is first remanded.77

Whether the court would have the authority to extend the time for the filing of any such motion beyond the ten day period specified is a debatable question.78

**Motions After Verdict or Judgment**

Under the proposed new code, as under the present practice, a motion for a new trial would be the proper motion to question any verdict, finding, or judgment.

In the case of jury trials, in ruling upon any such motion the trial court would be authorized to order a new trial as to one or more of the parties and as to part or all of the issues.79 The change proposed is nothing more nor less than a recognition of the same power in the trial court that is now exercised by the appellate court on appeal. On appeal the appellate court may affirm a judgment as to one or more of the parties or as to one or more of the issues and may remand the case for a new trial as to the other parties, or as to a part of the issues.80

As to all cases tried without a jury, the proposed new code would permit the trial court, during the time it had under consideration any motion for a new trial, to open the judgment, if one had been entered, take additional testimony, amend the findings of fact and conclusions of law, make new findings and conclusions, and enter a new judgment in conformity therewith.81 Again, this grants the trial court no greater power than it now has if it acts during the term at which the judgment is entered82 and only changes the present practice by extending the time during which the court may take such action.

It should be noted that the provisions prepared in regard to the power of the court to grant a new trial do not embody the present statutory limitation which prohibits a trial court from granting a party more than one new trial on the ground that the verdict is against the weight of the evi-

82. Savings & Trust Co. of St. Louis v. Skain, 345 Mo. 46, 131 S. W. (2d) 566 (1939).
dence.  

Under the suggested rule a motion for a new trial would be required to be filed within ten days after the entry of judgment, instead of "within four days after the trial, if the term shall so long continue; and if not, before the end of the term, as now required by statute." The ten day period could not be enlarged by the court. If the motion for a new trial should be based upon affidavits, the opposing party would have ten days after service within which to file counter-affidavits, which period might be extended either by the court or by stipulation of the parties for an additional twenty days, with the power in the court to permit reply affidavits. Upon its own initiative within ten days following the entry of judgment the court would be authorized to grant a new trial for any reason for which it might have granted a new trial on motion of the party, specifying in its order the grounds therefor.

The proposed code would dispense with the necessity of filing a motion for a new trial in order to preserve the right to complain on appeal of any error committed by the trial court in passing upon any objection made in the course of the trial, and it would only be essential to the preservation of such right of complaint to include in the motion for a new trial any matter with respect to which the trial court had been given no opportunity to rule. In other words, no such motion would be required to permit a party to attack a judgment on appeal on any ground involving error committed by the trial court in ruling upon any objection, but such motion would only be necessary to preserve complaints as to matters which had not been brought to the trial court's attention during the course of the trial, such as the amount of the verdict, misconduct of the jury in its deliberations, etc.

The new code would also abolish motions in arrest of judgment and

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motions for judgment notwithstanding the verdict.91 This change would not affect our existing practice as such motions have already been abolished by the decision of our supreme court in the case of City of St. Louis v. Senter Commission Co.92 In that case it was held that a motion in arrest of judgment fulfilled no function, as it was the duty of the appellate court to examine the record and consider all errors apparent on the face thereof, irrespective of the filing of any motion for a new trial or in arrest of judgment. What was said in that case in regard to motions in arrest of judgment applies with equal force to motions for judgment notwithstanding the verdict, as both such motions must relate to defects appearing on the face of the record.93

**Miscellaneous Provisions**

a. Disability of judge

The proposed new code would provide that in the event of death, sickness or other disability of the judge before whom a case has been tried and a verdict returned or, in a non-jury case, where his findings of fact and conclusions of law had been filed, any other judge regularly sitting or assigned might perform all further necessary functions.94 This is in accord with and in extension of the purpose and intent of our present statute95 authorizing the allowance of a bill of exceptions by a succeeding or acting judge where the judge who heard the case has gone out of office. This statute has been construed as permitting the acting or succeeding judge, in the circumstances mentioned, to rule on a motion for a new trial.96

b. Exceptions unnecessary

The necessity of taking formal exceptions to rulings or orders of the trial court would be dispensed with by the proposed code.97 It would only be necessary for a party to make known to the trial court the action which he desired the court to take or his objection to the action taken by the court, with a statement of his grounds. In most, if not all, of our circuit

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92. 340 Mo. 633, 102 S. W. (2d) 103 (1937).
93. See article by Judge Hyde entitled *Motions after Verdict to Suspend or Prevent Final Judgment* (1938) 6 Kan. City L. Rev. 163.
courts, exceptions to adverse rulings are saved as a matter of course. However, if it develops on appeal that through inadvertence there was a failure on the part of the reporter to note an exception and the appellant’s attorney overlooked such oversight, the appellate court will take no notice of the point. Such a slip has been made in relation to motions for a new trial with disastrous consequences. The retention in our present code of the requirement of formal exceptions illustrates the obsolescence of that code and the urgent need of reform.

c. Harmless error

The proposed new code would provide that after the rendition of a verdict or judgment, it should not be disturbed for any error or defect not substantially affecting the rights of the parties. This is but a statement of the rule which has been heretofore followed and a statement of the provisions of our statutes having to do with appellate practice.

CONCLUSION

In preparing this article the writer has obtained a fuller appreciation of the inadequacies of our present code than he had before the work was undertaken. All of us have known that our present code is antiquated. However, until the proposed new code was drafted, few of us were aware of the full extent of its imperfections and few had concrete ideas as to how the imperfections could be satisfactorily remedied. No one will contend that the proposed code is perfect, but without doubt it would be a great improvement over our present one.

The proposed changes will not make the practice of law any easier for the lawyers, whatever the class of business handled. Such is not the purpose of a revision, as the writer sees it. We lawyers can get along under the present code so long as our clients continue to seek our aid and advice. The demand for a revision comes from the public we serve which has evidenced its displeasure with the present system by its increasing willingness to have controversies settled by administrative bodies. Unless we lawyers modernize our system, we may expect to see a continued shrinkage in the volume of business moving through our courts.