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THE NEW MICHIGAN PRE-TRIAL PROCEDURAL RULES—MODELS FOR OTHER STATES?

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I. INTRODUCTION

"Michigan has completed a monumental task in its formulation and adoption of these procedural laws. They encompass the most enlightened views of modern procedural practice. Michigan proudly points to its achievement as a milestone in modern procedural reform."¹

THE new Michigan procedural laws are embodied in a revised set of statutes and court rules which became effective January 1, 1963, after a long period of study by a Joint Committee on Michigan Procedural Revision.² They abolish an anachronistic distinction between procedures in law and equity, abrogate a scattered, disorganized set of rules and statutes, and create a unified, coherent procedural system.

As a part of this system, the Michigan Supreme Court has promulgated new General Court Rules similar to most of the Federal Rules of Civil Procedure.³ In this revision Michigan has adopted some significant changes in the federal rules and some supplementary statutes of unusual interest. It has also retained some important prior Michigan procedures. These deviations from and changes in the federal rules will be reviewed for the purpose of ascertaining whether they are desirable for use in states which have adopted or are contemplating the adoption of the federal rules system. For this purpose, discussions of the advantages and disadvantages of state adoption of the federal rules system will not be rehearsed. Rather, it is assumed in this article that the federal rules system is generally desirable for use by the states.⁴ At the

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¹ Honigman, *Procedural Changes in Michigan*, 31 F.R.D. 113, 119 (1962).

² Professor Charles W. Joiner of the University of Michigan was chairman of the committee, and Mr. Jason L. Honigman, of the Detroit bar, was vice-chairman.

³ The Federal Rules of Civil Procedure are hereinafter referred to as the federal rules. The new Michigan General Court Rules are hereinafter referred to as the Michigan rules.

⁴ Some nineteen states have adopted the entire federal rules system. The status of the movement to adopt the federal rules in state jurisdictions is reviewed in Wright,

same time, it is assumed that consideration should be given to the possibility of making particular revisions for state use.

One important consideration in judging state revisions of the federal rules system is not discussed elsewhere in this article and is not relied upon to support specific conclusions concerning the Michigan changes. When a new procedural system is proposed in a state jurisdiction and the federal rules system is used as a general model, it is desirable to promote the ideal of uniformity in state and federal practice by adoption of each federal rule without major changes even though innovations or changes to preserve prior practice might result in some improvements. Ordinarily, it seems best to make changes only if they seem to offer very appreciable advantages.

Complete coverage of all Michigan revisions of the federal rules could be only cursory. Consequently, attention will be focused on the rules which are effective prior to trial, and, even so, only the most important revisions of the federal rules in this area can be discussed.⁵

II. COMMENCEMENT OF SUIT, SERVICE OF PROCESS, AND JURISDICTION

Since Federal Rule 4 is designed to deal with problems of service of process that arise from the organization of the federal court system and the jurisdictional requirements for suit in federal

Procedural Reform in the States, 24 F.R.D. 85 (1959). For criticism of the newly revised New York rules system, which does not follow the federal rules system, see Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 447-51 (1958).

⁵ The Michigan rules and statutes are analyzed in detail for Michigan lawyers in two sources. JOINT COMMITTEE ON MICHIGAN PROCEDURAL REVISION, FINAL REPORT pts. I-III (1960) (Part III of this report is hereinafter cited as FINAL REPORT); 1 HONIGMAN & HAWKINS, MICHIGAN COURT RULES ANNOTATED (1962) (hereinafter cited as HONIGMAN & HAWKINS). A preliminary report of the joint committee is also helpful. Joint Committee on Michigan Procedural Revision, *Michigan Procedural Revision: A Partial Set of Rules*, Mich. S.B.J., Jan. 1959, p. 7. Several articles and comments furnish background for certain of the new Michigan rules. Blume, *The Scope of a Cause of Action—Elimination of the Splitting Trap*, Mich. S.B.J., Dec. 1959, p. 10; Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 624 (1957); Joiner & Geddes, *The Union of Law and Equity*, 55 MICH. L. REV. 1059 (1957); Miller, *Splitting a Cause of Action Under the New Michigan Court Rules: Alternative Interpretations*, 8 WAYNE L. REV. 497 (1962); Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1-2), 55 MICH. L. REV. 327, 483 (1957); Comment, *Preliminary Motion Practice Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 399 (1962); Comment, *Pre-Trial Deposition and Discovery Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 417 (1962); Comment, *Joinder of Parties and Claims Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 512 (1963); Comment, *Venue and Jurisdiction Under the Revised Judicature Act and General Court Rules of 1963*, 8 WAYNE L. REV. 527 (1962); Comment, *Pleading Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 542 (1962).

district courts, most of the states which have adopted the federal rules system have been forced to revise the rule. Similarly, rather elaborate substituted provisions are included in the Michigan rules and statutes. These are important for Michigan practice, but they are fairly commonplace or involve innovations of minor general importance. However, three matters concerning service of process and jurisdiction merit extended consideration.

A. *Out-of-State Service Statute*

Statutory provisions include the substance of an Illinois statute that provides for obtaining personal jurisdiction by means of personal service outside the state on nonresidents who have specified "contacts" with the state.⁶ In separate sections relating to acts of individuals or their agents, corporations or their agents, partnerships or their agents, and partnership associations or unincorporated voluntary associations or their agents, the Michigan statute specifies that personal jurisdiction may be obtained with respect to the transaction of any business within the state, the commission of a tortious act or receipt of an injury from such act within the state, ownership, possession, or use of property within the state, and contracting to insure persons, property or risks in the state.⁷ These sections constitute a desirable elaboration of the similar Illinois provision.⁸

In addition to the above-mentioned sections, the Michigan statute contains provisions which are not found in the Illinois statute. Contracting for services to be rendered or materials to be furnished within the state is a basis for personal jurisdiction of all of the types of defendants named above. Also, acting as a director, manager, trustee, or officer of any Michigan corporation or any foreign corporation whose principal office is located in the state is ground for jurisdiction over nonresident individuals.⁹ A supplementary rule provides for service of summons and complaint outside of the state by the methods specified by the rules for ob-

⁶ ILL. REV. STAT. ch. 110, §§ 16-17 (1961). Similar statutes have been enacted in other states: IDAHO CODE ANN. §§ 5-514 to -517 (Supp. 1961); N.M. STAT. ANN. § 21-3-16 (Supp. 1961); N.Y. CIV. PRAC. LAW & RULES § 302 (1962); WASH. REV. CODE §§ 4.28.180-.185 (1961); and WIS. STAT. §§ 262.05-.06 (1961).

⁷ MICH. STAT. ANN. §§ 27A.705, .715, .725, .735 (1961).

⁸ The Illinois statute merely refers to "any person." It does not include the clause that receipt of an injury from a tortious act may be the basis of personal jurisdiction, but refers only to the commission of a tortious act within the state. ILL. REV. STAT. ch. 110, § 17 (1961). The Michigan reference to receipt of injury in the state codifies an Illinois decision interpreting the Illinois clause. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁹ MICH. STAT. ANN. § 27A.705.

taining personal jurisdiction of persons served within the state.¹⁰ Recent studies of the constitutionality of such statutes and of their application in particular instances are found elsewhere,¹¹ and the constitutional problems presented will not be re-examined here.

A vast array of questions concerning the meaning of the provisions outlining the jurisdictional bases are unanswered. For example, what type of interests in property held by a nonresident will bring defendants within the provision concerning ownership, possession or use of local property? Conceding that a nonresident has the requisite interest in local property, what must be the relation between his interest and the subject matter of a suit brought against him? Obviously, the utility of out-of-state service statutes is only presently affected by these and other unsolved questions which will ultimately be answered by the courts.

The Michigan statutory wording which deviates from language of the Illinois statute raises similar questions. In a case which involves substantial but incidental performance of a contract in Michigan, will the statute preclude a contention that there has been a transaction of business in Michigan, under the general clause referring to the transaction of any business, because of the existence of the more specific clause relating to performance of contracts in Michigan—the clause concerning contracts for services to be rendered or materials to be furnished in the state?¹² Does this latter clause refer to any contract which happens to involve the prescribed performance in Michigan, although performance in Michigan is not necessarily intended by the parties? What actions of a nonresident officer of a corporation with its

¹⁰ "Service of a summons and a copy of the complaint, as hereinbefore provided, shall confer personal jurisdiction over a defendant having any of the contacts, ties, or relations with this state as specified in RJA Chapter 7, by giving notice to the defendant of the pendency of the action and an opportunity to defend. There is no territorial limitation on the range of the service of such notice." MICH. RULE 105.9.

Rule 105.2, and RJA (Revised Judicature Act) ch. 19, § 1913, contain a special provision under which nonresidents may be served by personal service within the state upon an agent, employee, representative, salesman, or servant of the nonresident. Process must also be mailed by registered mail to the defendant at his last known address.

¹¹ Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599 (1955); Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958); Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 WIS. L. REV. 522 (1956); O'Connor & Goff, *Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME LAW. 223 (1955); Comment, 34 ROCKY MT. L. REV. 359 (1962).

¹² The specific clause reads: "Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant." MICH. STAT. ANN. §§ 27A.705, .715, .725, .735 (1961).

principal office in Michigan will subject him to personal jurisdiction? Such problems should not deter plaintiffs from using the statute in many situations. The elaborate Michigan provisions outlined above seem preferable to the more scanty provisions of the Illinois statute.

None of the general out-of-state service statutes, including the Michigan statute, deal adequately with interesting theories of interpretation which would extend the scope of the jurisdictional bases of such statutes to divorce suits. Whenever a divorce action is brought against a husband who is currently a nonresident on grounds which involve acts of a tortious nature which have previously been committed within the state, it is possible to take the position that the divorce suit involves the commission of a tort within the terms of the statutes. Thus, jurisdiction to render a valid personal judgment for alimony or support payments could be obtained by service on a nonresident husband outside the state.¹³ In Michigan, Rule 723 might also be somewhat pertinent, since it provides that in divorce suits plaintiff shall cause process to be served in accordance with Rules 105 and 106.¹⁴ Rule 105.9 provides for service outside the state under the jurisdictional statute.

Constitutional arguments against the use of the statutes in divorce cases might well be overcome, but important questions of statutory interpretation remain. In states in which spouses cannot sue each other for torts, it is rather unrealistic to classify any of their acts as tortious for the instant purpose. Even if tort actions between spouses are permitted, the above suggestion goes beyond the language of the statutes, for they seem to encompass only actions which have been traditionally labeled "tort" actions. Divorce actions in which alimony or support is sought have not been so categorized.¹⁵ Furthermore, the grounds for divorce actions are specified by the legislature, whether or not such grounds are tortious. The fact that such grounds may create civil liability by virtue of an independent field of law—the law of torts—is immaterial, as a logical matter, to a suit for divorce. Likewise, the right to alimony is usually considered statutory; it is not founded on tort law.

¹³ This theory has been accepted by a Washington trial court. *Stern v. Stern*, Civil No. 569793, King County Super. Ct., Aug. 21, 1961.

¹⁴ MICH. RULE 723.

¹⁵ For a succinct history of subject of divorce, see MADDEN, *PERSONS AND DOMESTIC RELATIONS* 256-63 (1931).

There is a less plausible theory to support the notion that if the marriage occurred within the state a resident spouse can obtain personal jurisdiction over a nonresident spouse in a divorce case. In this situation it might be argued that the divorce suit is an action arising out of a transaction within the state.

From some viewpoints a marriage involves a contract, but essentially it is a status or relation which is not governed by contract law.¹⁶ However, even if it is considered a contractual relationship or if its creation is accomplished merely by means of a contract, a marriage does not appear to be a "transaction" as that word is used in the out-of-state service statutes. "Transaction" has usually meant a business transaction of some kind.¹⁷ The thought that the subject matter of a divorce action arises out of the "transaction" of marriage also overlooks the fact that divorce may be had only on specified grounds, and not merely because there is a marriage.

Thus, the present general out-of-state service statutes do not appear to cover divorce suits. However, the need for personal jurisdiction for alimony and support orders in suits against nonresident husbands justifies consideration of appropriate statutory provisions to satisfy the need.

Having first outlined a broad policy that in specified situations it is fair for Michigan residents to bring suit in Michigan courts against nonresidents, the draftsmen of the Michigan statute in its final form tacked on a provision that deters resort to the statute. It states that, upon motion of defendant, plaintiff must post a bond in a sum approved by the court. If plaintiff does not obtain judgment, "so much of the penalty of said bond as may be required shall be applied to the satisfaction of any judgment for court costs and to defray the actual expenses of such defendant incurred in defending the action (but not to include attorney's fees)."¹⁸ If plaintiff obtains judgment, the reasonable expense of procuring the bond may be taxed as costs to defendant.

Presumably one purpose of the out-of-state service statute is to make suit against nonresidents convenient for Michigan plaintiffs. This purpose is nullified to a certain extent by the bond provision. In all but the clearest cases plaintiff will run the risk of posting bond and the further risk that the penalty of the bond

¹⁶ *Maynard v. Hill*, 125 U.S. 190 (1888).

¹⁷ See Comment, *supra* note 11.

¹⁸ MICH. STAT. ANN. § 27A.741 (1961).

will be applied to defray defendant's expenses. Thus, it appears that a prospective plaintiff will be required to compare in advance his probable expenses of suit in Michigan, including expenses arising as a result of the bond provision, with his probable expenses if suit is brought elsewhere. It may be difficult to make this comparison in many instances. The result may be that certain claims which are more than colorable will not be instituted in Michigan by use of out-of-state service. The bond provision may tend to relegate use of the statute to types of cases in which there is likely to be a default judgment. Moreover, the bond provision is illogical. It does not take into account the fact that defendant would have incurred expenses if he had been sued in his own state.

Eventually, many states will probably enact a broad out-of-state service statute, and there is no assurance that similar conditions will be enacted to protect Michigan residents and corporations who are sued under such statutes outside of Michigan.¹⁹ Finally, at the present writing the bond provision does not seem to be required to ensure the constitutionality of the statute. Thus, it appears desirable to omit such a provision.

It must be conceded that the bond provision will result in more equitable treatment of nonresidents. Since the bond penalty operates "in the event judgment is not rendered in favor of the plaintiff," it discourages use of the statute in suits which are basically groundless and are brought only in hope of a settlement. It seems more sensible and logical than a provision in the Washington out-of-state service statute which requires the losing plaintiff to pay reasonable attorney fees of defendant's attorney.²⁰

As mentioned above, when jurisdiction is based on the Michigan statute, service of process may be had in the manner provided for service to obtain personal jurisdiction within the state. Although substituted service is narrowly restricted in Michigan, this Michigan provision suggests that other states should consider enacting, in connection with an out-of-state service statute, a provision for substituted service at the home of a nonresident individual.²¹ Except for the bond provision the Michigan statute (with related rule provisions) is an excellent model.²²

¹⁹ The statutes cited in note 6 *supra* do not include any similar bond provision.

²⁰ WASH. REV. CODE § 4.28.185 (1961).

²¹ Except in Michigan and Wisconsin, only personal service is authorized by out-of-state service statutes. See statutes cited in note 6 *supra*.

²² Appropriate venue and statute of limitations provisions are included in the Michigan statutes. MICH. STAT. ANN. §§ 27A.1601-27, 5853 (1961). The statutes do

B. *Substituted Service at the Defendant's Abode*

The joint committee which drafted the Michigan rules proposed a rule providing for substituted service upon an individual in Michigan by service upon a member of his family of suitable age and discretion at his usual place of abode, so long as plaintiff authorized such service and also mailed a copy of summons and complaint to the usual place of abode.²³ New to Michigan, this proposal was disapproved by legislative action.²⁴ This rejection may have resulted from the fear that the proposed substituted service rule could be the subject of abuse, in some instances, even though it was more restricted than provisions for substituted service in many other states. In spite of such a fear, similar provisions have not been subject to criticism in other states. The fact is that most attorneys prefer to take the conservative action of attempting to obtain personal service before resorting to substituted service. The availability of such a mode of service helps to ensure that "process-dodging" tactics will be unsuccessful.

C. *Discretion of Trial Courts To Authorize Any Type of Constitutional Service of Process*

Another noteworthy service of process provision is found in Rule 105.8. This rule states that a court may in its discretion allow service of process to be made upon a defendant in any manner that is reasonably calculated to give defendant actual notice of the proceedings and an opportunity to be heard. An order permitting such service must be entered before actual service of process. To secure the order, plaintiff must show that service of process cannot reasonably be made in the manner outlined in other rules.²⁵ The rule was designed to authorize a trial court to permit, upon the appropriate showing, any means of service which might be constitutional under decided cases.²⁶ It ensures

not contain a provision dealing with attempts to join other claims with claims which are clearly within the statute. The Illinois statute restricts joinder of claims to claims arising from acts enumerated by the statute. ILL. REV. STAT. ch. 110, § 17 (1961).

²³ FINAL REPORT 12.

²⁴ 1 HONIGMAN & HAWKINS 77. Michigan is one of three states without provision for substituted service of this type. FINAL REPORT 14.

²⁵ "The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules." MICH. RULE 105.8.

²⁶ FINAL REPORT 20.

state authorization for constitutional service in addition to statutory service that might prove to be unconstitutional.²⁷

This purpose of securing utilization of newly approved or other constitutional service can be better accomplished by promulgation of amendments to the rules from time to time. Promulgation of amendments ensures centralized control of new methods of service and provides adequate notification to all attorneys in the state. Uniformity of decision is also promoted. Finally, to the extent that the instant rule is operative only at the trial court level, no statewide policy decision is made. It may well be that, as a matter of state policy, not all constitutional methods of service should be utilized.

III. PLEADINGS AND MOTIONS

A. *Order and Arrangement of Content*

Much of the substance of the federal rules concerning pleadings and motions has been retained in the new Michigan rules, but arrangement of content has been altered substantially. This arrangement seems less convenient than the simple order of statement in the federal rules. All of the time limitations for motions and pleadings are collected in the rule otherwise analogous to Federal Rule 6.²⁸ Counterclaims are treated in the rule governing joinder of claims, with the exception of one paragraph inexplicably included in the rule covering general rules of pleading.²⁹ The general subject matter of Federal Rules 12 and 56 is included in four rules, only three of which are numbered consecutively.³⁰ In fact, all of the Michigan rules, including the pleading rules, are numbered by a system which does not correspond to the federal system.³¹

The arrangement and the numbering of the new procedural rules which substantially incorporate the federal rules are not inconsequential matters; the rules should be numbered to encourage reference to the analogous federal rules. Such reference must be encouraged because many attorneys have only occasional reason to use new rules. As a matter of fact, some attorneys with con-

²⁷ 1 HONIGMAN & HAWKINS 114.

²⁸ MICH. RULE 108.

²⁹ MICH. RULE 203 governs joinder of claims, counterclaims, and cross-claims. MICH. RULE 111.8 provides that a counterclaim may exceed an opposing claim in amount.

³⁰ Similar in content to Federal Rules 12 and 56 are Michigan Rules 111 (in part), 115, 116, and 117 (in part).

³¹ For example, the rules similar to Federal Rules 6 through 13 are numbered Michigan Rules 107 through 109.

siderable trial work may treat new rules with cavalier abandon if they read them at all.³² This is possible because former methods of practice are available, at least in part, even after the federal rules system has been adopted.

B. *Changes in Federal Rules To Preserve Prior Practice*

Fact Pleading. Retention of "fact pleading" in Michigan seems to require more specific pleading than is necessary under the federal rules. To the extent this conclusion is correct, Michigan Rule 111 is not compatible with the philosophy of the federal rules.

Prior requirements for "fact pleading" of a "cause of action" are retained by the provision of Rule 111 which states that a pleading "which sets forth a claim for relief . . . shall contain . . . a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend . . ."³³ This provision is reinforced by Rule 115, which provides for a motion for more definite statement if "a pleading is so vague or ambiguous that it fails to comply with the requirements of the rules."³⁴ Rule 115 also provides that any part of any pleading may be stricken if it is "not drawn in conformity to these rules."³⁵

Mr. Honigman and Professor Hawkins, two leading commentators on the new Michigan rules, state that, "unless an unintended regression from prior practice is to be read into the new rule," the clause of Rule 111 concerning specific averments "must be taken as modifying that which precedes it—that is, as prescribing the purpose or end to which the pleader is required to state a

³² Mr. Philip S. Van Cise, who was the chief proponent of a system similar to the federal rules adopted in Colorado, sent a questionnaire to all judges in Colorado ten years after the system patterned on the federal rules became effective in that state. On the basis of the resulting data and his own extensive experience, he summarized Colorado's ten-year experience as follows: "Have they [the federal rules] improved the practice of law; are they of value to litigants; have they shortened the length of trials and facilitated compromises? The answer to these four questions is yes—if the lawyers and judges really know the Rules and properly apply them in court. The trouble is that many of both groups have not really studied the Rules and do not apply them." Van Cise, *The Colorado Rules of Civil Procedure*, 23 ROCKY MT. L. REV. 527, 528 (1951).

A standard joke in states which have promulgated an entire set of new rules concerns the law professor who asked the trial judge how the new rules were operating in his county. The judge replied, "Fine. They are causing no problems at all. No one is paying any attention to them."

³³ MICH. RULE 111.1.

³⁴ MICH. RULE 115.1.

³⁵ MICH. RULE 115.2.

'cause of action.'"³⁶ Thus, these commentators conclude that the rule emphasizes the notice function of the complaint and expeditious disposition of frivolous or legally hopeless claims.³⁷ It is further suggested that prior rules worked "quite well" and that it was "not necessary . . . to adopt new language and possibly write new interpretation and resulting confusion."³⁸ They also suggest that the Michigan Supreme Court has been liberal in these respects, and that "for the most part Michigan practice establishes that a complaint cannot be dismissed because its allegations are insufficient to cover all the technical elements of a cause of action, so long as the facts which might be proved under the pleading could qualify the pleader for relief."³⁹ Finally, it is stated that in recent years no appellate decision sanctions the dismissal of a complaint for pleading evidentiary facts nor, for the most part, has the Supreme Court recently seized upon lack of specificity or defective draftsmanship to avoid the merits by the device of labeling allegations as insufficient because they were "conclusions."⁴⁰

Despite these observations it appears that, at least for the present, Michigan has rejected in part the philosophy of the function of the complaint which is embodied in Federal Rule 8(a).⁴¹ The distinction between "ultimate facts," "evidential facts" and "conclusions" is apparently preserved to some extent. Undoubtedly, the Michigan Supreme Court has shown a liberal attitude in interpreting complaints, but even recent cases show retention of the concept that proper "fact" allegations must be allegations of "ultimate facts" and not allegations of "legal conclusions" nor allegations of "evidential facts."⁴² It might also be pertinent to observe

³⁶ 1 HONIGMAN & HAWKINS 196.

³⁷ *Id.* at 196-97.

³⁸ *Id.* at 198.

³⁹ *Id.* at 197.

⁴⁰ *Id.* at 197-98.

⁴¹ Under Rule 8(a) of the federal rules, technical distinctions between ultimate facts, evidentiary facts, and conclusions are abolished. A restricted use of the motion for more definite statement is contemplated. Evidential facts should not be stricken because they are evidential. See the short explanation and authorities cited in Meisenholder, *The Effect of Proposed Rules 7 Through 25 on Present Washington Procedures*, 32 WASH. L. REV. 219, 230-32, 261-63 (1957). At the same time, a motion to dismiss should be granted under the federal rules unless it appears certain that no state of facts entitling plaintiff to relief could be proved under the statements in the complaint. See cases collected in 2 MOORE, FEDERAL PRACTICE 2245-46 n.6 (1962) [hereinafter cited as MOORE]. Official forms indicate that statements may be quite general. FED. R. CIV. P. App. of Forms.

⁴² The Michigan Supreme Court has stated that the court is "committed to the notice theory of pleading," and that "no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend." *Baker v. Gushwa*, 354 Mich. 241, 246, 92

that, in states requiring a complaint to state facts, it is not uncommon to find trial judges occasionally enforcing these distinctions and specificity of pleading more strictly than seems warranted by statements in the opinions of the appellate courts of the state.

On its face, Rule 115.2 authorizes a motion to strike "evidential facts" because it authorizes the striking of any part of a pleading "not drawn in conformity to these rules." And since by definition "legal conclusions" are not "ultimate facts," it appears that a motion for more definite statement under Rule 115 can be used to attack allegations of such conclusions on the simple basis that such conclusions have been stated. In fact, it is arguable that the motion may be used to force particularized statements of fact in accord with the usual practice in most code pleading states. In other words, it seems that the motion for a more definite statement may be used to attack allegations of "ultimate facts" in various instances.⁴³ The joint committee has commented that the test for the motion "is based upon whether the adverse party can

N.W.2d 507, 510 (1958). See also *Jean v. Hall*, 364 Mich. 434, 111 N.W.2d 111 (1961); *Manley, Bennett & Co. v. Woodhams*, 349 Mich. 586, 84 N.W.2d 771 (1957).

Nevertheless, the distinctions mentioned in the text have recently furnished problems on appeal and are apparently regarded as pertinent at the trial court level. A long quotation stating the distinctions is approved in *Steed v. Covey*, 355 Mich. 504, 94 N.W.2d 864 (1959). In *Roblyer v. Hoyt*, 343 Mich. 431, 72 N.W.2d 126 (1955), the court held that a complaint for malicious prosecution was insufficient because an allegation that defendants acted without probable cause was merely a conclusion of law and there were no allegations of fact sufficient to support the conclusion. However, by proper reference to facts submitted in support of a motion to dismiss, the court found that there was probable cause. It is likely that the general allegation of lack of probable cause is sufficient in a complaint under Federal Rule 8(a). See the form located at 1 BENDER'S FEDERAL PRACTICE FORMS 489 (1963). Such an allegation is quoted with approval in *Riegel v. Hygrade Seed Co.*, 47 F. Supp. 290 (W.D.N.Y. 1942), and is conceded to be good, for purposes of argument, without deciding the point raised, in *Leggett v. Montgomery Ward & Co.*, 178 F.2d 436 (10th Cir. 1949).

In *Koebke v. La Buda*, 339 Mich. 569, 64 N.W.2d 914 (1954), the court stated that allegations that defendant held property in trust for plaintiff and that deceased's minor son stood in relationship of loco parentis to a party were insufficient conclusions. In more recent cases, part of the opinions are devoted to contentions that certain allegations were statements of fact and not conclusions. See, e.g., *Frazier v. Ford Motor Co.*, 364 Mich. 648, 112 N.W.2d 80 (1961); *Pfaffenberger v. Pavilion Restaurant Co.*, 352 Mich. 1, 88 N.W.2d 488 (1958). And the opinion in *In re Del Monte's Estate*, 340 Mich. 165, 65 N.W.2d 309 (1954), indicates details which a trial court thought should have been pleaded. Its conclusions were reversed on appeal.

⁴³ "In cases where the bill of particulars is now used to state details, this motion [motion for more definite statement] will be in order." FINAL REPORT 49.

"Michigan Rule 111 sets up more specific pleading standards than the Federal Rules. . . . The phrase 'failure to comply with the requirements of the Rules' thus makes it clear that it is the more specific standards of the Michigan Rules, and not the possibly looser standard of federal practice, that are to determine the adequacy of a pleading and its consequent susceptibility to a demand for a more definite statement." 1 HONIGMAN & HAWKINS 285.

reasonably be expected to frame a responsive pleading thereto.”⁴⁴ This statement does not appear to mean that the test is the same as the test for the similar federal motion, because the committee then states that the motion will lie when a bill of particulars has been in order.⁴⁵ Furthermore, the test stated in the federal rule was actually deleted from Rule 115.

The many extended written discussions of the nature and advantages of the pleading concepts embodied in Rule 8(a) will not be repeated.⁴⁶ Rather, the point here made is that Michigan has chosen to retain a system which differs from the federal rule in emphasis. To some extent, the advantages of Rule 8(a) (if one concedes that there are advantages) will not be realized.

When all the arguments for so-called “fact” and “cause of action” pleading are stripped of frills and verbiage, such pleading is primarily justified by notions that it ensures more “firming” of fact issues (including detailed issues) by the pleadings and that it enables opponents to “pin” each other down on those issues by the pleadings. That these results occur in a particular case is often questionable. That these functions should be the primary goal of pleading has often been questioned.⁴⁷ Certainly the federal pleading rules were designed to de-emphasize these functions of the complaint and answer.⁴⁸ Comparatively speaking, the Michigan rules seem to emphasize these functions.

The above observations concerning the Michigan rules may be somewhat overstated because of the writer’s lack of knowledge of actual practice in Michigan. In such case it should be concluded that, if the draftsmen of Rules 111 and 115 intended to make federal requirements for a complaint effective, they could have accomplished such a result very clearly by adopting Federal Rule 8(a) and related rules without change. Confusion has not resulted from such a course of action in other states.⁴⁹ Designed to incorporate existing Michigan practice, the above-mentioned

⁴⁴ FINAL REPORT 49.

⁴⁵ See note 43 *supra*.

⁴⁶ See, e.g., 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 255 (1960) [hereinafter cited as BARRON & HOLTZOFF]; 2 MOORE 1692-1721.

⁴⁷ See, e.g., PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION INSTITUTE, FEDERAL RULES OF CIVIL PROCEDURE 219-25 (Cleveland 1938).

⁴⁸ *Ibid.*

⁴⁹ For example, see comments in Clay, *May the Federal Civil Rules Be Successfully Adopted To Improve State Procedure?*, 24 F.R.D. 437, 439-40 (1959). It is important to note that, after adoption of Federal Rule 8(a), complaints may still be drafted in accordance with code pleading principles. Federal Rule 8(a) permits, but does not require, new types of allegations.

Michigan rules seem to have no utility, in any event, as models for other states.

Pleading Matter in Support of Denials. That the philosophy of pleading under the federal rules is somewhat different from the basic concepts embodied in the Michigan rules is also indicated by the retention of another prior Michigan procedure in Rule 111.4 This rule emphasizes the fact-issue-forming function of pleadings by retaining a former provision that in connection with every denial the pleader shall set forth the substance of the matters on which he will rely to support such denial.⁵⁰

Taken from the rules of the Michigan Railroad Commission, this rule was first proposed by the Michigan Procedure Commission in 1929 with the comment, "It would seem to have great possibilities for disclosing meritorious defenses and exposing fictitious defenses."⁵¹ The Michigan Supreme Court has stated very specifically that the purpose of the rule concerning denials is to "pin down" the defendant and point up exact fact issues:

"The latter part of section 2 of rule 23 provides that in connection with every denial the answer shall set forth the substance of the matters which will be relied upon to support such denial. The purpose of the rule is to narrow the issue solely to facts in dispute and to make it unnecessary to prove those matters upon which there should be no dispute. The main purpose of a lawsuit is to elicit the truth, and when the facts are known to either side and do not admit of any dispute, they should be frankly stated so as to make it unnecessary for the opposite party to offer proof as to such facts and thus also save the time of the court. This is especially true in cases involving breach of contracts where all the elements entering into the contract should be fully and freely brought out by declaration and answer so that the issue may be limited to the sole point or points over which there is a dispute. A stricter observance of the rule is exacted in assumpsit than in tort where frequently most of the facts are very much in dispute. The rule does not make the declaration a bill for discovery, nor does it require the defendant to produce its evidence prior to trial. It, however, does require in tort cases the setting forth of the substance of the matters which will be relied upon to support a denial. There can be no specific formula set forth as to what the answer should contain in a

⁵⁰ MICH. RULE 111.4. This rule is the same as former Michigan Rule 23.

⁵¹ MICHIGAN PROCEDURE COMM'N, FINAL AMENDED REPORT 43 (1929).

denial in a tort case and the sufficiency of the answer largely must rest within the sound discretion of the circuit judge.”⁵²

If this statement is at all accurate, the emphasis placed by the instant provision upon the answer as a means of forming detailed fact issues is greater in Michigan than in many code pleading states. To the extent the rule is operative (and it should be emphasized the writer is not acquainted with actual practice in Michigan trial courts), it is a partial throwback to Pomeroy's notion that the pleadings should set forth the “naked facts” in order to indicate fact issues. The rule is at the least inconsistent in spirit with current concepts of the function of the complaint and answer under the federal rules system, and, for that matter, with the remainder of the federal rules system which has been adopted in Michigan.

These conclusions are supported by a further rule providing that defendant *shall* explicitly admit or deny *each* averment of the complaint (or plead “no contest”). It should be added, however, that defendant may plead he is without knowledge or information to form a belief as to the truth of an averment. Such an allegation has the effect of a denial.⁵³

Additional Issue Pleading Devices. Two additional former rules also emphasize the pleading functions of forming fact issues and “pinning down” the opponent. Rule 113 provides that, whenever a claim or defense is founded upon a written instrument other than an insurance policy, a copy of the instrument or its pertinent parts shall be attached to the pleading as an exhibit unless specified excuses are stated in the pleading.⁵⁴ Rule 602 provides that the plaintiff need not prove the execution of an instrument or the handwriting of the defendant in an action on the instrument unless the defendant files *with his answer* an affidavit denying the execution or handwriting.⁵⁵

If the federal rules are to be adopted in any state, it seems preferable to use the federal pleading rules without the addition of various “tight” pleading requirements. This conclusion has been reached in practically all of the states which have adopted the entire federal rules system.

⁵² *Miller v. General Motors Corp.*, 279 Mich. 240, 243-44, 271 N.W. 746, 747 (1937).

⁵³ MICH. RULES 111.2, 111.4.

⁵⁴ MICH. RULE 113.4 (formerly Rule 17, § 5).

⁵⁵ MICH. RULE 602 (formerly Rule 29). The period for filing the affidavit may be extended.

"Bad Faith" Pleading. Another related former rule was retained and expanded. Rule 111.6 provides: "If it appears at the trial that any fact alleged or denied by a pleading ought not to have been so alleged or denied and such fact if alleged is not proved or if denied is approved or admitted, the court may, if the allegation or denial is unreasonable, require the party making such allegation or denial to pay to the adverse party the reasonable expenses incurred in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees."⁵⁶ The rule formerly applied only to denials.⁵⁷ It is obviously designed to discourage "bad faith" pleadings.⁵⁸

Several objections to the rule are patent. It disregards the practical problem of the lawyer who must begin suit without complete pre-suit investigation. Strict application of the rule would require such investigation prior to suit. In many cases such a practice would be wasteful of both time and money. In fact, from this standpoint it is inconsistent with the discovery rules which afford official investigation techniques only after the complaint is drafted and the suit is commenced. On the face of the rule, it might be possible for an attorney to sign a complaint in good faith under Rule 114 (similar to Federal Rule 11) only to be met at trial with sanctions against his client under this rule. Additionally, the rule does not recognize the fact that the attorney is responsible for the pleadings under Rule 114. When the substance of Federal Rule 11 has been promulgated, it is more sensible to penalize the attorney for bad faith than to penalize the client. Also, the rule is expressed in wholly ambiguous terms, such as "ought not" and "unreasonable." And, in addition, attorneys not familiar with Michigan practice would probably guess that in many instances enforcement is not sought for various practical reasons.

The chief matter of interest in the context of the previous discussion of other pleading rules is whether Rule 111.6 will tend to motivate draftsmen of complaints to be more specific or more general. It seems probable that the rule is inoperative in this respect, but that, if it has any effect, it motivates more specific pleading and tends to "strait-jacket" complaints. Two other states

⁵⁶ MICH. RULE 111.6.

⁵⁷ Former Michigan Rule 17.

⁵⁸ The former rule was proposed in 1929 to discourage denials made in bad faith. MICHIGAN PROCEDURE COMM'N, FINAL AMENDED REPORT 36 (1929).

which require fact pleading have enacted a similar provision.⁵⁹

Federal Rule 11, unsupported by a provision similar to Michigan Rule 111.6, appears to provide a much more practical means of securing good faith pleading. At the same time, it is more consistent with the goal that complaints may be fairly general and need not necessarily contain technical "ultimate" facts.

Compulsory Counterclaims. Federal Rule 13(a), concerning compulsory counterclaims,⁶⁰ was originally included in the proposed rules by the joint committee, but it was not incorporated in the final draft submitted to the Michigan Supreme Court.⁶¹

If a federal rule has not been effective in a state jurisdiction, a proposal that it be adopted may arouse fear and trepidation on the part of various members of a state bar in view of the drastic nature of the change in practice which the rule would seem to make. In Michigan, Professor Blume stated that a compulsory counterclaim rule "multiplies the dangers of lawyers losing claims by procedural errors."⁶² In answer to such a charge, it should be pointed out that the compulsory counterclaim is not a new, strange, and untried device. Not only has it worked well in practice in federal courts, but also it has been in effect in a few code pleading states.⁶³ Nor can the above charge of danger be supported by substantial statistics.

The most obvious objection to the device is that a defendant may not know that he has a matured claim which relates to the subject matter of the suit against him. And even more important, although defendant may know of such a claim, he may not be aware of its significance under the compulsory counterclaim rule. For these reasons, as well as others, defendant's attorney may never learn of the claim.

However, if the federal compulsory counterclaim rule is in effect, the dangers may be overcome by pertinent investigation on the part of defendants' attorneys prior to answer. Federal Rule

⁵⁹ CONN. GEN. STAT. ch. 898, § 52-99 (1959); ILL. REV. STAT. ch. 110, § 41 (1961).

⁶⁰ "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action." FED. R. CIV. P. 13(a).

⁶¹ 1 HONIGMAN & HAWKINS 479.

⁶² Blume, *The Scope of a Cause of Action—Elimination of the Splitting Trap*, Mich. S.B.J., Dec. 1959, pp. 10, 11.

⁶³ CLARK, CODE PLEADING 646 n.54 (1947) [hereinafter cited as CLARK].

13(f) also affords a substantial safeguard to defendant, for it provides that, when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of the court set up the counterclaim by amendment.⁶⁴ This rule has been construed liberally.⁶⁵ Indeed, one federal court even permitted an omitted permissive counterclaim to be made after answer although it was not due to any oversight, inadvertence, or excusable neglect.⁶⁶ On a sufficient showing it might be possible to set up such a counterclaim after judgment.⁶⁷ In some cases it may be questionable whether or not a particular counterclaim arises out of the transaction or occurrence which is the subject matter of plaintiff's suit and is therefore a compulsory counterclaim under the federal rule. This difficulty may be obviated by assertion of the counterclaim, and, if trial of the counterclaim with the original claim is inconvenient, a separate trial can be ordered.⁶⁸

On a more general basis, the compulsory counterclaim rule tends to accomplish the basic philosophy that a multiplicity of suits should be avoided if possible. If the federal rules system is to be used as a model, the compulsory counterclaim rule should be considered an integral part of that system.

Other Changes. The pleading and motion rules contain various other changes that were made to retain former Michigan practice, but for the most part the changes are of minor general importance.⁶⁹

C. *Innovations in Former Michigan Rules and the Federal Rules*

In other jurisdictions which have adopted the federal rules system, newly devised changes from the federal rules and former state practice are rare. This course was not followed in drafting the Michigan pleading rules; they contain several important innovations.

Defenses and Objections. The Michigan pleading rules contain a particularly interesting attempt to improve the statement

⁶⁴ FED. R. CIV. P. 13(f).

⁶⁵ 3 MOORE 89.

⁶⁶ *Singer Mfg. Co. v. Shepard*, 13 F.R.D. 509 (S.D.N.Y. 1952).

⁶⁷ 1A BARRON & HOLTZOFF § 402, at 627-28.

⁶⁸ FED. R. CIV. P. 42(b).

⁶⁹ Some of the additional changes which favor prior practice are as follows. Special provision is made for pleading upon a policy of insurance. MICH. RULE 112.4. Hypothetical allegations are not authorized. Also omitted is the provision of Federal Rule 8(e) which states that a pleading is not made insufficient by the insufficiency of one of two alternative statements. A bond may be required of plaintiff. MICH. RULE 109.

and content of procedures which are outlined in Federal Rules 12 and 56.

Of course, Federal Rule 12 provides that all defenses and objections shall be made for the first time in the answer.⁷⁰ However, it further provides that the defenses and objections relating to lack of jurisdiction over the person, improper venue, lack of jurisdiction over the subject matter, failure to state a claim, and failure to join an indispensable party may be made by motion prior to answer.⁷¹ If objections going to jurisdiction over the person or to improper venue are not made by motion when any of the above objections are so made, or if either of these two objections are not made by answer when no motion is made prior to answer, they are waived.⁷² The remainder of the objections listed above cannot be waived in the pleading stages of a suit.⁷³ Whenever any of the objections which can be made by motion or answer are so made, such objections can be set for hearing prior to trial.⁷⁴ Motions for judgment on the pleadings, to strike, and for more definite statement are also authorized.⁷⁵ Finally, by motion of the parties and permission of the judge, a motion prior to answer on the ground that the complaint does not state a claim may be treated as a motion for summary judgment under Federal Rule 56.⁷⁶ Federal Rule 56 spells out the requirements for summary judgment. Rules 12 and 56 thus state a relatively simple plan for assertion and disposal of major defenses prior to trial.

The Michigan rules substitute four rules for Federal Rules 12 and 56. In part these rules retain prior Michigan practice. First, it is provided that all defenses except lack of jurisdiction over the subject matter and failure to state a claim are waived unless made in the answer or by preliminary motion.⁷⁷ By separate rule, Rule 116, it is provided that the following objections may be raised by answer or motion prior to answer: (1) the court lacks jurisdiction of the person or property, (2) the court lacks jurisdiction of the subject matter, (3) the party asserting the claim lacks capacity to sue, (4) another action is pending, (5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute

⁷⁰ FED. R. CIV. P. 12(b).

⁷¹ *Ibid.*

⁷² FED. R. CIV. P. 12(g), (h).

⁷³ FED. R. CIV. P. 12(h).

⁷⁴ FED. R. CIV. P. 12(d).

⁷⁵ FED. R. CIV. P. 12(c), (e), and (f).

⁷⁶ FED. R. CIV. P. 12(b).

⁷⁷ MICH. RULE 111.3.

of frauds, infancy or other disability of moving party or other disposition of the claim before commencement of the action. These defenses by motion may be heard on affidavits and other evidence, and the court may also order immediate trial of these defenses when made by answer and render judgment on them or postpone the hearing until trial on the merits. If a jury trial is demanded prior to the hearing on the defenses listed under (5) above, the hearing must be postponed until trial on the merits. A defendant may make no more than one motion under this rule, but he may use any or all of the grounds listed above in support of the motion. However, with one exception, a motion based upon any one or more of such objections does not waive the right to make the remainder of such objections by answer. If the objection to lack of jurisdiction over the person or property is not made when a motion under the rule is first filed, it is waived.⁷⁸ Rule 116 is entitled "accelerated judgment"; it is designed to afford adjudication of the listed defenses prior to a full trial on the merits.⁷⁹

Rule 117 then provides for a "motion for summary judgment." This motion may be one for judgment because the complaint does not state a claim on its face (or because the answer does not state a valid defense), or because there is no genuine issue as to any material fact.⁸⁰ Thus, in effect, the "motion for summary judgment" will serve the same functions as a motion to dismiss because no claim is stated under Federal Rule 12(b), a motion for judgment on the pleadings under Federal Rule 12(c), and a motion for summary judgment under Federal Rule 56.⁸¹ This motion may be made by plaintiff after defendant responds to the complaint by motion or answer and by defendant before or after answer. Provisions similar to those stated in the federal summary judgment rule are included. Provisions for affidavits are contained in Rule 116. In contrast to Rule 116, Rule 117 is designed to test the law of a plaintiff's case and the existence of factual disputes.⁸² And finally, as indicated in the first part of this article, Rule 115 provides for a motion for more definite statement and a motion to strike.

One principal change from the federal rules system is the addition of defenses which may be raised by motion (numbers (3), (4),

⁷⁸ MICH. RULE 116.2.

⁷⁹ 1 HONIGMAN & HAWKINS 336-37.

⁸⁰ MICH. RULE 117.

⁸¹ FINAL REPORT 54.

⁸² 1 HONIGMAN & HAWKINS 358-59.

and (5) above) to the defenses mentioned in Federal Rule 12(b). In addition, as mentioned previously, it is specifically provided that, in the discretion of the court, trial and judgment may be had on these defenses prior to trial of the merits (if a jury is not demanded on the defenses listed under (5) above). Defenses concerning jurisdiction and failure to state a claim can be handled in the same way. Of course, under the federal rules defenses going to jurisdiction, venue, failure to state a claim, and failure to join an indispensable party may be disposed of prior to trial on the merits under the terms of Federal Rule 12(c).

The mentioning of the additional defenses listed in Rule 116 seems desirable. Defenses such as lack of capacity to sue and the bar of statutes of limitations have caused difficulty under the federal rules. However, it is difficult to find any advantage in the other Michigan revisions of Federal Rules 12 and 56. There seems to be no advantage in providing one rule for the defenses listed under Rule 116, as summarized above, and a second rule which makes separate provision for attack on the complaint, judgment on the pleadings and summary judgment. Moreover, the rules fail to state how motions under one rule are related to motions under the other rule. Apparently there can be three stages of motions prior to answer—a motion to strike or for more definite statement, a motion for accelerated judgment and a motion for summary judgment. Furthermore, the changes in content of Rules 12(b) and 56 could have been made within the order and arrangement of Federal Rules 12 and 56. As it is, the rearrangement of the general content of Rules 12 and 56 in the Michigan rules is not convenient for use in other states.⁸³

One other change from Federal Rule 12(b) and prior Michigan practice should be mentioned. The federal rule makes improper venue a defense to be raised under the rule by motion or answer. The objection is waived if not made when a motion on the other grounds listed in Rule 12(b) is made, or, if no such motion is made, when the objection is not made in the answer.⁸⁴ The Michigan rules treat venue objections under separate rules

⁸³ Additional changes in content from Federal Rules 12 and 56 are fully discussed in Comment, *Preliminary Motion Practice Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 399 (1962).

The provisions in the new New York rules for a motion to dismiss and a motion for summary judgment are somewhat similar to the Michigan provisions. N.Y. CIV. PRAC. LAW & RULES Art. 32, R. 3211-12 (1962).

⁸⁴ FED. R. CIV. P. 12(b), (g), (h).

relating to venue.⁸⁵ An objection to improper venue or a request for change of venue properly laid (for convenience of witnesses, etc.) must be made by a motion for change of venue filed before or at the time defendant files an answer, or upon a "deferred motion" after answer, "if the court is satisfied that the facts upon which the deferred motion is based were not and could not with reasonable diligence have been known to the defendant until 10 days prior to the motion."⁸⁶ If no motion is made within these temporal limitations, the right to change of venue is waived.⁸⁷

Federal Rule 12 only governs change of venue when venue is improper and does not govern motions for change of venue when it is properly laid.⁸⁸ This is an omission which should be remedied when the rule is adopted for state practice. The Michigan device of treating a motion for change of venue on any ground as a separate subject and creating a motion independent of other motions is certainly feasible, but there seems to be very little reason to deal with *improper* venue objections in a manner different from procedures for objection to lack of jurisdiction over the person. It seems desirable to retain the improper venue provision of Federal Rule 12(b). If this course is adopted, special provision must be made for change of venue for convenience.⁸⁹

Replies. The Michigan rules also contain an innovation regarding replies. A reply "to an answer demanding a reply" and a reply to a counterclaim denominated as such are required.⁹⁰ This provision should be contrasted with Federal Rule 7 which requires a reply to be made to a counterclaim denominated as such, but otherwise does not require a reply unless ordered by the court.⁹¹

If there is no counterclaim denominated as such, why should a reply to an answer be required or be dispensed with at the whim

⁸⁵ MICH. RULES 401-04.

⁸⁶ MICH. RULES 401-02.

⁸⁷ MICH. RULE 409.

⁸⁸ *Nowotny v. Turner*, 203 F. Supp. 802 (M.D.N.C. 1962); *Ferment-Acid Corp. v. Miles Lab., Inc.*, 153 F. Supp. 19 (S.D.N.Y. 1957); *Spence v. Norfolk & W. Ry.*, 89 F. Supp. 823 (N.D. Ohio 1950).

⁸⁹ The time limits for a motion for change of venue for convenience or in the interests of justice should probably be related in some way to possible delays of trial.

In Washington, Federal Rule 12(b) was changed to cover motions for change of venue for convenience of witnesses and in the interests of justice. This change seems to fix the time limit too early in the suit. At the stage of answer it may not be clear that there is reason for change of venue on these grounds.

⁹⁰ MICH. RULE 110.1.

⁹¹ FED. R. CIV. P. 7.

of defendant? Taken at face value, the rule allows a defendant to state any defensive matter affirmatively in the answer even though it could clearly be proved under an appropriate denial and is not in any sense "new matter," and then authorizes defendant to require a reply of plaintiff to such matter. At the same time, such allegations constituting argumentative denials are not subject to a motion to strike under the federal rules.⁹² The only joint committee comment that has any bearing on this interpretation is a statement that, since a reply is required only when demanded by the answer or when there is a counterclaim denominated as such, "there will be no reasonable excuse for failure to file a required reply, since the plaintiff can easily ascertain from his opponent's pleading whether one is necessary."⁹³ This may be true, but by like token the rule seems to require a reply at the option of defendant when there should not be a reply by any standard of judgment. Also, if defendant does not demand a reply to his answer, the joint committee suggests that plaintiff may still file a reply to new matter in the answer.⁹⁴

Thus, this rule is a far cry from the federal rule concerning replies to answers. The sensible theory which underlies the federal rule is based on the notion that the complaint and answer are usually sufficient to give notice of plaintiff's claims and defendant's defenses in the absence of a counterclaim. If the court can be convinced otherwise, it may order a reply to an answer.⁹⁵

"No Contest" Pleading. An innovation in defensive pleading is made by a provision that a defendant may plead "no contest to one or more of the claims or parts thereof stated against him."⁹⁶ It is further provided that such a plea permits the action to proceed without the necessity of proof of the claim or part thereof to which such a plea has been made, and that the plea has the effect of an admission for the purpose of the pending action only.⁹⁷

According to the joint committee, this pleading is somewhat analogous to a plea of *nolo contendere* in criminal proceedings.

⁹² 2 MOORE 2320. See cases cited in 1A BARRON & HOLTZOFF § 368, at 499 n.52. However, the motion to strike may be available in this situation under the Michigan rules.

⁹³ FINAL REPORT 38.

⁹⁴ *Ibid.*

⁹⁵ See discussion in 1A BARRON & HOLTZOFF § 243, at 13-14.

⁹⁶ "Whenever a responsive pleading is required, the pleader shall either (1) set forth an explicit admission or denial of each averment upon which the adverse party relies, or (2) plead no contest to 1 or more of the claims or parts thereof stated against him." MICH. RULE 111.2.

⁹⁷ MICH. RULE 111.5.

It will admit liability in the specific case in which it is made; it will establish defendant as a party entitled to notice of further proceedings; and it will result in a judgment which has the res judicata effect of a default judgment.⁹⁸

It has been suggested by Mr. Honigman and Professor Hawkins that in Michigan there is some room for doubt on the question of whether a default judgment precludes litigation of common questions of fact in a subsequent case involving a different cause of action.⁹⁹ But they also take the position that the language of the rule indicates that a fact to which a "no contest" plea is made is open to litigation in a subsequent action on a different claim.¹⁰⁰ It might be added that, if an analogy is to be made to the plea of *nolo contendere* in a criminal case, the "no contest" rule should have such an effect.¹⁰¹ It is also suggested that the rule is justified by the notion that, "if the purpose of res judicata is to conserve judicial energy, that purpose is better advanced by a policy which encourages no contest over issues which are of no importance except as they might become involved in collateral proceedings."¹⁰²

The "no contest" rule seems to be much broader than the above observations indicate. It seems to do more than preclude the operation of the doctrine of collateral estoppel in certain instances. The wording of the rule indicates that the pleading does not constitute an admission which could be used as an *evidential* admission in any other suit. This has been the usual result of a plea of *nolo contendere* as well.¹⁰³ It also appears that a pleading of "no contest" could not be used as an inconsistent statement to impeach the defendant as a witness in some other case.

Since the evident purpose of the rule is to permit the admission of facts in a particular suit by a method which would preclude the assertion of collateral estoppel in another case or preclude the use of the pleading as an evidential admission, the rule might afford undue tactical advantages to a defendant in certain situations. Suppose that in separate suits brought by different plaintiffs the defendant is charged with acts which caused

⁹⁸ FINAL REPORT 42-43.

⁹⁹ 1 HONIGMAN & HAWKINS 200-01.

¹⁰⁰ *Id.* at 200.

¹⁰¹ Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255, 1263 (1942).

¹⁰² 1 HONIGMAN & HAWKINS 201.

¹⁰³ See 4 WIGMORE, EVIDENCE § 1066, at 58 (3d ed. 1940); 22 C.J.S. *Criminal Law* § 425(3) (1961).

air or stream pollution injuring the property of the respective plaintiffs. For tactical reasons having little to do with the actual merits on the facts and law, he can plead "no contest" in certain of the cases as to certain issues without prejudice to contrary positions in the remaining cases. Should the defendant have such an advantage? In such types of cases there is a possibility that the "no contest" rule will not operate to conserve judicial energy.

The plea of *nolo contendere* in criminal cases can only be made with the permission of the court,¹⁰⁴ but under the instant rule there is no such safeguard. On the face of the rule there is no limitation on the situations in which the pleading may be used. If this is true, is it not desirable and conservative for a defendant to plead "no contest" to every allegation he would admit if the "no contest" rule were unavailable? Defendant would not be penalized. There seems to be no reason for less liberality in granting leave to amend such a pleading than in granting leave to amend an outright admission. If he amends his answer of "no contest" to state a denial, it is arguable that his original pleading cannot be used as an evidential admission in the case. In most jurisdictions an admission which is amended and changed to a denial may be so used.¹⁰⁵ Thus, it seems possible that "no contest" pleading to particular allegations may replace admissions in many instances. There is certainly no guarantee that such pleading will be used only with respect to issues which may be of importance only in collateral proceedings.

The conflict of such a practice with the philosophy that a trial is a search for truth rather than a game should be given some consideration. The effects of its solicitude for defendants should not be ignored.¹⁰⁶ Inevitably such a practice will be misunderstood by clients and, in some cases, even by lawyers. At least, the plea of *nolo contendere* seems to have been misunderstood in many instances. It has been called a gentlemen's plea of guilty, a plea which has no implication of a plea of guilty, a plea of implied guilt, and a plea which is a compromise between the defendant and the state.¹⁰⁷ As a mere guess, one might predict that a plea

¹⁰⁴ Mack, *Nolo Contendere: Its Use in Michigan*, Mich. S.B.J., Aug. 1958, pp. 20, 21.

¹⁰⁵ McCORMICK, EVIDENCE 510 (1954).

¹⁰⁶ Perhaps it could be argued that the federal pleading rules favor plaintiffs over defendants and that "no contest" pleading restores some balance. In the first place, the premise of such an argument is questionable. Secondly, the advantage given the defendant has no rational relation to possible present advantages that plaintiffs enjoy.

¹⁰⁷ Lenvin & Meyers, *supra* note 101, at 1255.

of "no contest" in a civil case will be regarded by the public as an obfuscation of the law. With some temerity it is suggested that the device must be assessed in the light of such possible public misunderstanding. Thus, serious questions may be raised concerning this device which is aimed at protecting defendants against conclusive and evidential admissions in other suits. At present its advantages appear to be minimal, although experience may justify it.

IV. JOINDER OF CLAIMS AND PARTIES

With a few exceptions, the Michigan joinder and party rules are substantial copies of their analogous counterparts in the federal rules. There is very little revision to preserve some of the different former Michigan practice, but three notable innovations in federal and prior Michigan practice merit consideration.

A. *Compulsory Joinder of Claims*

Hailed as a meritorious reform, Michigan Rule 203.1 provides for compulsory joinder of claims and seeks to avoid the so-called "splitting trap."¹⁰⁸ Specifically, the rule provides that a pleader shall state every matured claim against an opposing party if it arises out of the transaction or occurrence that is the subject matter of the action and does not require the presence of third parties over whom the court cannot acquire jurisdiction. It is further provided, "Failure by motion or at the pre-trial conference to object to improper misjoinder of claims or failure to join claims required to be joined constitutes a waiver of the required joinder rules and the judgment shall not merge more than the claims actually litigated."¹⁰⁹ Rule 302 requires the judge to inquire of the parties at the pre-trial conference whether plaintiff has joined all claims under the terms of the joinder rule.

The rule has been explained by the joint committee, Mr. Honigman, Professor Hawkins, and Professor Blume.¹¹⁰ Their discussion will not be repeated at length, but these authorities state that the Michigan judicial decisions involving questions of the splitting of a cause of action require joinder of claims arising out

¹⁰⁸ Blume, *The Scope of a Cause of Action—Elimination of the Splitting Trap*, Mich. S.B.J., Dec. 1959, pp. 10, 13.

¹⁰⁹ MICH. RULE 203.1.

¹¹⁰ FINAL REPORT 66-67; 1 HONIGMAN & HAWKINS 474-79; Blume, *supra* note 108, at 10.

of the same transaction or occurrence.¹¹¹ Under this case law, a plaintiff would be precluded from asserting a cause of action which he could have asserted in a former action which went to judgment. Rule 203.1 is designed to incorporate this case authority which precludes splitting a cause of action into the new Michigan rules system as a compulsory joinder rule.¹¹² Plaintiff is directed to bring all of the indicated claims in his first suit, but, to avoid unfairness to him and the harsh results of the former rule against splitting a cause of action, the new rule provides in effect that, if the plaintiff does not join all claims, as is required, and if the defendant fails to object, the related claims which were not joined may be the subject of another suit without concern over the prior case law against splitting. If defendant does object to a failure to join certain allegedly related claims and the judge rules in his favor, plaintiff may then join the claims. Should plaintiff, however, then fail to join the required claims, it is suggested that such claims are lost by operation of the principles of *res judicata*.¹¹³ At the same time it is said that the rule should have no effect upon the application of *res judicata* to claims actually litigated in the case, and that it should not change the *res judicata* effect on factual issues actually litigated.¹¹⁴

If the rule operates as indicated above, it may do away with some of the unfair results of the rule against splitting a cause of action. A plaintiff will not ordinarily lose a claim he should have prosecuted in an original suit in which he obtained a judgment. At the same time, defendant will be given a chance to object to failure to join related claims, but he will not be given an opportunity to wait and in a later suit on a related claim object for the first time that plaintiff has split his cause of action and therefore is precluded from bringing the subsequent suit.

Two principal difficulties have been suggested. The first is that the rule will not operate as intended if defendant is permitted to object within the terms of the rule without specifically pointing out a claim which he thinks should be joined.¹¹⁵ A proper interpretation of the rule should surmount this difficulty. The

¹¹¹ In support of this proposition the joint committee cites *Arnold v. Masonic Country Club*, 268 Mich. 430, 256 N.W. 472 (1934), and *Tuttle v. Everhot Heater Co.*, 264 Mich. 60, 249 N.W. 467 (1933). FINAL REPORT 66.

¹¹² FINAL REPORT 66.

¹¹³ 1 HONIGMAN & HAWKINS 477.

¹¹⁴ *Id.* at 476.

¹¹⁵ *Id.* at 477-79.

second difficulty concerns questions relating to the effect of an appeal or failure to appeal. Such questions are fully discussed by Mr. Honigman and Professor Hawkins.¹¹⁶

In situations in which plaintiff obtains a judgment in an original action and then commences a second suit on a related claim, additional general questions are also suggested by the rule. If Rule 203 were not in effect, and if it were true that the rule against splitting a cause of action required a plaintiff to join claims arising from the same transaction, then plaintiff would have nothing to gain by omitting such a claim in an original suit against the defendant. Such claims would then be omitted only through oversight. The penalty would be the defense of *res judicata* in a second suit on the omitted claims. In this situation, Rule 203 may tend to operate only to abolish the *res judicata* rule, because defendants may often fail to object to the nonjoinder of related claims. Even if it is assumed that plaintiffs usually fail to join related claims under Rule 203 because of oversight (as was probably true under the former Michigan case law), defendants may often be unable to ascertain the true reason for omission of claims known to them. The natural reaction in many cases may be for defendants to take a chance that plaintiff is unaware of the possibility of making the claim or of successfully prosecuting it if he is actually aware of the possibility. Why educate the plaintiff? Also, defendants will not object when they have overlooked a claim of plaintiff or have concluded that an omitted claim cannot be successful.

In other words, the rule may operate so that it will not result in more joinders of claims than if the rule were not in existence. At the same time, it may result in more multiple suits than would formerly have been possible. If it does so operate, the fundamental question will be whether avoidance of the hardship on plaintiffs of the rule against splitting a cause of action justifies a rule with this result.¹¹⁷ Of course, at present whether such a result will be realized is speculative.

The rule and the above remarks are based on the notion that

¹¹⁶ *Id.* at 478-79.

¹¹⁷ Of the complaint that the "splitting" rule is harsh, Judge Clark has said: "Compulsion put upon a litigant to settle his disputes at one time not merely is a proper safeguard to defendants, but saves time and expense to the court. In view of modern liberal provisions as to amendment, or even for starting a new action where a previous one has failed for reasons not going to the merits, the hardship upon a misinformed plaintiff is small." CLARK 474-75.

the Michigan case law which precludes splitting a cause of action and Rule 203 both require joinder of claims arising out of the same transaction.¹¹⁸ However, if the new Michigan rule is adopted in other jurisdictions, its wording suggests certain basic questions in connection with existing rules against splitting a cause of action. The rule against splitting has been based on a rather uncertain concept of a cause of action.¹¹⁹ If Rule 203 were in effect in other states, the phrase "claims arising out of the same transaction or occurrence" in the rule might have a broader scope than the term "cause of action" as interpreted in cases establishing the rule against splitting a cause of action.¹²⁰ Thus, to the extent that objections by a defendant under the rule would force plaintiff to add claims to those originally asserted in his complaint, the rule might force the joinder of some claims which plaintiff would not need to join if the ordinary rule against splitting a cause of action were the only sanction he would have to consider for failure to assert an "entire" cause of action. For example, in some states it has been held that there are two causes of action or claims when defendant's act injures plaintiff's person and property.¹²¹ If Rule 203.1 were adopted, would there be two claims related to the same transaction?

The terminology of the rule is not completely clear from a related viewpoint. Under case law which involves splitting a cause of action, the courts have sometimes inquired whether plaintiff has one entire claim or several claims.¹²² By its terms, Rule 203.1 requires examination of the question whether plaintiff has several claims arising from the same transaction, or merely several independent claims. It is apparent that the word "claims" is used differently in these two contexts. The use of the word "claim" or "cause of action" in the case law suggests that there may be a further distinction under Rule 203.1. In some instances, it may be necessary to distinguish between one claim, claims related to the same transaction, and independent claims.

Suppose defendant commits acts which constitute a continuous trespass or nuisance. Does plaintiff have one claim, claims related

¹¹⁸ See note 111 *supra*.

¹¹⁹ CLARK 476-77.

¹²⁰ Professor Blume has stated a contrary conclusion. Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 802 (1947).

¹²¹ See cases cited in CLARK 488 n.185.

¹²² "[A]n entire claim . . . cannot be divided and made the subject of several suits The rule does not prevent . . . the prosecution of several actions upon several causes of action." *Secor v. Sturgis*, 16 N.Y. 548, 554 (1858).

to the same transaction, or independent claims? If he has one claim, Rule 203.1 is not operative, by its terms.

Perhaps the above question can be dismissed as one concerning labels and not substance, particularly if the rule is intended to have exactly the same scope of operation as case law concerning splitting a cause of action. In practice, the rule may prove to be a desirable reform. Nevertheless, it appears that there is sufficient doubt concerning its probable effectiveness and advantages to justify postponement of its use as a model elsewhere. In support of this conclusion, it is also pertinent to consider the attitude that the rule against splitting a cause of action does not usually cause difficulty for plaintiffs.

B. *Compulsory Joinder of Parties*

A complete revision of Federal Rule 19 relating to compulsory joinder of parties may prove to be an abortive attempt to improve the rule in form and content for state practice. First, the disadvantages of adopting Federal Rule 19 for state practice will be reviewed, and then the Michigan revision will be discussed.

Most of the federal rules operate with comparative practical convenience, and contain standards which are comprehensible from the rule itself. In contrast, Federal Rule 19, the required joinder of parties rule, does not afford these advantages.¹²³ Without the embroidery of case law it is not intelligible. It can be given meaning only in the light of practice before and after its adoption.¹²⁴ And the wording is obscure when such practice is taken into account. Perhaps it may be restated as follows: "All persons must be joined as parties to a suit as indicated in cases in the federal courts."

¹²³ "(a) *Necessary Joinder*. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"(b) *Effect of Failure To Join*. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons." FED. R. CIV. P. 19(a), (b).

¹²⁴ 3 MOORE 2144-45.

As a result, it is often difficult to point to any concrete advantages that such a rule will afford when compared to existing compulsory joinder rules in particular states. Although it may broaden the area of compulsory joinder, it also substitutes a large and complicated field of case law in federal courts for the familiar existing body of state judicial authority. When opponents of the federal rules system make such an objection to the adoption of a rule similar to Federal Rule 19, the only practical direct answer is a rejoinder that the federal rule embodies most of the existing state law. This reply is essentially unsatisfactory. A conscientious attorney will be impelled to ascertain what the federal cases indicate as a proper course of action in any particular situation. Particularly annoying is the conflict of opinion in the federal courts concerning the role that state law should play in the application of Federal Rule 19.¹²⁵ It is sometimes even difficult to ascertain whether or not a federal decision on compulsory joinder of parties follows a particular state rule of the state whose substantive law governs the case.¹²⁶

There is also a conflict concerning the basic philosophy which should underlie the rule. On one side is the concept that results of existing federal decisions are all important. The authority of similar cases is thus emphasized.¹²⁷ However, mechanical application of such cases may thereby result. On the other side, to quote Professor Reed's study of required joinder problems, ". . . questions of required joinder should be resolved less and less on the basis of pat formulations which provide generalized characterizations of parties, and more and more on case by case consideration of the inter-related and sometimes competing interests" ¹²⁸ This approach was advocated even in the case of the relatively simple general situation of suits by joint obligees and against joint obligors.¹²⁹ It leads to the conclusion that Federal Rule 19 is too rigid.

¹²⁵ For an attempt to synthesize all of the cases, see 2 BARRON & HOLTZOFF § 511, at 91-94.

¹²⁶ See the majority and concurring opinions in the leading case, *Greenleaf v. Safeway Trails, Inc.*, 140 F.2d 889 (2d Cir. 1944).

¹²⁷ Referring to the term "joint interest," which is used to describe indispensable parties in Federal Rule 19(a), Professor Moore stated, "The phrase must be construed to mean those who were necessary or indispensable parties under the previous practice." 3 MOORE 2144.

¹²⁸ Reed, *Compulsory Joinder of Parties in Civil Actions* (pt. 2), 55 MICH. L. REV. 483, 537 (1957).

¹²⁹ Reed, *Compulsory Joinder of Parties in Civil Actions* (pt. 1), 55 MICH. L. REV. 327, 366-67, 374 (1957).

In the face of these and other objections, most of the states which have adopted the entire federal rules system have nevertheless adopted Federal Rule 19 without making any significant changes. The difficulties of attempting to revise it have probably proved too formidable in the midst of a movement to adopt all of the federal rules. It is much less difficult to accept the rule with all its inadequacies than to promote a revision—even if agreement can eventually be reached concerning a particular revision. Contrary to this usual course of action, the Michigan joint committee secured the adoption of a substantial revision of Federal Rule 19.

The Michigan rule that is similar to Federal Rule 19(a) provides that persons having such interests in the subject matter of an action that their presence is essential to permit the court to render complete relief shall be made parties. The reference in Federal Rule 19(a) to persons "having a joint interest" is deleted.¹³⁰ Federal Rule 19(b) has also been completely reworded, and provisions substantially similar to those in the New York required party rule have been adopted. The Michigan rule states that the persons having the requisite interest shall be summoned to appear if they are subject to the jurisdiction of the court. If they cannot be summoned to appear, the court may grant appropriate relief to those who are parties to prevent a failure of justice. In determining whether or not to proceed in such case, the court is to consider four matters. It should take into account whether it can render a valid judgment between the existing parties, whether plaintiff has another effective remedy if the case is dismissed, whether prejudice will result from the nonjoinder to defendant or the absent person, and whether such prejudice, if any, can be avoided or lessened by conditions in an order or the judgment of the court. Finally, where a person has not been joined who should have been joined, judgment may still be rendered against plaintiff when "it is determined that the plaintiff is entitled to no relief as a matter of substantive law."¹³¹

¹³⁰ "Necessary Joinder. Subject to the provisions of Rule 208 and of sub-rule 205.2, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief shall be made parties and be joined as plaintiffs or defendants and aligned in accordance with their respective interests." MICH. RULE 205.1. The source of this section is the New York provision that persons "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably effected [sic]" shall be joined. N.Y. CIV. PRAC. LAW & RULES Art. 10, R. 1001 (1962).

¹³¹ MICH. RULE 205.2. The model for this section is the New York provision which

The general scheme of the rule seems to reflect the influence of a study by Professor Reed and a study in support of a somewhat similar provision in the new New York statute.¹³² Although it is impossible to discuss Professor Reed's views in detail, his formulation of ideal guiding principles in required joinder cases will be summarized to explain the thrust of the Michigan revision. Professor Reed states that in required joinder problems the courts should consider two competing policies. On one side is the policy of seeking to avoid an adverse factual effect on the interests of absent persons. However, the court need not take into account the *legal* effect of its determination of the case upon such persons' rights in determining the controversy between the present parties, because the court's determination will not and cannot legally affect such rights.¹³³ On the other side is the policy of "giving a petitioner as much merited relief as possible."¹³⁴ Here, according to Professor Reed, the obligation of the court is to try to devise a way to proceed in the absence of a person who should be present but who cannot be made a party. The desire to do justice "entire rather than by halves" should not be emphasized.¹³⁵ With these principles in mind, there must be an inquiry by the court into the circumstances of each claim in which a joinder problem arises.¹³⁶ Thus, joinder questions should be considered on a case-by-case basis.

To summarize, the new Michigan rule directs that all should be joined to permit the granting of complete relief, but, if persons who should be joined for such purpose cannot be joined, the court should proceed and give any effective relief it can to the actual parties to the suit. In deciding whether or not to proceed, it should consider all of the factors mentioned in the rule.¹³⁷

Theoretically, the above principles and the rule may embody ideal standards for joinder. But how will the rule work in the

states that an action may proceed in the absence of one who should be a party "when justice requires." Similar factors are listed for consideration by the court. The New York statute does not contain the clause which authorizes judgment for plaintiff on the law. N.Y. CIV. PRAC. LAW & RULES Art. 10, R. 1001 (1962).

¹³² Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1-2), 55 MICH. L. REV. 327, 483 (1957); 1957 Report of the Temporary Comm'n on the Courts, *Compulsory Joinder of Parties*, N.Y. Legis. Doc. No. 6(b), at 233-56.

¹³³ 1957 Report of the Temporary Commission on the Courts, *supra* note 132, at 336, 338. See also Reed, *supra* note 132, at 338 (pt. 1).

¹³⁴ Reed, *supra* note 132, at 337-38 (pt. 1).

¹³⁵ *Id.* at 339.

¹³⁶ *Ibid.*

¹³⁷ See the discussion in 1 HONIGMAN & HAWKINS 546-47.

day-to-day practice of attorneys before a state's trial courts? Will its idealistic goal of case-by-case treatment be realized? Perhaps the method used by Mr. Honigman and Professor Hawkins in explaining the rule is an indication. First, they discuss the general principles embodied in the rule and the general way in which it should operate. Then they proceed to explain its operation in some general types of cases (and properly so). For example, how should joint tortfeasors be treated? It is said that since they need not have been joined prior to adoption of the rule, and the substantive law prior to the rule was that complete relief could be obtained against any one of them, joint tortfeasors need not be joined.¹³⁸ In a discussion of other types of parties, a general result is suggested in at least eight situations.¹³⁹ No detracting from the excellent discussion is intended; in fact, a sufficient explanation of the rule makes such a discussion necessary. The point is that lawyers, judges, and even commentators on procedural rules must live in a practical, workaday world which requires a certain number of rules of thumb in procedural matters. Inevitably they will mechanize general rules. Precedents will not be limited to completely particularized fact situations which appeared in previously decided cases.

Perhaps it is unfair at this early stage in the use of the rule to predict that it will not in the long run accomplish the resolution of required joinder problems "less and less on the basis of pat formulations which provide generalized characterizations of parties," to use Professor Reed's words, but, as a mere guess, it is not likely to accomplish such a result any more than would the adoption of Federal Rule 19. In spite of this guess, it may engender a climate in which Michigan judges, compared to those governed by Federal Rule 19, will strive with greater effect to retain cases in the absence of persons who should be joined but cannot be joined and to proceed in order to grant all possible relief between the actual parties. This result is a principal goal.

Is the generality of the revised rule (and the similar New York rule) any more desirable than the generality of Federal Rule 19? If Rule 19 is to be revised, it might well be made specific in its application to certain types of cases. For example, in a state which does not authorize suit by or against partners in the partnership

¹³⁸ *Id.* at 551.

¹³⁹ *Id.* at 551-57.

name, it seems desirable to spell out the rules of joinder in suits by or against partnerships. In short, it is difficult to refrain, as space limits require, from expressing disagreement in part with the complete case-by-case approach advocated by Professor Reed.¹⁴⁰ Suffice it to say that some consideration should be given to the fact that party rules, like all procedural rules, should be designed for everyday use in routine cases and not only for use in complicated cases. Furthermore, they should be useful to all members of the bar and not just to the most astute attorneys. They should not place a premium on uncertainty of result. Finally, it should be remembered that *party rules are not simply rules for the courts*. In particular instances it is important to identify, prior to suit, the parties who must be joined if suit is brought. When the above considerations are taken into account, the Michigan revision and the somewhat similar New York rule do not seem to be ideal solutions of the problems raised by Federal Rule 19. At least Federal Rule 19, with its encrustation of case law, furnishes some basis for prediction. Also, the Michigan revision furnishes little improvement over Federal Rule 19 in regard to the problem of distinguishing between parties the plaintiff need not join in any event and those parties he must join under the rule if joinder is possible. On the affirmative side, the Michigan rule should accomplish one vital reform. It should abolish the notion that absence of an indispensable party is a jurisdictional defect.

Two specific innovations in the Michigan rule merit further comment. Rule 111.3 provides, in effect, that failure to object to nonjoinder of required parties by motion or by responsive pleading waives the objection. Supporting this rule is the theory that nonjoinder is not a jurisdictional defect.¹⁴¹ Furthermore, the compulsory joinder rule is regarded as being primarily for the benefit of the defendant, and thus he should take timely advantage

¹⁴⁰ The Michigan and New York rules seem to reflect in part a notion expressed by the New York advisory committee. "These [the factors for consideration listed in the rules] are the factors which should be considered in determining questions of indispensability. In varying degrees the courts have considered them, though often incompletely, and with unfortunate language which misleads the mechanically minded. The subject defies precise written rule; it calls for discernment as to how the various factors should be weighed in the individual case. However, general reference in a statute or court rule to the various interests involved, indicating the sort of attention which should be given to the matter, would be helpful to both bench and bar." 1957 Report of the Temporary Comm'n on the Courts, *supra* note 132, at 251.

¹⁴¹ MICH. RULE 111.3; 1 HONIGMAN & HAWKINS 546; Reed, *supra* note 132, at 332-34 (pt. 1).

of it.¹⁴² Mr. Honigman and Professor Hawkins suggest that if a nonjoinder objection is first made on appeal, the trial court's decision should not be reversed.¹⁴³ They also suggest, however, that since Rule 207 authorizes parties to be added at any stage of the proceedings, the appellate court may still consider the factors listed in Rule 203.1 and decide whether or not the judgment should be allowed to stand. In this situation it has been stated that the court should not consider prejudice to the defendant arising from the nonjoinder because the defendant has waived any such objection.¹⁴⁴

Some disagreement with the above ideas could be expressed. For example, is it always true that the objection is primarily for the benefit of defendant? Conceding that the above-mentioned notions are valid, should it be concluded that joinder questions should be raised at the latest by the responsive pleading? Party questions can often be difficult and complicated, and they will tend to be even more difficult if a true case-by-case approach is actually taken by the courts. This consideration indicates that defendant should not be required to raise the joinder issue at the stage of answer under the penalty of waiver. He should be given the opportunity to raise the objection for the first time within some period of time after the pleading stage. Although the nonjoinder objection should not be regarded as jurisdictional, it is arguable that recognition should be given to its importance.

The second important innovation in the compulsory joinder rule is that part which provides that, if there is a failure to join a person who should have been joined under the rule, the court may enter a judgment against a plaintiff who is not entitled to relief as a matter of substantive law.¹⁴⁵ In support of this provision it is argued that a judgment that a plaintiff is not entitled to relief as a matter of substantive law should not be reversed simply for failure to join a necessary party.¹⁴⁶ In addition, since the rule is also effective at the trial level, it seems to reflect the broad viewpoint that failure to join a person who should be joined under the rule is of no moment if the relief secured in the suit does not harm him.¹⁴⁷ The instant provision reinforces the phi-

¹⁴² FINAL REPORT 75.

¹⁴³ 1 HONIGMAN & HAWKINS 558.

¹⁴⁴ *Ibid.*

¹⁴⁵ MICH. RULE 205.2, quoted in the text at note 131 *supra*.

¹⁴⁶ 1 HONIGMAN & HAWKINS 558.

¹⁴⁷ See discussion of this viewpoint in Reed, *supra* note 132, at 532-37 (pt. 2).

losophy that the trial court should give whatever relief it can give without prejudice to the absent party.¹⁴⁸

On the other hand, a trial judge may err in rendering a judgment on the law against plaintiff. If his decision is reversed on appeal and the case may not proceed without the absent party, there has also been a waste of time and effort.¹⁴⁹ Furthermore, even though a judgment against plaintiff may have no legal effect on absent parties, it could have important extra-legal effects. It should also be noted that the rule is not clear in specifying the stage of the suit at which the judge may rule on the law against the plaintiff, within the terms of the rule, or whether his ruling can only be made on the face of the complaint.¹⁵⁰

Again, it seems desirable to postpone consideration of adoption of this Michigan party rule until substantial experience is had with it in Michigan.

C. *Permissive Joinder of Parties*

An innovation in the permissive joinder of parties rule alters the old saw, "If you can't lick 'em, join 'em." It seems to say, "If you can lick 'em, join 'em." In addition to the provision of Federal

¹⁴⁸ See *Bourdieu v. Pacific W. Oil Co.*, 299 U.S. 65 (1936), in which the Court stated: "Since, plainly, the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

"The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. . . . If it be urged that the United States is an indispensable party and, hence, that the court may not proceed even to inquire whether the bill states a cause of action, the answer is that good sense suggests precisely the contrary. For a mere inspection of the bill at once discloses that it states no cause of action and, therefore, the United States is not an indispensable party, since it cannot be prejudiced by, and has no interest requiring protection in, a proceeding which at the threshold is seen to be without substance. Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor." *Id.* at 70-71.

¹⁴⁹ As indicated in the quotation in note 148 *supra*, the Supreme Court emphasized that in the *Bourdieu* case it was certain that no cause of action was stated by complainant's bill. In *Smith v. Sperling*, 237 F.2d 317 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 91 (1957), the court of appeals ordered the trial court to determine the legal sufficiency of a cause of action asserted by plaintiff before proceeding to consider a non-joinder objection under Federal Rule 19. The clarity of the objection to plaintiff's complaint was not mentioned.

¹⁵⁰ In *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946), the majority opinion states that the rule of the *Bourdieu* case does not apply if the complaint states a cause of action. See discussion in *Reed*, *supra* note 132, at 530-37 (pt. 2). Michigan Rule 506 does not seem to be so restricted.

Rule 20 that parties may be joined if there is asserted by or against them any right to relief in respect of or arising out of the same transaction, occurrence, or series thereof, and if any question of law or fact common to them all will arise in the action, Michigan Rule 206 states that all persons may join as plaintiffs or be joined as defendants in one action "if it appears that their presence in the action will promote the convenient administration of justice."¹⁵¹

When will the presence of parties "promote the convenient administration of justice"? A similar provision in a former Michigan statute did not authorize plaintiffs to join unless their causes of action were joint and did not authorize plaintiffs to join defendants unless the liability was one asserted against all of them.¹⁵² It appears that if the instant clause of the rule has this meaning it adds nothing to Federal Rule 20(a). Therefore, it has been urged that the clause authorizes joinder although claims and parties may not be joined under Federal Rule 20(a).¹⁵³ More specifically, it is suggested that plaintiff may join claims against one or more but not all of the defendants with a claim against all of multiple defendants when the former claims do not arise out of the same transaction or occurrence (or series of transactions or occurrences) which gave rise to the claim against all the multiple defendants.¹⁵⁴ There is some support for the view that the same result follows under Federal Rule 20(a).¹⁵⁵ However, it is contrary to the majority of federal court decisions on the subject.¹⁵⁶ These cases take the viewpoint that all claims by or against multiple parties must relate to the same transaction or occurrence under Federal Rule 20(a).

It can be questioned whether the wholesale joinder of unrelated claims in multiple party suits is desirable. Even if such joinder is desirable in some instances, the circumstances under which joinder is generally authorized to promote the convenient administration of justice remains a mystery. The standard is so broad it may be largely ineffective. Or if it is made effective by

¹⁵¹ MICH. RULE 206.1.

¹⁵² 1 HONIGMAN & HAWKINS 578.

¹⁵³ *Id.* at 578-79.

¹⁵⁴ *Id.* at 579-80.

¹⁵⁵ See the argument in 2 BARRON & HOLTZOFF § 533.1, and in Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 604-11 (1952).

¹⁵⁶ The applicable cases are cited and discussed in 2 BARRON & HOLTZOFF § 533.1.

the courts, the standard does not indicate the areas in which it will be effective.

As it now stands, the instant provision appears undesirable as a model for a change in Federal Rule 20(a).

V. DISCOVERY RULES

For the most part, the new Michigan discovery rules follow the format and content of the federal discovery rules. Of the various revisions which have been made, three are of primary importance.

A. *Limitation of Discovery to Matter Which Is Relevant and Admissible Under the Rules of Evidence*

In its final report the joint committee recommended that the discovery rules in Michigan should have the same scope of operation as the federal rules.¹⁵⁷ Under the federal rules, discovery may be had regarding any matter which is not privileged and which is relevant to the subject matter of the pending action.¹⁵⁸ Testimony may be elicited, even if it is not admissible at the trial, if it appears reasonably calculated to lead to the discovery of admissible evidence.¹⁵⁹

The prior Michigan rules had limited the taking of depositions and pre-trial discovery to "matter not privileged and admissible under the rules of evidence governing trials, which is relevant to the subject matter involving the pending action."¹⁶⁰ In rejecting this limitation, the joint committee tersely stated, "The admissibility and relevancy test of the present rules is eliminated, and the Federal Rules followed. What is admissible and relevant depends on factors that can be known only when the matter is offered in evidence at the trial, and not at this early stage of the proceedings."¹⁶¹ However, the recommendation of the joint committee was not followed. When the discovery rules were finally promulgated, they limited the taking of depositions by the above-mentioned language used in the former Michigan rule.¹⁶²

¹⁵⁷ FINAL REPORT 84-85.

¹⁵⁸ FED. R. CIV. P. 26 (depositions), 33 (interrogatories), 34 (discovery and production of documents and things).

¹⁵⁹ FED. R. CIV. P. 26(b).

¹⁶⁰ Former Michigan Rule 35.

¹⁶¹ FINAL REPORT 85.

¹⁶² MICH. RULE 302.2(1).

Presumably the justification for an "admissibility" limitation relates to a fear that without the limitation discovery procedures can be mere "fishing expeditions."¹⁶³ Is there anything of substance in this reason for the limitation *if the federal discovery rules are otherwise adopted?*

In answering this question, consideration should be given to the reasons for the use of depositions and interrogatories for the purpose of discovery—a purpose which is specifically mentioned in the new Michigan rules.¹⁶⁴ These reasons for discovery procedures have been reviewed many times by judges and commentators. In summary, the discovery rules were devised to provide means for full disclosure of all facts for presentation at the trial, exposure of groundless claims, creation of a rational basis for settlement, and delimitation of the area of controversy. Discovery affords the opportunity to avoid surprise, confusion, and gamesmanship.¹⁶⁵ To accomplish these purposes fully, "fishing expeditions" for inadmissible evidence are necessary if that epithet means a search for facts which are relevant but inadmissible. In Michigan it is not entirely true that it "is no longer a valid objection that counsel's discovery proceedings may constitute a 'fishing expedition,' if there appears any reasonable possibility that there be fish in the pond."¹⁶⁶

Furthermore, the limitation is not necessary to protect a party against discovery of irrelevant matter. Court orders may be ob-

¹⁶³ In rejecting a contention that an administrator of a decedent's estate could not take the deposition of a plaintiff without waiving the plaintiff's disqualification under the dead man's statute, the court made the following statement concerning the instant limitation, "It will be noted, however, that, at least so far as matters not privileged are concerned, the limitation pertains not to the identity, qualifications or competence of a witness but to the competency of the evidence and its relevance to the subject matter of the litigation. This limitation was intended to prevent fishing expeditions into areas unrelated to the cause of action, not to impede a party in discovering from any person, whether competent as a witness or not, all facts and information, not privileged, which are relevant to that cause of action." *Banaszkiewicz v. Baun*, 359 Mich. 109, 115-16, 101 N.W.2d 306, 308-09 (1960).

¹⁶⁴ "After commencement of an action, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." MICH. RULE 302.1.

¹⁶⁵ Representative comments are contained in the following materials: *Hickman v. Taylor*, 329 U.S. 495 (1947); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961); 2A BARRON & HOLTZOFF § 641; 4 MOORE 1031-36; *The Practical Operation of Federal Discovery (A Symposium on the Use of Depositions and Discovery Under the Federal Rules)*, 12 F.R.D. 131, 139 (1951); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944-46 (1961).

¹⁶⁶ BELLI, *MODERN TRIALS* 29 (abridged ed. 1963).

tained to protect against annoyance, embarrassment or oppression under the federal and Michigan rules.¹⁶⁷ As mentioned below, the Michigan rules also furnish adequate protection against unnecessary discovery of materials gathered for the suit and prohibit investigation of some of the work product of an attorney.

One of the chief criticisms of the federal discovery rules is the charge that discovery often necessitates unreasonable expense. The instant limitation can have little effect upon expense. It should also be noted that the Michigan rule provides that the court may issue orders to protect a party against undue expense.¹⁶⁸

It has already been suggested that the complaint should be required to state a claim entitling the plaintiff to relief, as specified in Federal Rule 8. In states in which such a provision is in force, adoption of the instant limitation in the discovery rules would be particularly illogical because the discovery of the facts and the delimitation of the controversy by discovery are more important goals when relatively general complaints are possible.

Thus, once the federal rules system is adopted, the addition of the instant limitation is neither very logical nor sensible. Of course, it cannot be denied that, even with this limitation, the Michigan discovery rules are useful.

B. *Work Product of Client and Attorney*

The Michigan rules also include express restrictions on discovery of writings prepared in anticipation of litigation, statements secured from witnesses, and other "work product" of the client and his attorney. Rule 306.2 contains the following provisions:

"The court shall not order the production or inspection of any writing prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any statement obtained from an adverse party or other witness by a party, his attorney, surety, indemnitor or agent in anticipation of litigation unless a copy of such statement was not given to the wit-

¹⁶⁷ FED. R. CIV. P. 30, 31, 33.

¹⁶⁸ MICH. RULES 306.2, 307.2, 309.2.

ness or party or unless the court is satisfied that the denial of production and inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice."

Also, production or inspection of writings which reflect an attorney's mental impressions, conclusions, or legal theories cannot be ordered.¹⁶⁹

The first sentence quoted above from Rule 306.2 is somewhat similar to an amendment to the federal rules proposed in 1946. It is essentially a compromise between proposals that the described material be privileged and that the described material be subject to discovery without limitation.¹⁷⁰ If a specific compromise between extreme viewpoints is to be adopted, it is a feasible alternative. However, as indicated in the discussion below, it should be expanded to include statements of witnesses.

Although the rule is workable, very little guidance is furnished by the language of the limitation. From this standpoint, it might well be desirable to indicate more clearly the factors which attorneys and judges should consider, or, on the other hand, to place greater emphasis on the discretion of the trial judge.

A number of questions are raised by the separate treatment of statements of witnesses and parties in the second sentence quoted from Rule 306.2. It requires that, in addition to the matters which a court should consider in ordering production of writings under the first sentence quoted above, the matter of whether the adverse party or other witness was given a copy of his statement should be a pertinent factor for consideration when production of witnesses' statements is sought.

The consideration which a court should give to this matter is not clearly indicated. Ambiguous and awkward, the sentence suggests various interpretations. The following questions do not exhaust the possibilities. Does the sentence mean that production by an opponent of a statement of a witness who is not a party can be ordered only if the copy of the statement was not given to the

¹⁶⁹ MICH. RULE 306.2.

¹⁷⁰ Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 457-60 (1946). See generally *Developments in the Law—Discovery*, *supra* note 165, at 1027-44.

witness *and* denial of production would prejudice the party seeking production? Does it mean that the court may order production of a copy without more ado on the mere showing that the opponent did not originally give a copy to the witness? Does the sentence mean that, even if the witness was given a copy of his statement, the court may order production by the opponent who has a copy if the party seeking production would otherwise be prejudiced or harmed if he did not obtain a copy from anyone? Does it mean that the court may order production by the opponent only if the party seeking production would be prejudiced or harmed because he cannot presently obtain a copy from the witness who was originally given a copy by the opponent?

Perhaps the most logical interpretation on the face of the language is the interpretation that a court may not ordinarily order production by the opponent if the witness has been given a copy of his statement, but, if for some reason the party demanding the copy will be prejudiced by lack of production by the opponent (because the witness has lost his copy, etc.), the production can still be ordered. On the other hand, if the witness has not been given a copy of his statement, perhaps production of the opponent's copy may be ordered without any further showing. Perhaps a showing of prejudice might still be required if the witness has not been given a copy. The question of whether a witness has a copy of his statement demanded from the opponent appears relatively unimportant in any event. The opponent has no substantive objection to producing a statement of a witness if he can only object that the witness has a copy.

The Michigan rule would thus be much simplified if the first sentence quoted above included statements of witnesses as well as other writings, and if the second sentence were eliminated.

C. *Miscellaneous Provisions*

Upon permission of the court or stipulation of the parties, depositions may be electronically recorded.¹⁷¹ This provision permits accumulation of experience with electronic devices.

Various other minor additions are made to the federal rules. Some of these embody proposed amendments to the federal rules which have not been adopted by the Supreme Court of the United

¹⁷¹ MICH. RULE 306.3.

States. Others amplify or clarify specific provisions in the federal rules.¹⁷²

VI. PRE-TRIAL CONFERENCE

Michigan Rule 301 is similar to the former Michigan rule concerning mandatory pre-trial conferences. The matters which should be considered at such a conference are stated in much more detail than in the federal rule.¹⁷³ In this respect, the Michigan rule is a substantial improvement over the federal rule, which specifies the subject matter of a conference in vague, general terms.¹⁷⁴ It

¹⁷² Some of these changes are treated in Comment, *Pre-Trial Deposition and Discovery Under the Michigan General Court Rules of 1963*, 8 WAYNE L. REV. 417 (1962).

¹⁷³ "In every contested civil action the court shall direct the attorneys for the parties to appear before it for a conference to

(1) state and simplify the factual and legal issues to be litigated, to consider the formal amendment of pleadings or their amendment by pretrial order, and if desirable or necessary, to order that such amendments be made;

(2) hear and determine all pending defenses filed under Rule 110.16 and motions which should be disposed of before trial; and determine whether a jury trial shall be had pursuant to demand, if any, theretofore made;

(3) consider the consolidation of cases for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(4) consider admissions of fact and authenticity of documents, including ordinances, charters, and regulations, which will avoid unnecessary proof;

(5) consider limiting the number of expert witnesses and whether the parties wish to agree to the appointment of an impartial expert;

(6) specify all damage claims in detail as of the date of the conference but the amount of liability insurance carried by a party shall not be required to be disclosed at the pretrial conference or by means of discovery unless it is relevant to an issue in the case and admissible in evidence;

(7) produce all proposed exhibits in the possession of the attorneys in support of the main case or defense and admit the authenticity of such exhibits whenever possible;

(8) arrange for completion of discovery proceedings, physical examinations, and depositions;

(9) submit and consider appropriate authorities in support of contentions made;

(10) estimate the time required for trial;

(11) discuss the possibility of settlement;

(12) consider all other matters that may aid in the disposition of the action." MICH. RULE 301.1.

¹⁷⁴ "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the

is particularly desirable for use in a state in which pre-trial conferences have not been previously authorized.

The nationwide controversy concerning the utility of a pre-trial conference will not be recounted here. In any event, the experience in Michigan with mandatory conferences should be investigated in every jurisdiction in which provisions similar to the federal rules are effective.

VII. TRIAL, JUDGMENT, AND POST-TRIAL RULES

Whenever the federal rules which apply to procedures prior to trial are adopted, a few federal rules relating to trial and judgment must also be adopted.¹⁷⁵ All such rules have been adopted in Michigan. The remaining trial and post-trial rules are important, but space limitations preclude discussion of them here.

VIII. CONCLUSION

Judge Clark stated his reaction to new rule proposals of the Advisory Committee for the Temporary Commission on the New York Courts as follows: "One senses a conceived necessity to use much of the federal system while disguising this use so far as may be."¹⁷⁶ He also concluded that the New York proposals (which have now been enacted) followed an outmoded pattern of "confusing intermixtures of the federal practice denatured by local rules."¹⁷⁷

The Michigan rules that are effective prior to trial cannot be so characterized, because they contain federal rules provisions to a greater degree. And it is also true that the new Michigan rules and statutes constitute, for Michigan, the major and enlightened reform characterized in the quotation at the beginning of this article. Nevertheless, the above review of major changes in the federal rules indicates rather clearly that the Michigan rules do not embody as logical and coherent a system of procedure prior to trial as does the federal rules system without the Michigan changes. It seems inevitable that lack of complete consistency and

subsequent course of the action, unless modified at the trial to prevent manifest injustice." FED. R. CIV. P. 16.

¹⁷⁵ FED. R. CIV. P. 42 (Consolidation; Separate Trials), 54 (b) and (c) (Judgment Upon Multiple Claims; Demand for Judgment), 62(h) (Stay of Judgment Upon Multiple Claims).

¹⁷⁶ Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958).

¹⁷⁷ *Id.* at 447-48.

unity will result from a hybrid system of procedure which is based essentially upon the federal rules system, with substantial changes motivated in part by a desire to retain some prior state practices not contained in the federal rules, and in part by a desire to improve specific federal rules by innovations.

The major changes which have been made in the federal rules in order to retain prior Michigan practice do not for the most part furnish desirable models for other states in which the federal rules system is employed or contemplated. Each major innovation must be judged on its merits. Some of the major innovations discussed here are not desirable models; some are at the least presently questionable. It is fair to conclude that, taken as a whole, the Michigan pre-trial procedural rules system is not as desirable for use in other states as the federal rules system without the Michigan changes.