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THE MODERNIZED CIVIL CODE OF MISSOURI

CHARLES L. CARR

The 1939 Missouri Legislature, by resolution, invited the Missouri Supreme Court to submit to the General Assembly for its consideration, suggestions for a Revised Code and Rules of Civil Procedure. The supreme court, pursuant to the said legislative suggestion, appointed a committee of fifty-four lawyers, resident throughout the state, to make suggestions of needed changes to the court. This committee in turn requested all lawyers in the state to participate by offering suggestions as to changes that should be made. The supreme court committee, with full co-operation from the Missouri and local bar associations in the state, and with the co-operation of many lawyers throughout the state, formulated two alternative proposals, designated as Plan I and Plan II. Plan I was limited to the amendment of a relatively small number of existing civil procedure statutes, which statutes, based upon experience, did not properly function. Plan II was more comprehensive in scope and constituted an entire new code.

The supreme court committee reported the above two plans to the supreme court on December 10, 1940. The supreme court, recognizing its responsibility, feeling that further study was not only highly desirable, but also imperative, and that full opportunity should be afforded the members of the Bar, both individually and collectively, to study and criticize the proposals, caused the above two plans to be published to the bar of the state. After many helpful suggestions were received, it was finally agreed that Plan II, modified in line with suggestions made, should be submitted to the

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legislature for passage. This was done in the form of Senate Bill 34, which was first read in the senate on February 11, 1943. Senate Bill 34, after full hearings and careful consideration both in the Senate and the House, with numerous changes—additions, deletions, and amendments—was passed by the legislature, and on August 6, 1943, was approved by Governor Donnell.

Senate Bill 34, as passed, represents the studied thought of the Missouri Supreme Court, the state legislature, and of the lawyers of Missouri, in the aggregate, for a period of approximately four years.

The primary objectives of amendments to the Code of Civil Procedure should be:

1. To simplify legal procedure,
2. To expedite trials and upper court reviews,
3. To lessen litigation expense, all to the end
4. That substantial justice will be done between parties litigant.

By simplifying legal procedure: (a) The number of lawsuits that are now disposed of on legal technicalities, procedural law and on oversights, as well as unintentional waivers of counsel, will be greatly reduced, and (b) The merits and demerits of the particular cause of action and defense will be passed upon and reviewed.

By expediting trials and upper court reviews: (a) A more extended use of the judicial process will be encouraged, and (b) Both our courts and the legal profession will be relieved of a rather pronounced and, in part, well-founded criticism of inefficiency.

In lessening litigation expense: (a) The court rooms will be open to more and more people for the determination of their legal controversies, and (b) The attorneys will be enabled more efficiently to serve the public.

The attainment, even in part, of the above primary objectives brings us closer to the fulfillment of the one all inclusive objective; namely, to see that substantial justice is done between parties litigant.

Measured by the above standards, Senate Bill 34, as passed, constitutes a big stride forward in our code procedure. The new law is not perfect. Ambiguities exist in the act itself. Additional specific amendments should be, and undoubtedly will be, made. Taking the act as a whole, however, it is highly beneficial and corrects many defects in our old Code of Civil Procedure.

To consider properly and analyze the scope and terms of the new Civil Code Act, even in outline form as here necessary, it is thought advisable to refer to the act by specific sections or section groups, pointing out both the
main provisions of same and the substantial changes from existing law. For proper construction of the new law amendments made by the legislature will be referred to in connection with some section. After the new act has thus been discussed, the most important new provisions will be summarized. In conclusion, some additional amendments that should receive the attention of the courts and bar of the state, and of future general assemblies, will be referred to briefly.

The sections of the act that will be hereinafter referred to will be the numbered sections of the act as finally passed unless the contrary is indicated.


Title and Section 1: A consideration of the title and Section 1 of the new code (Senate Bill 34) indicates that the new act is not an all-inclusive code of civil procedure. Certain articles of the present General Code of Civil Procedure (Mo. Rev. Stat. (1939) c. 6) are not repealed and such said articles continue as the law to supplement the new act. Thus article 2, entitled "Infants as Parties," article 3, entitled "Place of Bringing Actions," articles 8 and 9, with reference to limitations in both real and personal actions; article 11 with reference to change of venue; article 14 with reference to the declaratory judgment act; article 15 concerning referees and receivers; article 18 with respect to judgments and proceedings thereon; article 19 dealing with executions and exemptions; and finally article 20 providing for costs, all in Chapter 6 under the general code, are not repealed by the new act and must be treated as a part of the new Civil Code of Missouri.

The new act does not repeal Missouri Revised Statutes (1939) Chapter 8 concerning the civil procedure in particular actions, Missouri Revised Statutes (1939) chapter 9, governing evidence, and Missouri Revised Statutes (1939 chapter 11, providing for the organization and procedure in justices' courts. Said chapters 8, 9 and 11, then, likewise supplement the so-called new civil code (SenateBill No. 34). The new code does announce and change a few rules of evidence, but the great body of evidence rules announced by particular statutes remains unaffected. The new code is concerned with the civil procedure in courts of record, but in one particular instance it governs practice in courts not of record; that is, justice courts.

1. Enacting clause, Senate Bill 34 (hereinafter cited S. B. 34).
2. S. B. 34 § 2.
3. See S. B. 34 § 23.
While many sections of the old General Civil Code have been expressly repealed by the new act, the provisions of many of these sections have been reenacted without change or substantial change in the new code.

Section 2 states the scope of the act as being applicable to all suits and proceedings of a civil nature unless otherwise provided by law, in the supreme court, court of appeals, circuit courts, and common pleas courts. This section also points out both to the bar and the courts that the act shall be construed "to secure the just, speedy, and inexpensive determination of every action."  

Section 3 provides that the new code will take effect on January 1, 1945. It also provides that the new code will cover all proceedings after such date, except only in those cases pending prior to said date where the enforcement of the rule would work injustice. In such cases the former procedure is to be applied.

II. General Provisions.

Section 4 merely reaffirms the old law that there shall be one form of action to be known as a "civil action."  

Section 5 provides for the service and manner of service of pleadings subsequent to the original petition, written motions (other than ex parte), written notices, and other writings. Service upon the attorney, rather than the party, is indicated, unless the court otherwise orders. Service need not be made on parties in default except where new or additional claims for relief are made. In actions involving an unusually large number of defendants, the court has authority to dispense with the service of pleadings of defendants and replies thereto as between defendants. Affirmative defenses and counterclaims in such actions are deemed denied. The filing of any such pleading and service thereof upon the plaintiff constitutes due notice. This section also permits the filing of pleadings and other papers with the judge. All papers after the petition required to be served upon a party are required to be filed "either before service or within five days thereafter." This last provision should be noted particularly for here the court makes "filing"

secondary to "service." Senate Bill 34 as originally introduced was patterned after the new Federal Rules of Civil Procedure which makes "service" of primary importance, but as the bill proceeded through the legislature amendments were made making "service" secondary to "filing." This had led to some uncertainty in the bill as passed and the practitioner is warned, in case of doubt, both to "serve" and "file" the various pleadings and other papers, and this in the time indicated.  

Section 6 states the rule with respect to computing a period of time, states when Sundays and legal holidays are excluded, and provides that written motions (other than ex parte), together with notice of hearing, shall be served not later than five days before the time specified for hearing unless a different period is fixed by law or by court order or rule. This section provides that supporting affidavits shall be served with the motion. Here again the matter of "service," rather than "filing," is of primary consideration.

This section also permits orders extending time to perform certain acts, provided certain conditions are complied with, but the time to commence action, file motion for new trial, and to take appeal cannot be extended.

Section 6(c) calls for particular attention, as it is revolutionary in Missouri. It provides that the time for doing, or the power to do, any act "is not affected or limited by the expiration of a term of court." This provision changes very materially many of the old provisions of the code; as for example, the time to plead, to suggest death, to file motion for new trial or grant a new trial, to file supersedeas bond, and the time to take an appeal.

Sections 7 and 8 merely provide that the court shall be deemed always open for the purpose of filing pleadings, issuing process and making interlocutory orders, that the clerk's office shall be open during business hours on all days except Sundays and legal holidays, and sets forth the matters that the clerk may do as a matter of course.

Section 9 provides that every term of court shall commence by operation of law at the time fixed by statute and shall continue in session until the next regular term of court, and this without any formal act or order.

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8. In re "filing" and "service" see S. B. 34 §§ 5(d), 6(d), 20, 58, 65, 75, 81, 83, 85, 116-118, 120, 129, 130, and 131.
This section erases from our old code the technical provisions requiring formal and careful action to open properly or continue in session a term of court. 12

Section 10 is very important in that in addition to recognizing the the power of the supreme court to direct the form of writs and process, it expressly recognizes the jurisdiction of that court "to promulgate general rules for all courts of the state and to harmonize (until subsequent legislative enactment) the various statutes relating to civil procedure." A limitation is placed on the court that it shall not change the substantive rights of any litigant or enact rules contrary to harmonious procedural laws in force at the time.

This section is of particular benefit in that it gives express authority to the supreme court to issue directions in the form of general rules to our trial courts and to adopt uniform appellate court rules to be followed by the three courts of appeals, as well as by the supreme court itself. This should result in eliminating the confusion that now exists from variant appellate court rules, particularly with respect to abstracts and briefs.

It should be stated that originally Section 10 also gave the supreme court power

"to suggest forms of pleadings, motions, orders, notices, bonds, instructions and other proceedings."

The above quoted provision, however, was stricken by the legislature; there-fore, Section 10, as enacted into law, should not be construed to authorize any such power in the supreme court.13

III. Parties

Section 11 merely readopts in substance the provisions of Sections 849 and 850, Missouri Revised Statutes (1939), providing in general that every action shall be prosecuted in the name of the real party in interest except as expressly noted.14

Sections 12 and 13 included in the original bill as introduced, concern actions in which infants, incompetent persons, or their legal representatives, are parties. These sections were eliminated from the bill when it was pointed out that they created conflicting jurisdiction between the probate and cir-

cuit courts and occasional confusion in, rather than simplification of, our civil code. The legislature thought it preferable to continue in effect Missouri Revised Statutes (1939) chapter 6, article 2, dealing with infants as parties rather than enact said proposed Sections 12 and 13. They were thus eliminated. The substance thereof need not be referred to.\textsuperscript{15}

Section 14 provides that whenever a claim exists under the law of another state, action thereon may be brought in this state by the persons entitled to the proceeds of the claim or by the representative of such persons, whoever is empowered by the law of said other state to bring action therefor. This section also provides that the proceeds of any such action, resulting either from judgment or settlement, shall be paid to the person bringing such suit, and that such person is authorized to satisfy the judgment and execute a release.\textsuperscript{16}

Sections 15 and 16 provide for the joinder as parties, plaintiff or defendant, of persons having a joint interest or necessary for the complete determination of the controversy. Relief may be asserted jointly, severally, or in the alternative, and judgment may be given for one or more plaintiffs against one or more defendants, according to their respective rights and liabilities.\textsuperscript{17}

Section 17 provides procedure by motion in the event of nonjoinder or misjoinder of parties. Misjoinder is not a ground for dismissal. The section provides that the motion to drop or add parties may be made at the same time as other motions provided in Section 65, and if so made, the provisions of Section 65, with reference to consolidation of motions and waiver of objections, shall apply. The last reference to Section 65 apparently is a typographical error and should read "Section 66."\textsuperscript{18}

Section 18. Under this section persons having claims against a plaintiff may be joined as defendants and required to interplead when their claims may expose the plaintiff to double liability. A defendant exposed to similar double liability may obtain such interpleader by way of cross claim or counterclaim. It is no objection to the joinder that the claims of the several

\textsuperscript{15} S. B. 34 §§ 12 and 13; Mo. Rev. Stat. (1939) c. 6, art. 2, not repealed but continued in effect.


claimants are not identical or of common origin. They may be adverse to and independent of one another. Neither is it an objection to the joinder that liability is denied in whole or in part on any or all of the claims.\(^\text{19}\)

Section 19 provides for class actions within rather broad scope by class representatives, whether the claims be joint, common, several or secondary. The pleading requirements in a secondary stockholders’ action are stated. A class action cannot be dismissed or compromised without the approval of the court, and then only upon notice as required by the section or by the court.\(^\text{20}\)

Section 20 provides for third party proceedings in an action on motion (either _ex parte_ or upon notice as provided). Such third party procedure may be had by the defendant with respect to the cause of action stated in plaintiff’s petition and by the plaintiff with reference to the cause of action stated in defendant’s counterclaim. Practically the only limitation to a third party proceeding is that the third party defendant is, or may be, liable to the third party plaintiff or to the adverse original party for all or a part of the adverse original party’s claim against the third party plaintiff, be he an original defendant or an original plaintiff. A third party defendant may assert any and all defenses, counterclaim, and cross claims that he has against the original plaintiff, or any other party as provided by the code. He may also assert any defenses which the third party plaintiff has to the adverse party’s original claim. The third party defendant is bound by the adjudication of the third party plaintiff’s liability to the original adverse party, as well as of his own liability to the adverse original party or to the third party plaintiff. The third party defendant may join a third person as a party to the action who is or may be liable to him or to the third party plaintiff for all or a part of the claim asserted against the third party defendant. The original adverse party can amend original pleadings to assert liability against the third party defendant.

The third party practice as authorized by Section 20 is new in Missouri procedure except in a few limited situations as in actions against municipalities. If it does not result in too great a complication of issues, it should

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20. S. B. 34 § 19. See Fed. Rule 23; no prior statutes authorizing class actions in Missouri; only allowed in equity practice prior. See Lilly v. Tobbein, 103 Mo. 477, 15 S.W. 618 (1890).
be of great benefit in avoiding multiplicity of suits, double liability, unnecessary expense, and extended litigation.21

Section 21 provides for intervention, both mandatory and permissive, as provided in the section, and provides the method of procedure by motion accompanied by a pleading setting forth the claim or defense. The section lodges a discretion in the trial court to permit the intervention of the state or a governmental subdivision, or an officer, agency or employee thereof, when the validity of a constitutional provision, a statute, an ordinance, or a regulation of the state or a governmental subdivision affecting the public interest is drawn in question. As this section was originally drafted it was made mandatory in all of the above cases affecting the public interest for the trial court to notify the chief legal officer of the state or subdivision affected and intervention was made mandatory upon the court upon application of the proper governmental agency or officer. The legislature, realizing that this original provision would cast an unnecessary burden upon the court and would unnecessarily and unduly encumber the procedure in many cases, properly amended the section as above pointed out.22

Section 22 provides for suggestions for abatement and revival of actions in the event of death or incompetency of a party, where a party transfers his interest in the action, where a corporation is dissolved or its charter is forfeited, and in the event a public officer who is a party dies, resigns, or otherwise ceases to hold office.23

It should be particularly pointed out that this section provides that if the death of a party occurs prior to final judgment, or after final judgment and before appeal, and substitution or motion therefor is not made within one year after the death, the action shall be dismissed as to the deceased party; and if death occurs after appeal and before final determination thereof, and substitution or motion therefore is not made within one year after the death, appeal shall be dismissed as to the deceased party. This provision

22. S. B. 34 § 21. Cf. Fed. Rule 24 and see Colo. Rule 24. Missouri has had no general statute for intervention, and the right has been narrowly construed. Mo. Rev. Stat. (1939) §§ 343, 365 (dower); §§ 1489, 1490 (attachment); § 1533 (ejectment); §§ 1568, 1569, 1571 (garnishment); § 1716 (partition); § 3456 (mortgaged property); § 3571 (mechanic’s lien); § 5039 (dissolution of corporation); §§ 6436 and 6755 (condemnation proceedings), give an unconditional right to intervene in particular proceedings and Sec. 91 (surviving partners and creditors); §§ 1348 (on execution) recognize a conditional right to intervene in particular matters.
changes the present law with reference to suggestion of death and eliminates court terms to measure the time within which death must be suggested.

IV. Process

Section 23 provides that suits may be instituted in courts of record by filing the petition with the clerk and either suing out a writ of summons against the person or of attachment against the property of the defendant or by the voluntary appearance of the adverse party. The mere filing of the petition is no longer sufficient to constitute a commencement of an action to toll a Statute of Limitation. (But see Sec. 24.) This section also provides that the filing of a statement or account in a court not of record (as well as the filing of a petition in a court of record) and the suing out of process shall be taken and deemed the commencement of a suit.24

Section 24 states the duties of the court clerk to issue process. The clerk, upon the filing of the petition, shall forthwith issue the required summons or other process.25

Section 25 designates the form of the summons.26

Section 26 designates the persons authorized to serve process.27

Section 27 requires the summons and petition to be served together and apparently requires the petition to be served on each and all defendants rather than upon the first defendant served, as permitted under the present practice (Rev. Stat. Mo. (1939) § 880). The section also designates the manner in which personal service must be had upon an individual, including an infant or incompetent person, upon a domestic or foreign corporation, a partnership, an unincorporated association, and upon a public, municipal, governmental, or a quasi-public corporation or body.28

A party may waive service by endorsed written acknowledgment. If a defendant should refuse to hear the writ read or to receive a copy of the writ or petition, when offered, such refusal constitutes sufficient service.


Section 28 authorizes service by mail or by publication in cases affecting a fund, will, trust estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court. In the event that the defendant so served does not appear, judgment may be rendered affecting said property, res or status as to said defendant, but such service shall not warrant a general judgment against a defendant. The section states the requirements for obtaining service by mail or by publication. One of these requirements is that the application shall show why service cannot be had in the manner prescribed in Section 27. It would appear, therefore, that service by mail or publication is only authorized when service cannot be had in the ordinary manner, but subparagraph (d) of this section provides that the court may also in its discretion order that a summons be issued and delivered for service in the ordinary manner "if the same can be had."

Service by mail is an innovation. As a protective measure, the section requires that such service be by registered mail, with return receipt requested signed by addressee only, and addressed to the defendant at the address furnished by the plaintiff. Additional protective measures are found in Section 30(b) requiring the returned registered mail receipt to be filed in the action and by Section 58, giving defendant thirty days within which to plead after such filing.

In connection with service by publication, an additional protective requirement provides that within ten days after the order or publication, "the clerk shall mail a copy of the notice to each defendant whose address has been stated in the motion." This provision tends to give the party served by publication actual notice of the suit. This is not required under the old code.

This section, among other things, requires the order of publication of notice to advise the defendant of the time he is required to appear and defend, "which shall be at least forty-five days after the date of the first publication." This last provision is somewhat inconsistent with the provision contained in Section 58, requiring a defendant to answer "within forty-five days after the first publication of notice."29

Section 29 provides that all process may be served anywhere within the territorial limits of the state and may be forwarded to the sheriff of any

29. S. B. 34 § 28. See also Secs. 30(b) and 58; Fed. Rule 4(c) adopts state practice for other than personal service; see Mo. Rev. Stat. (1939) §§ 891, 897, 899, and 900, which are repealed by S. B. 34 § 1, and see Mo. Rev. Stat. (1939) § 1689, which may be supplanted.
county for the purpose of service.\textsuperscript{30} This section, of course, must be construed to refer only, as far as the territorial limitations of the state are concerned, to ordinary service, as provided in Section 27.

Section 30 states the requirements with respect to the return of process and the manner of making proof of service by mail and by publication.

With respect to service by mail it is expressly provided that proof shall be "by a certificate of the clerk that he has mailed a copy of the summons and of the petition as required by law and the order of the court and by the return registered mail receipt mentioned in Section 28(a), which shall be as filed as a paper in the particular lawsuit." This requirement prevents service by mail from being abused and prevents judgments from being entered on mail service without the above evidence of actual receipt of notice by the defendant.

The proof of service by publication is similar to that under the old code, with the addition that the clerk's certificate that he mailed a copy of the notice to each defendant whose address was stated in the motion for order of publication and the date of mailing is required to be filed in the case.\textsuperscript{31}

Section 30 also provides that no person shall be arrested, held to bail, or imprisoned, on any mesne process or execution founded upon any civil action whatsoever.

Section 31 lodges in the court a discretion to permit amendment of any process, return, or proof of service that the court may deem just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.\textsuperscript{32}

V. Pleading

Section 32 designates the authorized pleadings as being petition, answer, reply if the answer contains counterclaim, answer to cross-claim, third-party petition, third-party answer. The section provides that no other pleading shall be required "except that the court may order a reply to an answer or a third-party answer."\textsuperscript{33}

\textsuperscript{31} S. B. 34 § 30. See also S. B. 34 §§ 28 and 58; cf. Fed. Rule 4(g) and Mo. Rev. Stat. (1939) §§ 884 and 888.
Sections 33-57 state the requirements as to the form, content, and substance of the pleadings.

Section 33 states the requirements as to the caption of a pleading and the designation of parties therein.34

Section 34 requires every pleading to be signed by at least one attorney of record in his individual name, stating his address. A party not represented by attorney must sign his name and state his address. Pleadings are not required to be verified or accompanied by affidavit, except where specifically provided by rule or statute.35

Section 35 requires each averment of a pleading to be simple, concise, and direct, and states that no technical forms of pleading or motion is required.36

Section 36 is a particularly important section which requires special attention. This section reads:

"A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. If a recovery of money be demanded, the amount shall be stated. Relief in the alternative or of several different types may be demanded." (Italics mine.)

When Senate Bill 34 was originally introduced in the legislature, the above italicized word "facts" was not in the above section, but in lieu thereof, the word, "claim," was included.

As originally introduced, the above section was patterned after Rule 8 of the new Federal Rules of Civil Procedure, which has been interpreted (along with approved Form 9, made a part of said federal rules) as permitting the pleading of a mere general conclusion of negligence in negligence cases. The amendment of said Section 36 substituting the word "facts" for the word "claim" was made to avoid the deficiency of the federal rule and to prevent any ruling that the pleading of a mere general conclusion of negligence is sufficient under our Missouri practice.

The amendment of the above section recognizes the fundamental rule

of pleading; namely, that a pleading should notify the adverse party as to the ultimate facts issues that he must meet. It is submitted that our Section 36 is a great improvement over and corrects the deficiency of Federal Rule 8.

Section 37 authorizes counterclaim, both legal and equitable, against the opposing party even though the claims may be independent. They may be presented in the alternative. Such counterclaims may be joined where there are multiple parties, if the requirements of Sections 15, 16 and 18 of the code are satisfied. There may be a like joinder of cross-claims if the requirements of Section 77 and Section 20, respectively, are satisfied.

Section 38 authorizes the presentation of claims which heretofore were only cognizable after another claim had been prosecuted to a conclusion, the new code providing that such claims may be joined in a single action (either in petition or reply) and providing that the court shall grant relief in accordance with the relative substantive rights of the parties. Thus a plaintiff may state a claim for money and a claim to set aside a fraudulent conveyance without first having obtained a judgment establishing the claim for money, and a plaintiff may state his original claim against a defendant and also state a claim for having a release, composition, settlement, or discharge set aside as fraudulent, or as otherwise wrongfully procured.

Section 39 permits general denial defenses, but specific denials are favored. A pleading denying knowledge or information sufficient to form a belief as to the truth of an averment has the effect of a denial.

Section 40 requires avoidance or affirmative defenses to be affirmatively and expressly pleaded. This section likewise requires the court, where a pleading is mistakenly designated, to treat same as having been properly designated.

Section 41 provides that where a responsive pleading is required and none is filed, the averments of the prior pleading, other than those as to amount of damages, are admitted. When a reply is filed, whether required or not, all affirmative defenses of the answer which are not denied in the reply are deemed admitted. Where a responsive pleading is not filed and is

not required, the averments of the prior pleading shall be taken as denied or avoided. 42

Section 42 provides that a party may set forth two or more statements of a claim or defense alternately or hypothetically either in one count or defense or in separate counts or defenses. It should be particularly noted in this section that when two or more statements are made in the alternative, and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Such separate claims or defenses may likewise be based either on legal or equitable grounds, or both.

It is submitted that this section, although authorizing alternative pleading, does not permit the pleading of inconsistent claims or defenses. This section was taken bodily from Federal Rule 8(e)(2), but the language of said rule permitting claims and defenses “regardless of consistency” was deleted from this section. 43

Section 43 requires all averments of claim or defense to be made in numbered paragraphs and requires each paragraph to be limited as far as practicable to a statement of a single set of circumstances. Numbered paragraphs may be referred to by number in all succeeding pleadings. Whenever a separation facilitates clear presentation, each claim founded upon a separate transaction or occurrence and each defense other than denials, shall be stated in a separate count or defense. 44

Section 44 provides that statements in one pleading may be adopted by reference in a different part of the same pleading, or in another pleading, or in any motion. It should be particularly pointed out that this section, contrary to previous rulings, makes an exhibit to a pleading a part thereof for all purposes. 45

Section 45 provides that it shall be sufficient to aver the ultimate fact of the capacity of the party to sue or be sued or of the authority of the party to sue or be sued in a representative capacity, or of the legal existence of a corporation, or of an organized association of persons that is made a

45. S. B. 34 § 44; Colo. Rule 10(c). Cf. Fed. Rule 10(c), and see Mo. Rev. Stat. (1939) §§ 954, 966, and 967.
party. Denial of such ultimate facts is required to be by specific negative averment, supported by such particulars as are peculiarly within the pleader’s knowledge. The burden of proof, when a party so raises any of the issues mentioned, is placed upon the opposite party. 46

Section 46 provides that when parties sue or are sued as a partnership and the names of the partners are set forth, the existence of the partnership shall be deemed confessed unless denied by specific negative averment supported by particulars peculiarly within the pleader’s knowledge. 47

Section 47 requires averments of fraud or mistake to be stated with particularity but permits malice, intent, knowledge, and other condition of mind to be averred generally. 48

Section 48 authorizes the general pleading of performance or occurrence of conditions precedent, but a denial of performance or occurrence is required to be made specifically and with particularity. When so made the burden of proof is on the party pleading the performance or occurrence. 49

Section 49 authorizes the pleading of an official document or official act by averring that the document was issued or the act done in compliance with law. 50

Section 50 provides that in pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. If such allegations be controverted, the party pleading then shall establish the facts conferring jurisdiction. 51

Section 51 of Senate Bill 34 as originally introduced provided that averments of time and place should be treated as material matter. The bill as passed eliminated this section.

Section 52 requires items of special damage to be specifically pleaded, and where exemplary or punitive damages are sought, the petition is required to state separately the amount of such damages. 52

Section 53 provides that in an action for libel or slander it shall be sufficient to state generally that the defamatory matter set forth was pub-
lished or spoken concerning the plaintiff, and extrinsic facts with respect thereto need not be pleaded. Such allegation need only be proved when controverted by answer. In libel and slander actions the defendant may allege both the truth of the matter charged and any mitigating circumstances to reduce the amount of damages and whether justification be proved or not, the defendant may give in evidence the mitigating circumstances.53

Section 54 states that in pleading a private statute, or right derived therefrom, it shall be sufficient to refer to said statute by its title and the place where found in the session acts or in the revised statutes, and the court shall thereupon take judicial notice thereof. This section also requires the court to take judicial notice of the public statutes and judicial decisions of another state where the pleading states that the law of another state is relied upon.54

Section 55 authorizes the pleading of a written instrument, upon which a claim, defense, or counterclaim is founded by pleading the instrument either (a) according to legal effect, or (b) by reciting it at length in the pleading, or (c) by attaching a copy thereof to the pleading as an exhibit.55

Section 56 provides that when any claim or counterclaim is filed upon any written instrument and the same is “set up at length in the pleading or a copy attached thereto as an exhibit,” the execution of such instrument shall be deemed confessed unless the party charged to have executed the same shall specifically deny the execution thereof.56

It will be noted that Sections 55 and 56 are confusing in that while Section 55 authorizes the pleading of a written instrument “according to legal effect,” Section 56 does not recognize such method of pleading a written instrument and recognizes only the written instrument as deemed confessed (under the circumstances stated) when the written instrument is either pleaded “at length” or “when a copy (is) attached” as an exhibit. It would seem to follow from the above two sections that where an instrument is only pleaded according to legal effect it must be proved under all circumstances. I do not believe that this was intended by the legislature, although this situation was expressly called to its attention.

54. S. B. 34 § 54, which is substantially Mo. Rev. Stat. (1939) §§ 956 and 958.
Section 57 very properly provides that all pleadings shall be so construed as to do substantial justice.  

Section 58. By this section a defendant is required to file his answer (a) within thirty days after personal service, (b) within thirty days after the return registered mail receipt is filed in the event of service by mail, and (c) within forty-five days after first publication of notice in the event of service by publication. Other and subsequent responsive pleadings required to be filed must be filed within twenty days after the filing of the pleading to which it is addressed. Where a reply (otherwise unnecessary) is ordered by the court such reply must be filed within twenty days after entry of the order, unless the order otherwise directs. The filing of any motion provided for in Sections 61, 62, 63 and 64 alters the time fixed for filing any required responsive pleading. Unless a different time is fixed by order of court, (a) the responsive pleading may be filed within ten days after notice of the court's action in denying a motion or postponing its disposition until the trial on the merit, and (b) the responsive pleading may be filed within ten days after the filing of a more definite statement or bill of particulars as required by court order sustaining such a motion. Responsive pleadings, however, are not required to be filed in less time than authorized had a motion not been made.

It will be noted that Section 58 makes the "filing" of pleadings and motions of primary importance, and the filing of pleadings and motions is timed from the filing of previous pleadings except when responsive to the original petition. As this section was originally written, "service" was made primarily important; but the legislature substituted "filing" for "service," as above indicated, as the proper criterion. (But see Sections 5(d) and 83.) By Section 5(a) and Section 6(d) every pleading subsequent to the original petition, every written motion (other than ex parte), and every written notice and other writing, must be served as well as filed, as therein indicated.

Section 59. Demurrers and pleas in abatement and to the jurisdiction are abolished by this section. Matters formerly reached thereby are reached by motion under the new code. (See Sections 60, 61 and 62.)

This section changes materially the procedure under the old code and should be very beneficial in eliminating many procedural technicalities and in protecting the practitioner against adopting the wrong procedure.

VI. MOTIONS

Sections 60-71. These sections are concerned with motions.

Section 60 provides that an application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The section provides that the requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All requirements relating to matters of form of pleading, including captions and signature, apply to all motions and other papers provided for by the code.60

Section 61 enumerates many objections that may be raised by motion, whether or not the same appear from the pleadings and other papers filed in the cause. The section also provides that supporting grounds may be supplied by affidavit and controverted by opposing affidavit in accordance with subsection (d) of Section 6.61

Section 62 expressly provides that the objections of failure to state a claim upon which relief can be granted or to state a legal defense to a claim may be raised by motion "when these objections appear on the face of the pleading."62

Query: How could these objections appear other than on the face of the pleading? It is submitted that the above quoted language of the section is mere surplusage.

Section 63 provides that a party may move for a more definite statement or for a bill of particulars with respect to any matter contained in a pleading "which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare generally for trial when a responsive pleading is not required." The section also provides that if the motion be granted and the order of court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion

was directed or make such other order as it deems just. It is likewise pro-
vided that a bill of particulars becomes a part of the pleading which it sup-
plements.63

This section is substantially the same as the new Federal Civil Procedural
Rule 12(e), but the above italicized, quoted words of Section 63, are not
found in the federal rule.

It is submitted that this rule is vitally important and it is hoped that
it will be liberally construed by our courts to serve the purpose for which
it is intended. The federal rule has been rendered of little or no beneficial
effect as construed by the federal court. Such courts have generally denied
motions to make pleadings more definite or for a bill of particulars and have
required parties to seek information through the more cumbersome, expen-
sive, and inconvenient methods of discovery through interrogatories, deposi-
tions, or pre-trial hearings. It is hoped that our courts will not erase the
beneficial provisions of Section 63 by any narrow construction as have the
federal courts with reference to their rule of Civil Procedure 12(e). It is not
believed that our court will follow the improper precedents established by
the federal court for the reason that Section 36 of our code requires material
"facts" to be pleaded whereas Federal Rule 8 and approved form 9 require
only general conclusions—not facts—to be pleaded to render a pleading suf-
cient. It was to get away from Federal Rule 8, as construed by the federal
court, that our legislature amended Section 36 of the code to require "facts"
to be pleaded.

Section 64 authorizes a motion to strike redundant, immaterial, im-
pertinent or scandalous matters from any pleading.64

Section 65 provides that all motions shall be made within the time
allowed for responding to the opposing party's pleading, or, if no responsive
pleading is permitted, within twenty days after the "service" of the last
pleading. Motions and pleadings may be filed simultaneously by the same
party without waiver of the matters contained in either.65

Section 66 provides that motions may be joined and no waiver result
by such joinder or by proceeding to trial on the merits when the objection
is properly raised by motion. This section, however, provides that a party
waives all objections and other matters then available to him by motion

64. S. B. 34 § 64. Cf. Fed. Rule 12(f) and Mo. Rev. Stat. (1939) §§ 936 and
937.
65. S. B. 34 § 65; see also S. B. 34 § 66.
by failure to assert the same by motion within the time limited by Section 65, except (1) failure to state a claim upon which relief can be granted, or failure to state a legal defense to a claim, and except (2) lack of jurisdiction over the subject matter.66

The joinder of all motions in one or the filing of all motions at the same time as above provided will eliminate many trial delays, as under the old code and should be highly beneficial. Technical errors and waivers such as arose under the old code on account of motions and pleas not being presented in proper order will be eliminated under the above provisions.

Section 67 provides that when a motion is directed to an answer or a reply, substantial defects in all prior pleadings may be considered and judgment rendered against the party who has first failed to state a claim upon which relief can be granted or to state a legal defense to a claim.67 This section recognizes the old common law rule with regard to opening the record for consideration.

Section 68 authorizes a motion for judgment on the pleadings by any party after the pleadings are closed, but within such time as not to delay the trial.68

Section 69 provides that all motions shall be heard and determined before trial on application of any party, unless the court for good cause orders that the hearing and determination be deferred until trial.69

Section 70 provides that all motions and other acts or proceedings, except trials upon the merits, may be heard and performed by a judge in chambers without the attendance of the clerk or other court official; and this “at any place either within or without the county.” The section also provides that “no hearing, other than one ex parte, shall be conducted outside the county without the consent of all parties affected thereby.”70

Section 71 provides that trial court shall establish regular and frequent motion days and lodges a broad discretion in the trial court as to the manner of expediting the court’s business. Under this section the trial court can

66. S. B. 34 § 66. Cf. Fed. Rule 12(g) and (h) and Mo. Rev. Stat. (1939) §§ 922 and 926; S. B. 34 §§ 72, 114(d) and 140(a). See also S. B. 34 § 65.
68. S. B. 34 § 68; Fed. Rule 12(c).
VII. DEFENSES, COUNTERCLAIMS, AND CROSS-CLAIMS

Section 72.2a By this section all defenses and objections for which there is no provision for the raising of same by motion shall be raised in the responsive pleading if one is permitted, and when no responsive pleading is required, the case shall be deemed at issue. All issues of fact raised or deemed to be raised shall be determined at the trial. This section also provides:

"If a responsive pleading is required all defenses or objections not raised therein are waived, except (1) failure to state a claim upon which relief can be granted, or failure to state a legal defense to a claim, and, except (2) lack of jurisdiction over the subject matter."

Section 73. Under this section it is mandatory to plead as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the party has against any opposing party, if it arises out of a transaction or occurrences constituting the subject matter of the opposing party's claim, and does not require the presence of third persons as parties who are beyond the jurisdiction of the court.73

Undoubtedly, if a party does not plead a counterclaim, as above required, this will constitute an estoppel or waiver.

Under Senate Bill No. 34 as originally introduced (original Section 74), permissive counterclaims were authorized which did not arise out of the transaction or occurrence constituting the subject matter of the opposing party's claim. The legislature, however, eliminated this section specifically authorizing permissive counter-claims. It is submitted, however, that permissive counterclaims are authorized under the broad provisions of Section 37 of the new code.

Apparently under the new code, counterclaims, sounding both in tort and in contract, may be joined, and this irrespective of the nature of the opposing party's claim or claims.

Section 74 provides that a counterclaim may or may not diminish or

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72. S. B. 34 § 72. Cf. Fed. Rule 12(g) and (h); Mo. Rev. Stat. (1939) §§ 926, 933, and 1081 to 1083.
72a. Cf. S. B. 34 §§ 66, 114(d) and 140(a).
73. S. B. 34 § 73. Cf. Fed. Rule 13(a) and (b) and Mo. Rev. Stat. (1939) §§ 917, 922, 929 and 989 to § 1001.
defeat the recovery sought by the opposing party. The relief sought may exceed in amount or be different in kind from that sought in the pleading of the opposing party.\textsuperscript{74}

\textit{Section 75}. Under this section a claim, either maturing or acquired by the pleader after “serving” his pleading, may, with permission of the court, be presented as a counter-claim by supplemental pleading.\textsuperscript{76}

\textit{Section 76}. Under this section a counterclaim may be pleaded by amendment, with leave of court, where the prior failure to plead through oversight, inadvertance or excusable neglect, or justice so requires.\textsuperscript{78}

\textit{Section 77} authorizes cross-claims by one party against a co-party arising out of the transaction or occurrences which is the subject matter either of the original action or of a counterclaim therein. Such claim may include a claim that the party against whom it is asserted is, or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.\textsuperscript{77}

\textit{Section 78}. When additional parties are required for complete relief under counterclaim or cross-claim, this section requires the court to order them brought in as parties defendant, if jurisdiction can be obtained.\textsuperscript{78}

\textit{Section 79}. Where separate trials are ordered under section 97, this section provides that judgment on a counterclaim or cross-claim may be rendered, even if the claims of the opposing party have been dismissed or otherwise disposed of.\textsuperscript{79}

\textit{Section 80} provides that, except as otherwise provided by law as to negotiable instruments, every assigned claim shall be subject to be reduced to the extent of all counterclaims which the obligor has against the plaintiff assignor at the time of notice of the assignment.\textsuperscript{80}

\section*{VIII. Amendments}

\textit{Section 81}. This section provides that pleadings may be amended as a matter of course at any time before a responsive pleading is “filed and served”; or where no responsive pleading is required and the action has

\begin{itemize}
\item \textsuperscript{74} S. B. 34 § 74; Fed. Rule 13(c).
\item \textsuperscript{75} S. B. 34 § 75; Fed. Rule 13(e).
\item \textsuperscript{76} S. B. 34 § 76; Fed. Rule 13(f).
\item \textsuperscript{77} S. B. 34 § 77; Fed. Rule 13(g).
\item \textsuperscript{78} S. B. 34 § 78. Cf. Fed. Rule 13(h); S. B. 34 § 15(b).
\item \textsuperscript{80} S. B. 34 § 80. Cf. Mo. Rev. Stat. (1939) §§ 990, 991 to §§ 993 and 996.
\end{itemize}
not been placed upon the trial calendar, the pleading may be amended "within 30 days after it is filed." Otherwise, amendments can be made only by leave of court or by written consent of the adverse party. A party is required to plead to an amended pleading within the time remaining for response to the original pleading or within ten days after "service" of the amended pleading, whichever period may be the longer, unless the court otherwise orders.81

Section 82 provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, the pleadings may be amended, or shall be treated as amended, to conform to the evidence. If evidence is objected to as not within the issues made by the pleadings, amendments may be allowed when the presentation of the merits of the action will be subserved and the objecting party fails to show that he will be prejudiced thereby. The court may grant a continuance to enable the objecting party to meet such evidence.82

Section 83 authorizes a party, upon motion, reasonable notice and terms "to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The court may require the adverse party to plead thereto and specify the time therefor.83

IX. Trial Court Procedure

Section 84 lodges a discretion in the trial court to inaugurate pre-trial conferences (1) to simplify issues, (2) to make necessary or desirable amendments to pleadings, (3) to obtain admissions of fact and of documents to avoid unnecessary proof, (4) to limit the number of expert witnesses, and (5) to consider such other matters as may aid in the disposition of the action. The trial court in its discretion may establish by rule a pre-trial calendar. Results accomplished at pre-trial conferences are embodied in court orders which control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.84

This section introduces an innovation to Missouri procedure and should

84. S. B. 34 § 84; Fed. Rule 16.
be highly beneficial, but will be beneficial only when trial judges exercise the discretion granted, and then only within proper limits.

Section 85 authorizes a party to serve an adverse party with written interrogatories to be answered by the party served, or if such party be a public or private corporation, a partnership or association, to be answered under oath by any officer, director, partner or managing agent competent to testify. Answers must be signed by the person making them and a copy thereof "served" on the party submitting the interrogatories within fifteen days after delivery, unless otherwise ordered. Objections to interrogatories may be presented to the court within ten days after service, on notice, as in case of a motion; and answers shall be deferred until the objections are determined. No party, without leave of court, can serve more than one set of interrogatories to be answered by the same party. 85

Section 86 provides that a party upon motion and notice, and for good cause, may obtain a court order (1) ordering any party to produce and permit the inspection and copying or photographing of designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain material evidence, or (2) ordering any party to permit entry upon designated land or other property in his possession or control for the purpose of inspection or making photographs of any designated relevant object or operation thereon. The court order shall specify the time, place, and manner of inspection and may prescribe such terms and conditions as are just. 86

Section 87 authorizes the court, upon motion, notice and for good cause shown, to order a party, when material, to submit to a physical or mental examination by a physician, chosen by the party requesting the examination. The order shall specify the time, place, manner, condition, and scope of examination and the person or persons by whom it is to be made. The physician making the examination shall be deemed the witness of the party procuring the examination, unless called as a witness by the opposing party. This section also provides that upon request of and without cost to him, the party examined shall be ordered furnished with a full written report of the examination. 87

It is submitted that Section 87, unlike the new Federal Rule 35, is weak, one-sided or partial, and does not result in full discovery to both parties.

Federal Rule 35 provides that if the party examined requests a copy of the examination report, (a) the party causing the examination to be made is entitled to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition, and (b) the party examined waives any privilege he may have regarding the testimony of any other person who has made an examination with respect to the same mental or physical condition. Section 87 does not contain such commendable provisions.

Section 88 authorizes written requests for the admission (for the purpose of the pending action only) of the genuineness of relevant documents or of the truth of any relevant matters of fact pertaining to such documents. The section sets forth the procedure for obtaining such admissions and the rights of the adverse party with respect to such requests.\textsuperscript{88}

Section 89 sets forth various methods by which Sections 85, 86, 87, and 88 may be enforced, as well as the resulting penalties that may be imposed for a refusal to obey the provisions of said sections. The court, among other things, may (a) treat the facts sought as established, (b) refuse to allow the disobedient party to introduce evidence or support or oppose designated claims or defenses, (c) strike out pleadings, (d) dismiss the action in whole or in part or render judgment by default, and (e) impose court costs on the disobedient party.\textsuperscript{89}

Section 90 provides that all trials upon the merits shall be conducted in open court and, as far as convenient in the regular court room, that trials may be conducted or motions heard outside the county where pending, with the consent of all parties affected thereby.\textsuperscript{90}

Section 91 provides that the court clerk shall place cases upon the trial docket as soon as possible after issue is joined, or after ten days from the date a case reaches the trial court upon appeal, change of venue, or otherwise, upon issue already joined. Cases are to be set for trial in accordance with the rules and practice of the trial court, except as to such appeals as otherwise especially may be provided for by law.\textsuperscript{91}

Sections 92-96. These sections deal with continuances, the application and grounds thereof, and the sufficiency thereof. Applications must be made


by motion in writing unless the adverse party consents that it be made orally in open court. Amendments are authorized.

If the application for continuance be based on the ground of an absent witness and the application and affidavit be sufficient, the cause shall be continued, unless the opposite party admits that the witness, if present, would swear to the facts set out in the affidavit, in which event the cause shall not be continued, and the party moving for continuance may read the facts stated in the affidavit as the evidence of the absent witness. The opposing party may disprove the facts disclosed, or prove any contradictory statement made by such absent witness. Another stated ground for continuance, either of trial or preliminary procedural steps, including the taking of depositions, is the fact that the party applying for such continuance or his attorney is a member of the Missouri legislature and in actual attendance at a session of same.92

Section 97 provides that whenever several suits, founded alone upon liquidated damages, shall be pending in the same court by the same plaintiff (a) against the same defendant or (b) against several defendants, the court may consolidate such suits into one action. Said section also provides that the court may order separate trials of different claims to avoid inconvenience or prejudice.93

Section 98. By this section the right of trial by jury, as declared by constitution and as given by a statute, is preserved to the parties inviolate. This section also provides that the issue as to whether a release, composition, or discharge was fraudulently or otherwise wrongfully procured, shall be tried by jury, unless waived.

Parties, including infants, incompetent persons, and their legal representatives, are deemed to have waived trial by jury, (1) by failing to appear at trial, (2) by filing written consent in person or by attorney, (3) by oral consent in court, and (4) by entering into trial before the court without objection.

In actions against the state when a statute provides for trial without a jury, the court with the consent of both parties, may order a jury trial, the verdict having the same effect as if trial by jury had been a matter of right.94

Sections 99-104. These sections deal with dismissals.

Section 99 allows a plaintiff one dismissal without prejudice at any time before final submission to the court or to the jury. A second dismissal without prejudice is not allowed after the jury has been empanelled, or after evidence has been introduced in a non-jury case, except by stipulation or by court order made on special verified motion for good cause. Section 99 also provides that no party, who has been granted one dismissal at his request after an adverse ruling preventing a recovery, shall as a matter of right be granted more than one new trial or more than one appeal on the ground that the adverse ruling was erroneous.95

Section 100. Under this section a defendant may move for dismissal of an action or of any claim against him for failure of the plaintiff to prosecute or comply with the code or any order of court. The defendant may also move for dismissal at the close of plaintiff's evidence on the ground that upon the facts and the law the plaintiff has shown no right to relief, and this without waiving his right to offer evidence in the event the motion is not granted or in the event that the motion is granted and the resulting judgment is later held erroneous.96

Section 101 provides that a dismissal without prejudice permits the party to bring another action for the same cause, unless the action is otherwise barred, but that a dismissal with prejudice operates as an adjudication upon the merits. Any voluntary dismissal, other than one which the party is entitled to take without prejudice, and any involuntary dismissal, other than one for lack of jurisdiction or for improper venue, shall be with prejudice unless the court in its order for dismissal shall otherwise specify.97

Section 102 provides that the provisions of Sections 99, 100, 101 and 104 apply to the dismissal of any counterclaim, cross-claim, or thirty-party claim.98

Section 103 provides that a dismissal, either voluntary or involuntary, of a plaintiff action shall not operate to dismiss or discontinue a counterclaim or cross-claim in said action.99

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95. S. B. 34 § 99. Cf. Fed. Rules 13(i) and 41(a) and (c) and Mo. Rev. Stat. (1939) §§ 978, 979, 1001, 1041, 1107, 1108, 1110, and 1111. See also S. B. 34 § 79.
Section 104 provides that if a plaintiff has once dismissed an action in any court and commences a second action based upon or including the same claim against the same defendant, the court may make an order for the payment of any unpaid costs of the action previously dismissed and may stay the proceedings in the second action until the plaintiff has complied with the order.\(^{100}\)

Section 105. Under this section at the close of the evidence, or at such earlier time during trial as the court may reasonably direct, any party may request that the court instruct the jury on the law applicable to the issues in evidence. The court may also instruct the jury of its own motion. Instructions and requests for instructions must be in writing. Given instructions are required to be carried by the jury to their jury room. Instructions, both given and refused, are required to be filed and kept as a part of the record.

Section 105, as passed, also provides:

"The court shall afford ample opportunity for counsel to examine the instructions before the same are given and to make objections out of the hearing of the jury."

The above quoted provision puts a duty upon trial judges to give counsel ample opportunity to examine and consider instructions before they are given and puts a duty on counsel—at least a moral and ethical duty—to point out defects in instructions and make objections out of the hearing of the jury.\(^{101}\)

The above quoted provision of Section 105, however, is not mandatory in requiring specific objections to instructions, and failure to present such objections do not constitute waivers.

When the above Section 105 (originally Section 113) was first presented in Senate Bill No. 34 the following provision was included, immediately following the above quoted provision, namely:

"No party may thereafter complain of the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

The last quoted provision gave rise to considerable controversy and objection, and the legislature deleted same. By the above amendment specific and formal objections to instructions are not required, and errors charged to instructions are preserved in the same manner as heretofore.


It is submitted that the legislature properly deleted the above provisions requiring specific objections to instructions, as such provisions, if enacted into law, would result in many cases riding off on mere technicalities, with the merits undetermined; and review of the substantial rights of litigants would be foreclosed by the ignorance or oversight of counsel. Such provisions, if enacted, would not be in accord with the primary purpose of the new code "to secure the just, speedy, and inexpensive determination of every action."

Sections 106-111. These sections are concerned with verdicts.

Section 106 provides that a verdict of a jury is either general or special. A general verdict is defined as one by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is defined as one by which the jury finds the facts only, leaving the judgment to the court.102

Section 107 provides that in every issue for the recovery of money only, or specific, real or personal property, the jury shall render a general verdict.103

Section 108 provides that in all other cases, if at any time during the progress of any cause, it shall, in the opinion of the court, become necessary to determine any facts in controversy by the verdict of a jury, the court may direct an issue or issues to be made.104

Section 109 states that no issue shall be made, except such as shall be directed by the court.105

Section 110 requires the trial of such issues to be by jury, and provides that the issues shall be disposed of by a general or special verdict before a final judgment shall be made.106

Section 111 provides that in actions for the recovery of money only, when the verdict is for the plaintiff or for the defendant in case of offsets or other demands for money, the jury shall also assess the amount of the recovery. Section 111 also provides that when exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict.107

When Senate Bill No. 34 was introduced in the legislature Federal Rule

of Civil Procedure 49(a), authorizing special verdicts only, at the discretion of the trial judge, was included verbatim as original Section 114, and original Section 115 provided for a general verdict when the trial court did not require a special verdict. These sections were deemed unsatisfactory by the legislature, and the above Sections 106-111, merely announcing present law, were substituted in lieu thereof.

When Senate Bill 34 was before the legislature many attorneys advocated that a section be included in the new code authorizing special questions to the jury to be answered and returned, accompanied by a general verdict, similar to Federal Rule of Civil Procedure 49(b), or even better, Section 60-2918, General Statutes of Kansas 1935, but the legislature refused so to do and merely reenacted present law.

It is submitted that if special questions and special answers were authorized by our code, similar to the above Kansas statute, it would be highly beneficial. Many cases that are now reversed and remanded on account of error not shown to be harmless by the record would be affirmed, where the answers to special questions would affirmatively show the error as harmless. The present trend is toward requiring administrative boards to make special findings of fact. This is also the rule under the new Federal Code of Civil Procedure and under our new code in actions tried to the court without a jury.\textsuperscript{108} There is no reason why juries, within proper limits, cannot and should not, make similar special findings of fact.

\textit{Section 112} abolishes the demurrer to the evidence and the request for peremptory instructions, and in lieu thereof the motion for a directed verdict is substituted. A motion for a directed verdict does not waive the right to introduce evidence or waive a trial by jury in the event the motion is not granted. Upon motion for directed verdict by a party opposing a claim, the court, whether so requested or not, may dismiss the claim without prejudice, rather than sustaining the motion, if justice so requires.\textsuperscript{109}

\textit{Section 113} provides that whenever a motion for a directed verdict made at the close of all the evidence is denied, or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set


aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed in the alternative. If a verdict has been returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict has been returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.\textsuperscript{110}

Section 114 outlines procedure in cases tried upon the facts without a jury. The court is required to rule upon all objections to evidence as in jury cases and where, in the opinion of the court, evidence is not admissible, it shall not be received, except, where the evidence is brief and not privileged, the court shall permit the same (including evidence on cross examination and evidence in rebuttal relating thereto) to be preserved apart from the evidence received. Upon request of any party the court is required to make specific findings of fact and prepare and file a brief opinion containing a statement of the grounds for its decision and the method of determining any damages awarded; but no findings of fact, except such as have been specifically requested, and no conclusions of law or objections to the judgment or to the opinion of the court are necessary for purposes of review. All fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached.

Upon motion of a party made not later than ten days after entry of judgment the court may amend the judgment and opinion. This motion may be made with a motion for new trial.

The appellate court reviews the case upon both the law and the evidence as in suits of an equitable nature, and such court shall consider any evidence rejected by the trial court and duly preserved when the appellate court believes such evidence to be admissible. The appellate court may also order any rejected evidence to be taken by deposition or under a reference and returned to said court.

It should be particularly pointed out that Section 114(d) expressly provides:

\textsuperscript{110}. S. B. 34 § 113; Fed. Rule 50(b).
“The question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the trial court.”

X. New Trial

Section 115 provides that a new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court, or referee; that in an action tried without a jury, the court may open a judgment if one has been entered, take additional testimony, amend findings of fact, or make new findings, and direct the entry of a new judgment. This section also provides that only one new trial shall be allowed on the ground that the verdict is against the weight of the evidence, and that every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted.

Section 115 expressly provides:

“A new trial may be granted for any of the reasons for which new trials have heretofore been granted.”

As originally introduced this section, through oversight, did not state any grounds upon which new trials could be granted. When this was called to the attention of the legislature, the above streamlined provision, patterned after Federal Rule 59(a) was inserted. It was pointed out to the legislature that this streamlined provision would require reinvestigation each time of the prior law to ascertain if a new trial could be properly granted, and that it would be preferable to set forth the particular grounds authorizing a new trial as under the present law. The legislature, however, did not see fit so to do.

Section 116. Under this section a motion for new trial shall be filed not later than ten days after the entry of the judgment. The judgment is required to be entered as of the day of the verdict. If a timely motion is filed, the judgment is not final until disposition of the motion.

It will be noted that Section 116 extends the time to file a motion for a new trial from four to ten days, and this without any limitation of court term. Motions for directed verdict and motions to amend judgment and

opinion are provided for in like time under Sections 113 and 114(c), respectively. It is submitted that these motions, timely filed, likewise keep the judgment from becoming final until such motions are disposed of.

Section 117 provides that when a motion for new trial is based upon affidavits they shall be "served" with the motion. The opposing party has ten days after such "service" within which to "serve" opposing affidavits, which period may be extended for an additional period not exceeding twenty days, either by the court for good cause shown, or by the parties by written stipulation. The court may permit reply affidavits.114

It will be noted that under Section 116 a motion for new trial is required to be "filed," but under Section 117 affidavits, upon which a motion for new trial is based, are required to "be served with the motion." These sections serve to point out the confusion throughout the new code as to whether pleadings and motions must be "served" or "filed" or both "served and filed."115

Section 118 provides that if the motion for new trial is not passed on within 90 days after the motion is "filed," it is deemed denied for all purposes.116

It will be noted that Section 118 limits the time of the trial court to pass on a motion for new trial to ninety days after the motion is filed. As originally introduced the time was limited to sixty days. This time was considered too short by the legislature for a trial court, even acting with due diligence, to give careful and proper consideration to the matters presented. The section is framed to enable the trial court, acting with due diligence, to have an opportunity to correct its own errors, but the section prevents delay by trial courts in passing on motions for new trial. The section is rather liberal in giving trial courts the opportunity to correct their own errors, as compared with proposed and recommended Section 24 of Plan II of the Supreme Court Advisory Committee which made motions for new trial unnecessary for review unless the objection to be urged on appeal was not otherwise passed on by the trial court.

Section 119. Under this section the trial court of its own initiative, not later than thirty days after entry of judgment, may order a new trial for any reason for which it might have granted a new trial on motion of a party.

114. S. B. 34 § 117; Fed. Rule 59(c).
115. In re "service" and "filing." See section references Note 8 § 5, supra.
116. S. B. 34 § 118.
The section also provides that every order granting a new trial shall specify the grounds therefor.\(^\text{117}\)

Under the old law cases were deemed to be in the breast of the court during the term of court at which the judgment is entered. Under the new code court terms have been eliminated as guides to measure time in which particular procedural steps must be taken. It thus became necessary, as provided in Section 119, to fix a particular time after entry of judgment within which the court could act of its own initiative in granting a new trial in the interest of justice.

Section 120. Under this section motions for judgment notwithstanding the verdict and motions in arrest of judgment are abolished. Objections heretofore made by such motions are raised under the new code either by a motion for new trial or by a motion filed at the same time, as is required for a motion for new trial, praying for appropriate relief.\(^\text{118}\)

Here again the new code simplifies procedure and eliminates the possibility of procedural technical errors due to uncertainty and confusion as between motions.

Sections 121 provides that if a judge before whom an action has been tried is unable to perform the duties to be performed after a verdict is returned or findings of fact are filed, then any other judge sitting in or assigned to the particular court may perform those duties or, if unable so to do for any reason, in his discretion may grant a new trial.\(^\text{119}\)

XI. Appellate Procedure

Section 122. By this section formal exceptions to court rulings and orders are made unnecessary, it being sufficient that a party makes known to the court the action he desires the court to take or his objection to the action of the court and his ground therefor, and even this is necessary only when opportunity has been given so to do.\(^\text{120}\)

Section 123 provides that the supreme court and the courts of appeals


\(^{118}\) S. B. 34 § 120. See Mo. Rev. Stat. (1939) §§ 1171 to 1173, 1184 and 4126; Hyde, Motions After Verdict to Suspend or Prevent Final Judgment (1938) 6 Kan. City L. Rev. 163; Carr, supra note 12, at 40 (suggesting that the motion in arrest of judgment should be abolished).


shall not reverse the judgment of any court except where error has been committed against an appellant that materially affects the merits of the action.\textsuperscript{121}

\textit{Section 124.} When Senate Bill No. 34 was originally introduced this section (original Section 128) provided that bills of exception and the distinction between record proper and the bill of exception were abolished. The section, however, was eliminated by the legislature before final passage.\textsuperscript{122}

\textit{Section 125.} By this section writs of error are abolished in civil cases and review is limited to appeal.\textsuperscript{123}

\textit{Section 126} states the orders and judgments from which appeals may be taken. This section is substantially the same as Section 1184, Missouri Revised Statutes (1939), and reenacts the present law.\textsuperscript{124}

\textit{Section 127} provides that parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; that without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.\textsuperscript{125}

\textit{Section 128} re-enacts Missouri Revised Statutes (1939) Section 1185 as to the designation of parties and the title of an action on appeal.\textsuperscript{126}

\textit{Section 129} recites the steps necessary to take a regular appeal; namely, (1) filing a notice of appeal by "a party or his agent . . . not later than 10 days after the judgment or order appealed from becomes final," and (2) depositing with the clerk of the trial court at the time of filing the notice of appeal the docket fee of ten dollars in the appellate court. After a timely filing of the notice of appeal, failure of the appellant to take further steps to secure the review of the judgment or order appealed from does not affect

\textsuperscript{121} S. B. 34 \S\ 123. See Mo. Rev. Stat. (1939) \S\S 973, 1228, 1265, 1266, 6408 and 6443. See also S. B. 34 \S\ 140(b); Carr, supra note 12, at 40 (suggesting that writ of error should be abolished).

\textsuperscript{122} S. B. 34 \S\ 124.

\textsuperscript{123} S. B. 34 \S\ 125; Mo. Rev. Stat. (1939) \S\S 1200 to 1219, 1221 to 1224, repealed. Criminal writs of error not affected; Mo. Rev. Stat. (1939) \S\S 4131, 4145, 4147. See S. B. 34 \S\S 10 and 145 and S. B. 34 \S\ 145, n. 151 infra.

\textsuperscript{124} S. B. 34 \S\ 126, which is substantially Mo. Rev. Stat. (1939) \S\ 1184, with last sentence omitted, the subject of which (docketing cases) is covered by S. B. 34 \S\ 139(b), and with the addition "nor clearly limited in special statutory provision" on account of such Sections as Mo. Rev. Stat. (1939) \S\S 8636 and 9692.

\textsuperscript{125} S. B. 34 \S\ 127; Fed. Rule 74. See Mo. Rev. Stat. (1939) repealed \S\S 1203 to 1212, 1220 to 1224.

\textsuperscript{126} S. B. 34 \S\ 128, same as Mo. Rev. Stat. (1939) \S\ 1185.
the validity of the appeal, but is ground for such action as the appellate court deems appropriate, which may include a dismissal of the appeal.\textsuperscript{127}

Section 130 provides that in cases where the time for filing ordinary notice of appeal has expired, a party, within six months from date of "final judgment," may apply to the appropriate appellate court by motion and with notice to adverse parties for a special order permitting the appellant to file a notice of appeal. If said motion is supported by proof that the delay was not due to appellant's culpable negligence, the clerk of the trial court will be notified to permit appellant to file motion of appeal.

When appeal is taken after special order under authority of Section 130, the power to issue is lodged exclusively in the appellate court, which has a discretion either to decline a stay or to grant same upon terms. Any supersedeas bond authorized by the appellate court shall be filed in the trial court, and the sureties therein shall be subject to the jurisdiction of the trial court as provided in Section 134.

Where an appeal is taken as provided by Section 130, if the final judgment of the trial court is reversed or modified, this shall not affect the rights of any person not a party to such suit acquired in good faith after expiration of the time prescribed for the taking an appeal without a special order, but before the filing of the notice of appeal by special order.\textsuperscript{128}

The legislature in adopting Section 130 recognized that the short time permitted by Section 129 in which to file a notice of appeal would, no doubt, result unjustly in denying a review in some cases; hence, the provisions of Section 130 to avoid any such injustice.

It will be noted that under Sections 129 and 130, the steps necessary to take an appeal have been very much simplified.

Section 131 prescribes the requirements of a notice of appeal and provides that the clerk of the trial court shall give notice of the "filing" of the notice of appeal to all other parties to the judgment and to the clerk of the appropriate appellate court. Such notice is to be given by mailing copies of the notice of appeal by registered mail. Neither the prior death of the party or attorney to be served nor the failure of the clerk to give such notice affects the validity of the appeal.\textsuperscript{129}

\begin{enumerate}
\item[127.] S. B. 34 § 129; see Fed. Rule 73(a) and Mo. Rev. Stat. (1939) §§ 1186 and 1187.
\end{enumerate}
It would appear clear under Section 131, requiring the trial court clerk to serve notice of appeal by registered mail, that an appealing party filing notice of appeal under Section 129 or 130 is also relieved from serving notice of appeal on the other parties to the judgment or order.

Section 132 states the cases in which a stay of execution is authorized and sets forth the conditions of the supersedeas bond, as required in some cases.\(^{130}\)

The section, unlike the present law limiting the time to file a supersedeas bond by court term, requires the bond to be filed within twenty days from the date of order authorizing same. The bond is not required to include as a penalty a sum double the amount involved, as under the present law, but an amount fixed by the court to fully protect the other parties to the judgment is sufficient. It is expressly provided that the bond shall indicate the addresses of the sureties.

Section 133 provides that if a supersedeas bond is not filed within the time specified in Section 132, or if the bond is found insufficient, and if the action has not as yet been transferred to the appellate court, a bond may be filed at such time before the action is so transferred, as may be fixed by the trial court. After the action is transferred, application for leave to file a bond may be made only in the appellate court.

This section recognizes that an appealing party may overlook filing, or be unable to file, a supersedeas bond within the limited time fixed by Section 132. Additional time to file a supersedeas bond is therefore authorized by Section 133. It should be particularly noted that an appellate court, after a case is transferred to it, can authorize and grant leave to file a supersedeas bond.\(^{131}\)

Section 134 provides that a surety, by entering into a supersedeas bond, submits himself to the jurisdiction of the trial court and his liability may be enforced on motion for judgment, without the necessity of an independent action. The motion may be served on the surety in the same manner as a summons, or if the surety is not a resident who can be found in the county, and the surety maintains no office therein, service shall be made by the trial court clerk by registered mail to the last known address of the surety.\(^{132}\)

This section affords a quick and simple remedy against a surety on a

\(^{130}\) S. B. 34 § 132. Cf. Fed. Rule 73(c) and (d) and Mo. Rev. Stat. (1939) § 1188.


supersedeas bond. Here, again, service by registered mail may be used as above indicated.

Section 135. Under this section an appellant is required to prepare or cause to be prepared and filed, within ninety days after appeal is taken, a full transcript of the record in the cause including the bill of exceptions, or, if the parties agree in writing, an abbreviated or partial transcript of the evidence, either in narrative or question and answer form. The transcript of record agreed to by the parties, or by the judge and the clerk of the trial court under his hand and seal of the court, shall be transmitted to the proper appellate court. A copy of the transcript of record, including the bill of exceptions, shall remain on file in the office of the clerk of the trial court.

Section 135 expressly provides:

"The Supreme Court and the Courts of Appeal in making and promulgating rules in relation to the practice in those courts shall have no power or authority by order, rule, decree or otherwise to require parties to print the transcript of the record including the bill of exceptions or to print abstracts of the record including the bill of exceptions."

Section 135 further provides that the review courts shall make rules with reference to taxing as costs against the losing party a reasonable charge for the transcript of the record, including the bill of exceptions, but that said court shall have no power to require any party to an appeal to file a bond for costs in those courts.133

The above Section 135 is one of the most important in the entire code as it expedites, simplifies, and greatly lessens the expense of an appeal. This section, not requiring the record on appeal to be printed, should open the doors of our upper courts to more reviews and permit the poor litigant to have his case reviewed.

Section 136 provides that when the questions presented by appeal can be determined without an examination of all the pleadings, evidence and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. This statement is required to include a copy of the judgment

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133. S. B. 34 § 135. Cf. Fed. Rule 75 and Mo. Rev. Stat. (1939) §§1180, 1181, 1194-1199. See also S. B. 34 § 139; Carr, supra note 12 (where the writer suggested that the requirement that a bill of exceptions be printed, should be changed).
or order appealed from, a copy of the notice of appeal with its date of filing, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the question raised, shall be approved by the trial court and shall then be certified to the appellate court as the transcript on appeal.134

This section, likewise, tends to simplify and lessen the expense of an appeal. If used by attorneys it should be highly beneficial to litigants.

Section 137. By this section the transcript on appeal is required to be filed with, and the action transferred to, the appellate court within ninety days from the date of filing of the notice of appeal, except where more than one appeal is taken from the same judgment or order to the same appellate court, in which event the trial court may prescribe the time for filing and transferring, which shall in no event be less than ninety days from the date of filing of the first notice of appeal.135

This section will greatly expedite appeals.

Section 138 very properly lodges in the trial court a discretion to extend the time within which any act may be done under Sections 135 and 137—time to prepare and file a transcript on appeal. This power is in accordance with the general authority given to trial courts under subsection "b" of Section 6 of the new code.136

This beneficial section will permit the review of cases, which otherwise would be denied, review due to the limitations of time provided in Sections 135 and 137.

Section 139 authorizes the appellate courts to provide by rule the requirements for briefs, the manner in which transcripts, briefs, and other documents shall be served upon or made available to the opposite party, the time and manner in which appeal shall be docketed and set for argument (even contrary to prior statutes giving particular preference), and for the taxation of costs of preparing transcripts on appeal.

Section 139 very properly provides:

"Any appellate court may suspend or modify the rules made in pursuance of this section in a particular case upon a showing that

136. S. B. 34 § 138. Cf. Fed. Rules 6(b) and 73(g) and Mo. Rev. Stat. (1939) §§ 1193, 1194, 1195 and 1199. See also S. B. 34 § 6(b).
justice requires a suspension or modification, and shall do so especially when litigant is a poor person and the general rules require a burdensome expenditure of money."

Section 140. Under this section an appellate court is authorized to award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as such court ought to have given, as to the appellate court shall seem agreeable to law. The section points out that unless justice requires otherwise, the review court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears. Upon an affirmation or dismissal of a "case," the review court is authorized to award penalties, as therein provided, as may be just. The section also provides that when a judgment is affirmed for part of a sum for which judgment was rendered by the trial court, such part shall bear lawful interest from the date of rendition of the original judgment in the trial court. Execution may be awarded either out of the review court or the trial court.

Section 140 points out, as does also Section 123, that no judgment shall be reversed by an appellate court unless the error committed by the trial court against the appellant materially affects the merits of the action.

It should be particularly pointed out that Section 140 provides:

"Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or legal defense to a claim, no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court." It is submitted that the last quoted language of Section 140 overlooks, and is inconsistent with, the language of Section 114(d), referring to cases tried upon the facts without a jury, where it is stated:

137. S. B. 34 § 139. Cf. Mo. Rev. Stat. (1939) §§ 1193, 1194, 1195, 1196, 1225, 1226, and 2087. See also S. B. 34 § 135. For examples of present statutes giving particular cases preference in docketing and hearing, see Mo. Rev. Stat. (1939) §§ 1184 (appeals from orders refusing to revoke or modify interlocutory orders appointing receivers); 3752 (workmen's compensation appeals); 5692 (Public Service Commission cases); 11669 (election contests); 11796 (corrupt practice proceedings); 12484 (sanitary district cases) and 12834 (proceedings for removal of public officers).

138. S. B. 34 § 140.
142. See S. B. 34 § 123 and note 121. supra.
143. Cf. S. B. 34 §§ 66, 72 and 114(d).
"The question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the trial court."

As originally introduced Section 140 (then Section 144(a)) required all errors that had to be presented to or expressly decided by the trial court to be "specifically raised in a timely motion for new trial." This provision, however, was stricken out by the legislature as injecting too many technicalities and the present practice was approved.144

Section 140A makes the decision of the majority of the judges of the supreme court or of the court of appeals the decision of the court, but provides that if in any case the judges shall be equally divided in opinion, a special judge learned in the law may be agreed upon in writing by the parties, or, absent such agreement, appointed by court order.145

Section 141 requires the judicial opinions of our upper courts to be reduced to writing and filed in the case; and, if the decision is not unanimous, the opinion is required to show which judge delivered it, and which judges concurred or dissented. The clerk of the upper court, when an opinion is filed in his office, is required to endorse thereon the day on which filed, to enter same upon his minutes, and within thirty days thereafter to make a true copy thereof and transmit same without delay to the trial court.146

XII. Documentary Evidence; Depositions

Section 142 authorizes a trial court, by court order, and by subpoena, to command the production of documentary evidence, either by a witness or a party, on the taking of a deposition.147

This section changes the present Missouri law.

Section 143 (originally Section 147) with reference to depositions (almost identical with Federal Rule 30(d)) was eliminated by the legislature and needs no special reference here.148

Section 144 states the requirements for reading, signing and amending


147. S. B. 34 § 142. Cf. Fed. Rule 45(a), (b) and (d)(1); see Mo. Rev. Stat. (1939) § 1937.

148. S. B. 34 § 143.
depositions and when these provisions may be waived. A motion to suppress is indicated as the proper procedure to raise questions involving the validity of the deposition on account of the refusal or failure of the deponent to sign same.\textsuperscript{140}

XIII. CRIMINAL CASES UNAFFECTED

Section 145 provides that this code shall not apply to criminal procedure and is not intended even to affect such procedure; that if by inadvertence criminal procedure statutes are affected by this code, the supreme court shall immediately promulgate a rule restoring the criminal provisions affected to the end that the procedure in criminal cases shall not be changed by this code.\textsuperscript{150}

This section was deemed necessary, as the criminal code is not self sufficient but is supplemented by provisions of the civil code; and some of the sections of the civil code, also applicable to the criminal code, have been repealed by this act, as for example, sections dealing with writs of error.\textsuperscript{151}

The most important new provisions of the new Code of Civil Procedure, hereinbefore referred to, may be summarized as follows:

1. Court terms are eliminated as measuring the time: (a) to plead (Secs. 28(b) and 58), (b) to suggest death (Sec. 22), (c) to file motion for new trial (Sec. 116), (d) for a trial court to grant a new trial of its own initiative (Sec. 119), (e) to take appeals (Secs. 129-130), (f) to file a superseded bond (Secs. 132-133), (g) to transfer case to appellate court (Sec. 137), and (h) to perform procedural steps in general (Sec. 6(c)).

2. Formal opening and continuance of court terms are not required (Sec. 9).

3. The Supreme Court of Missouri is authorized to adopt uniform appellate court rules, as well as to promulgate general rules for all courts of the state; and all of the appellate courts are authorized to suspend or modify rules in a particular case upon a showing that justice so requires. (Secs. 10, 139.)

4. Alternative relief may be sought in the same action (Secs. 16, 36, 37, 42).

5. Misjoinder of parties is not a ground for dismissal (Sec. 17).

6. Interpleader rules are liberalized (Sec. 18).

\textsuperscript{140} S. B. 34 § 144, which is substantially Fed. Rule 30(e).

\textsuperscript{150} S. B. 34 § 145. See also S. B. 34 § 125.

\textsuperscript{151} See State v. Lackey, 236 S.W. 529, 530 (Mo. App. 1923) and Mo. Rev. Stat. (1939) §§ 1200 to 1224—particularly Sec. 1202; and see Cr. Code § 4147.
7. Third-party proceedings, an innovation in Missouri procedure, are recognized within broad scope (Sec. 20).

8. The original petition, as well as the summons, must be served on all defendants (Sec. 27).

9. Service by registered mail is authorized (Secs. 28, 30).

10. Counterclaims, not already the subject of a pending action, growing out of the same transaction upon which the plaintiff's claim is based are mandatory if jurisdiction of the necessary parties can be acquired (Sec. 73) and independent or alternate counterclaims, whether legal or equitable may be joined (Sec. 37).

11. Claims and defenses may be pleaded in the alternative or hypothetical (Sec. 42).

12. Pleadings are required to be numbered by paragraphs (Sec. 43).

13. An exhibit to a pleading is a part thereof for all purposes (Sec. 44).

14. Judicial notice shall be taken of the public statutes and judicial decisions of another state where the pleading states that the law of another state is relied upon (Sec. 54).

15. Demurrers, pleas in abatement, and pleas to the jurisdiction are abolished, and matters formerly reached thereby are reached by motion under the new code (Sec. 59; see Secs. 60-71).

16. Trials and hearings may be conducted outside the county where suit is pending with the consent of all parties affected (Secs. 70, 90).

17. Cross-claims are authorized by one party against a co-party, which arise out of the same transaction and subject matter of the original action or of a counterclaim (Sec. 77).

18. Pleadings are treated as conforming to the proof, either with or without amendment (Sec. 82).

19. Pretrial conferences and practice are recognized for the first time in Missouri (Sec. 84).

20. Written requests for the admission of the genuineness of documents are authorized (Sec. 88).

21. Dismissals without prejudice are limited and controlled (Secs. 99-104).

22. Demurrers to the evidence and requests for peremptory instructions are abolished, and in lieu thereof the motion for a directed verdict is substituted (Secs. 112-113).

23. Law actions tried to the court without a jury are tried as equity cases (Sec. 114).

24. New trials may be granted to all or a part of the parties and on all or a part of the issues; and in cases tried without a jury the court may open judgment, take additional testimony, amend findings of fact, or make new findings (Sec. 115).

25. The trial court is limited to a period of ninety days after a motion for new trial is filed within which to pass on same; and if not so
passed upon, the motion is deemed denied for all purposes (Sec. 118).

26. The trial court may order a new trial of its own initiative within thirty days after entry of judgment (Sec. 119).

27. Motions for judgment notwithstanding the verdict and motions in arrest of judgment are abolished. Objections formerly made by such motions are to be made either by a motion for new trial or by motion filed at the same time as is required for a motion for new trial, praying for appropriate relief (Sec. 120).

28. Formal exemptions are abolished (Sec. 122).

29. Writs of error are abolished, and review in civil cases is limited to appeal (Secs. 125, 126-131).

30. One or more parties may appeal without summons and severance (Sec. 127).

31. Appeals are simplified and taken by the filing of a notice of appeal, together with a deposit of the appellate court docket fee (Secs. 129-131).

32. Supersedeas bonds may be filed and approved by the trial court up to the time the case is transferred to the appellate court, and, with leave of the appellate court, after transfer of the action to such court (Sec. 133).

33. Summary action may be taken against a surety on a supersedeas bond by motion in the same proceeding, and service may be had in such case either personally or by registered mail (Sec. 134).

34. The transcript of the record, including the bill of exceptions and the abstract of the record, are not required to be printed, the original typewritten transcript being filed in the review court and a copy in the trial court (Secs. 135, 139).

35. A transcript of the record may be shortened and abbreviated by written agreement of parties (Secs. 135-136).

36. Upper courts are required to dispose finally of cases on appeal unless justice requires otherwise, in which event the review court may award a new trial either in whole or in part, as may be just (Sec. 140).

37. A trial court, by order and by subpoena, can command the production of documentary evidence at the taking of depositions (Sec. 142).

The above summation shows the highly beneficial results occasioned by the passage of the new civil code (Senate Bill 34) in Missouri.

As stated at the beginning, the new code is not perfect. Defects have been pointed out in the foregoing analysis of the various sections. Some of
these defects can be overcome by court rule and proper judicial construction. There are still, however, omissions in our new civil code that should be corrected by subsequent legislatures. Among these omissions may be mentioned (1) summary judgments with proper limitations to prevent impairment of trial by jury and (2) special questions to juries.

The new civil code does not become effective until January 1, 1945, and if a session of the legislature is held prior to such time, some of the defects and omissions of the new civil code may be corrected. In any event, while the new civil code is very beneficial and we have taken a great stride forward, the courts and the bar of the state should not be content, but should ever seek additional amendments to approach closer to the primary objectives hereinbefore mentioned and "to secure the just, speedy, and inexpensive determination of every action."

152. S. B. 34, as originally introduced (original Secs. 87-93) made provisions for summary judgments, but the legislature deleted such provisions. There seemed to be fear that these provisions, similar to those contained in the Federal Rules, would be too broadly construed under federal decisions.

153. See discussion under Sec. 111 at note 107, supra.