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THE EFFECT OF PROPOSED RULES 7 THROUGH 25 ON PRESENT WASHINGTON PROCEDURES: PART II

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Proposed rules 7 through 12 of the Rules of Pleading, Practice and Procedure, recommended by the Judicial Council and published by the Supreme Court, were considered in the Autumn, 1957, issue of the Law Review. This second article includes comment on the general changes in present practice which would be made by proposed rules 13 through 25 and by proposed rule 42. These rules are concerned primarily with parties and joinder of claims. In run-of-the-mine cases they will not be as important as the pleading rules already discussed.

In general, our present law concerning joinder of causes of action and joinder of parties is sometimes arbitrary. In many instances it is uncertain. There are unexplained gaps in the governing court rules, statutes, and case law. In situations where a rule has been established some of the pertinent case law is almost literally buried because it cannot be discovered by ordinary research methods.

Regardless of particular advantages or disadvantages of any of the proposed joinder rules, it is clear that they would at least substitute a logical, coherent and unified system for the present hodgepodge. Comparatively, they offer a more readily accessible, understandable, and usable set of rules than is embodied in present Washington law.

The proposed rules are reproduced below to indicate the similar federal rule as well as the proposed rule. For the text of the federal rule, read the rule with matter in brackets, omitting matter in italics. For the text of the proposed Washington rule, read the text with matter in italics, omitting matter in brackets.

Proposed Rule 13

COUNTERCLAIM AND CROSS-CLAIM

[Subdivisions reproduced below]

Unlike some of the other federal rules, federal rule 13 has evoked little written comment—favorable or otherwise. This is somewhat surprising in view of its provision for compulsory counterclaims and its liberal policy for permissible counterclaims. Perhaps this lack of comment is due to the fact that similar provisions were in existence in the federal rules governing equity cases prior to 1938.2

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The general purpose of the rule is the avoidance of multiplicity of suits. It requires or authorizes counterclaims by original parties, parties who are brought in, and parties who intervene.\(^8\)

Any counterclaim would have to be a claim under rule 8(a) entitling the pleader to relief against the opposing party. Therefore, except as indicated below, a counterclaim would include the types of demands made by defendants which are now labeled counterclaims, setoffs, and cross-complaints in Washington.

Rule 13 would replace the Washington statutes concerning counterclaims and setoffs and the Washington case law concerning cross-claims or cross-complaints to the extent indicated in the following discussion.

**Rule 13 (a)**

**Compulsory Counterclaims.** 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.

**Compulsory Counterclaims.** This section provides for compulsory counterclaims, which would be new in this state.\(^4\) A counterclaim would be compulsory under the following conditions: (1) if it arose before the time of serving the pleading containing the counterclaim, unless at the time the original action was commenced the counterclaim was the subject of another pending action; (2) if it were against any

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\(^8\) Ordinarily a counterclaim will be pleaded by the original defendant. However, as indicated in the text which follows, a counterclaim may be made by plaintiff in the reply. A third party defendant brought into the case under rule 14 is authorized to make a permissive counterclaim and is required to make a compulsory counterclaim under the terms of that rule.

\(^4\) Compulsory counterclaims are provided for in a few code pleading systems. Clark, *Code Pleading* 646, note 54 (1947). In Washington if a counterclaim is an independent cause of action, the defendant may elect not to plead it even though it is connected with the subject of plaintiff’s action. If he does not do so, a judgment in the case will not bar defendant from a subsequent independent action based on the claim nor deprive him of the right of asserting the claim as a counterclaim or defense in a subsequent action. Scott v. Holcomb, 149 Wash. Dec. 377 (1956), and cases cited therein. Diamond Ice & S. Co. v. Klock Produce Co., 103 Wash. 369, 174 Pac. 435 (1918), 110 Wash. 683, 189 Pac. 257 (1920), and Jansen v. Kolmitz, 130 Wash. 314, 226 Pac. 1025 (1924), are instructive cases on this point.

However, it is also true that if proof of a counterclaim would defeat the plaintiff’s cause of action, and the counterclaim is not asserted, judgment for the plaintiff bars a later assertion of the counterclaim by independent suit or otherwise. Judish v. Rovig Lumber Co., 128 Wash. 287, 222 Pac. 896 (1924); Olsen v. Title Trust Co., 58 Wash. 599, 109 Pac. 49 (1910). To the extent this rule is operative, it could be argued that there is a species of compulsory counterclaim now effective.
opposing party; (3) if it arose out of the transaction or occurrence which was the subject of the opposing party's claim; and (4) if it did not require the presence of third parties of whom the court could not acquire jurisdiction. No penalty would be incurred in the action in which a compulsory counterclaim was omitted, but the principle of res judicata would operate to bar the later assertion of the compulsory counterclaim by an independent suit or otherwise.5

All present permissive counterclaims and setoffs relating to the transaction or occurrence which is the subject of the suit would be compulsory counterclaims.6 Claims relating to the subject matter of the suit which are now asserted in "cross-complaints" against the opposing party would also be compulsory counterclaims.7

Transaction or Occurrence. Conditions (1) and (2), listed above, apply in part to permissive counterclaims and will be discussed below in connection with rule 13(e) and rule 13(b) respectively. Condition (3) above states the principal feature distinguishing a compulsory counterclaim from a permissive counterclaim as outlined in proposed subdivision (b). Compulsory counterclaims are those relating to the transaction or occurrence that is the subject of the opposing party's claim; permissive counterclaims are all other claims against the opposing party.

What is a "transaction or occurrence" within rule 13(a)? Generally speaking, these terms are broad and include any set of facts or circumstances unified in logic or in actual life. A leading federal case describes a "transaction" as a "word of flexible meaning. It may com-

5 3 Moore, Federal Practice 28 (1948).
6 See discussion of rule 13(b) for a possible qualification of this statement concerning setoff. The presently authorized counterclaim arising out of the contract or transaction set forth in the complaint would become a compulsory counterclaim. In an action arising on contract RCW 4.32.100 also authorizes counterclaims on any other cause of action arising also on contract. Such counterclaims would be permissive under rule 13(b). With the qualification indicated in the discussion of rule 13(b), setoffs against the plaintiff which do not relate to the contract sued upon (as authorized by RCW 4.32.110) would be permissive counterclaims. Present setoffs related to the contract which is the subject of the suit would be compulsory counterclaims.
7 In some states a "cross-complaint" relates to a procedure formerly used in equity cases. Bancroft, Code Pleading 648 (1926). In practice in Washington, it appears that possible distinctions between such a "cross-complaint" by a defendant against a plaintiff and a "counterclaim" against the plaintiff are usually ignored. No cases have been discovered which delineate any definite scope of a cross-complaint against the plaintiff as distinguished from a counterclaim against the plaintiff. See, for example, Northwestern & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139 (1902); and Chandler v. Miller, 172 Wash. 252, 19 P.2d 1108 (1933). As between plaintiff and defendant, the terms "counterclaim" and "cross-complaint" are used without distinction in a number of opinions. See, for example, Duggar v. Dempsey, 13 Wash. 396, 43 Pac. 357 (1896); Reynolds v. Dickson, 48 Wash. 407, 93 Pac. 910 (1908); Caine v. Seattle & Northern Ry Co., 12 Wash. 596, 41 Pac. 904 (1895); Ingersoll v. Clapp, 179 Wash. 335, 37 P.2d 895 (1934). For cases concerning cross-complaints against co-parties, see discussion of Rule 13(g).
prehend a series of many occurrences, depending not so much upon
the immediateness of their connection as upon their logical relation."
Many cases illustrate this idea. Any unified fact occurrence in real
life, such as an automobile accident, would be an "occurrence." This
term is not intended to limit the term "transaction."

Thus, the definition of the area of compulsory counterclaim is some-
what similar to the definition of the area in which a permissive coun-
terclaim may now be made on the ground that it relates to the trans-
action which is the subject of plaintiff's action.

**Jurisdiction and Venue.** Jurisdiction over the subject matter of a
compulsory counterclaim would rarely be challenged in view of the
fact that the superior courts are courts of general jurisdiction. If there
were no jurisdiction over the subject matter of the counterclaim it
probably would not have to be asserted. If the counterclaim involved
persons who were not parties to the suit but who would be indispen-
sable parties to the counterclaim under proposed rule 19, and if personal
jurisdiction of such persons could not be obtained, the counterclaim
would not have to be asserted.

Venue requirements would probably be treated as follows. If the
presence of a third person as an indispensable party were required by
the counterclaim and his presence violated venue rules, he could make
a venue objection. However, plaintiff could probably not object to
an original defendant's counterclaim against the original plaintiff on
the basis of ordinary venue statutes. In federal court it has been held
that a plaintiff waives venue objections to counterclaims against him
by bringing his action. A similar rule now prevails in most states as
to permissive counterclaims which relate to the transaction that is the
subject matter of the suit.

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9 For example, plaintiff sued defendant on an account for goods sold and delivered
pursuant to a distributorship contract. Several counterclaims involving breaches of the
distributorship agreement were compulsory counterclaims. Parmelee v. Chicago Eye
Shield Co., 157 F.2d 582 (8th Cir. 1946).
10 RCW 4.32.100.
11 In federal court there is jurisdiction over a compulsory counterclaim if there is
jurisdiction over plaintiff's case because it involves a federal question, even though
there is no independent ground for jurisdiction of the federal court over the counter-
claim. See discussion, 6 Cyclopedia of Federal Procedure 48-54 (1951). But in state
court an analogous rule would not have to be followed in jurisdictional matters because
the above rule is a federal jurisdictional rule involving a matter not governed by rule
13. It seems logical to conclude that rule 13 does not bear on the subject.
12 Contracting Division, A. C. Horn Corp. v. New York Life Insurance Co., 113
F.2d 864 (2d Cir. 1940).
13 General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932). However
this rule may be considered an interpretation of federal venue requirements. It is not
dealt with by rule 13(a).
14 Cases are collected in Note, 129 A.L.R. 915 (1940).
The Washington venue statutes which are jurisdictional (such as the venue statute relating to actions involving real property) probably would have a different effect. Plaintiff would probably not waive objection to venue of a counterclaim under these statutes merely by bringing his suit. For example, if a defendant were in the rather unusual position of having a compulsory counterclaim against the plaintiff involving real property in a county other than the county in which plaintiff had brought his action, it seems that plaintiff would be able to object to such a counterclaim because the court would not have jurisdiction of it.

**Declaratory Judgment Actions.** Some question has been raised under the federal rule as to whether compulsory counterclaims must be made in declaratory judgment actions. Federal cases have split on the question of whether a counterclaim for declaratory relief is proper, but indicate that rule 13 governs counterclaims of defendant in declaratory suits against him.6

**Rule 13 (b)**

**Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

As under present Washington law, this rule permits contract claims against the opposing party which are not related to the transaction that is the subject of the suit, and which are now properly the subject of setoff and counterclaim, to be asserted as counterclaims.17 But it is much broader than present Washington law. In addition, any type of unrelated claim against an opposing party could be asserted. Presumably if plaintiff sued the defendant for alienation of affections of his wife, defendant could counterclaim by seeking damages for breach of a contract.

Thus, our statute on permissive counterclaim would be entirely abrogated.18

In a suit on an express or implied contract, RCW 4.32.110 authorizes setoff by the defendant of "any demand of a like nature against the plaintiff in interest." To this extent RCW 4.32.110 would also be replaced. However, this statute also provides that, except in actions on negotiable instruments under certain circumstances, the defendant

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10 See footnote 11. No analogous Washington case has been found.
16 Cases are reviewed in 6 CYCLOPEDIA OF FEDERAL PROCEDURE 46-48 (1951).
17 RCW 4.32.100; RCW 4.32.110. Assertion against an assignee of claims against the assignor is discussed later in the text.
18 RCW 4.32.100.
may set off a contract demand existing against the prior assignor of the contract claim upon which the plaintiff is suing. Does the proposed rule cover such setoffs against a prior holder of plaintiff's claim when it provides for counterclaims against the "opposing party"? If it does not, the setoff statute would continue to be effective insofar as it provides for setoffs good against plaintiff's assignor (in contract cases only).

There is a federal case which holds that the compulsory counterclaim rule governs counterclaims against the subrogor when plaintiff is a subrogee and that the subrogor should be brought in as an additional necessary party for the granting of relief to the defendant. It is therefore arguable that the proposed rule would abrogate the above statute insofar as it authorizes setoffs against an assignor to be asserted against a plaintiff assignee, when the setoff relates to the contract sued upon.

In addition, the statute allows setoffs of unrelated contract claims against a prior holder to be asserted against an assignee-plaintiff who is suing on an assigned contract. It is not at all clear that the federal rule authorizes the defendant to assert any permissive claims under the rule against an assignor in the suit by the assignee. Perhaps it does not. If so, it could be urged that our setoff statute would not be abrogated to the extent that it allows setoff of unrelated contract claims against the assignor to be asserted in a suit by an assignee. If the rule is adopted, the supreme court could at the same time settle this problem and indicate whether or not the rule is intended to replace the setoff statutes entirely.

Three other setoff statutes present a similar problem. RCW 4.32.120 authorizes similar setoffs of contract claims against a person beneficially interested in plaintiff's suit when plaintiff is a trustee or has no real interest in the contract sued upon by him. RCW 4.32.130 allows setoffs of demands against testators or intestates in suits brought by executors and administrators. RCW 4.32.140 allows setoffs of claims of testators and intestates against plaintiffs who sue executors and administrators in their representative capacities. No direct authority has been discovered for similar counterclaims under the federal rule.

The previous comment on venue of compulsory counterclaims applies to permissive counterclaims. There would have to be independent

jurisdiction over the subject matter of the permissive counterclaim. A counterclaim could be asserted in a reply. At present this is not possible except in limited situations. The time at which counterclaims must exist is discussed below.

Rule 13 (c)

Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

This is the subdivision which indicates that a counterclaim under the rule involves both legal and equitable setoffs under present rules as well as present counterclaims which involve affirmative relief beyond a setoff. At present a setoff involves a contract type of claim only. A counterclaim may involve a contract type of claim, or it may involve some other type of claim relating to the transaction which is the subject of plaintiff's suit. As a practical matter this distinction is not bothersome, but it would be abolished. A permissive counterclaim under the rule could be any type of claim, including one greater or less in amount than plaintiff's claim.

Rule 13 (d)

Reserved. [Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.]

This federal rule is properly omitted from the proposed rules.

Rule 13 (e)

Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

As already mentioned, under subdivision (a) a counterclaim otherwise compulsory would not have to be made by a defendant if the claim had not matured at the time the defendant served his answer. See discussion in 3 Moore, Federal Practice 53-57 (1948).


22 In Green v. Harris, 113 Wash. 259, 193 Pac. 690 (1920), the court approved allegations of a setoff in the reply to defendant's counterclaim when the setoff was not connected with the subject matter of the complaint. The general rule seems to be that a claim which plaintiff could have pleaded affirmatively in the complaint may not be pleaded in the reply as a counterclaim upon which relief may be sought. See Note, 42 A.L.R. 564 (1926).

23 Cases are collected in 3 Moore, Federal Practice 86, note 3 (1948).
Nor would it have to be made if it had matured at that time and were the subject of another pending suit at the time the current suit was commenced against the defendant. It might be noted that this latter condition would apply only if the other suit were pending in a court of another jurisdiction. If the claim of defendant were pending in a suit commenced by defendant in Washington when the suit of plaintiff was commenced in Washington, plaintiff would probably be required to make his claim as a compulsory counterclaim in defendant's suit.

Although no clear federal authority has been found, a counterclaim which would be permissive under subdivision (b) probably could not be made as a matter of right if it matured after the defendant served his answer.

Rule 13(e) is closely connected with the above provisions. It allows the defendant (or the pleader) to assert a counterclaim maturing after service of the answer (or his pleading) with the permission of the court. Under present rules in Washington, setoffs and counterclaims against the plaintiff which do not relate to the subject matter of the suit must mature and belong to the defendant at the time the suit is commenced by plaintiff.24

If counterclaims otherwise compulsory matured after service of answer, they could be made under this section, but they would not be compulsory counterclaims. It might be unusual for such counterclaims to be unmatured as a practical matter, but it would not be unusual for permissive counterclaims under rule 13(b) to mature after the answer is served by the defendant.

The subdivision provides for the assertion of counterclaims "acquired by the pleader after serving his pleading." On its face, this wording would allow the defendant to buy up assignable counterclaims after he served his answer and assert them with permission of the court. Federal cases indicate that if an after-acquired counterclaim is related to the plaintiff's claim, the court might give permission to assert it.25 This would probably be an unusual situation. If such counterclaim were unrelated to plaintiff's claim, one of the factors for the court to consider would be whether the defendant acquired the coun-

24 RCW 4.32.100; RCW 4.32.110. Counterclaims that do not relate to the transaction which is the subject of the action must exist at the time of commencement of the suit. Conner v. Scott, 16 Wash. 371, 47 Pac. 761 (1897); Farmers and Merchants Bank v. Eagon, 122 Wash. 586, 211 Pac. 278 (1922). The majority rule is that if the counterclaim relates to the transaction which is the subject of the suit, it need not exist at the commencement of the suit. 80 C.J.S. 36 (1953). No Washington case has been found.

terclaim to harass the plaintiff in conducting his suit.\footnote{26}{General Motors Corp. v. Kolodin, note 25 supra, and cases cited therein. See discussion in 3 Moore, Federal Practice 85-88 (1948).}

In any event assignable claims purchased by the defendant prior to the filing of his answer could be asserted as counterclaims. In this instance, rule 13 may favor an astute defendant if he has no defense and is sued by a plaintiff who has various matured debts and against whom a judgment cannot be collected. Even under present practice in contract cases, contract causes of action acquired by defendant prior to commencement of suit may be asserted against the plaintiff.\footnote{27}{This is the general rule. 47 Am.Jur., Setoff and Counterclaim, §63 (1943).}

\section*{Rule 13 (f)}

\textbf{Omitted Counterclaim.} When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

It is sometimes objected that a defendant, and particularly his attorney, may not even know that defendant has a compulsory counterclaim—a matured claim relating to the transaction or occurrence which is the subject of the suit. Or it is said that the defendant or his attorney may overlook it. Much of such danger could be avoided by some investigation prior to answer. The risk of overlooking a compulsory counterclaim would still exist, however, and rule 13(f) is designed to give protection to the defendant under such circumstances. This section should, therefore, be construed with liberality if a compulsory counterclaim has been omitted. One federal court allowed an omitted counterclaim to be filed where it would not delay trial, although it \textquoteleft\textquoteleft was not due to any oversight or inadvertence but to inexcusable neglect.	extquoteright\textquoteright\footnote{28}{Singer Mfg. Co. v. Shepard, 13 F.R.D. 509 (S.D.N.Y. 1952). (The opinion seems to indicate that the counterclaim involved in this case was permissive.)} Lack of good faith and prejudice to plaintiff are important factors for the court to consider in exercising its discretion.\footnote{29}{See discussion in 3 Moore, Federal Practice 89-90 (1948).}

The problem of ascertaining whether a known claim is a compulsory counterclaim or a permissive counterclaim is somewhat related to the above problem. Unless there is some strong practical reason for other action, a counterclaim which cannot be easily classified should be asserted.

Subdivision (f) also covers late assertion of a permissive counterclaim, but refusal of permission to make such a counterclaim is not as vital to defendant as in the case of a compulsory counterclaim.
There is no time limit for securing leave to assert an omitted counterclaim, but request to assert such counterclaim should be timely in view of the particular excuse for omitting it and other pertinent circumstances.\textsuperscript{50}

At present there is no similar Washington statute or rule covering permissive counterclaims or setoffs.

**Rule 13 (g)**

**Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Subdivisions (a) and (b) of rule 13 provide that counterclaims are claims against an opposing party. Subdivision (g) authorizes certain claims to be made as cross-claims against a co-party (not an opposing party prior to the time the cross-claim is made). This nomenclature should be kept in mind because the term, "cross-claim," is sometimes used in state practice to describe a claim against an opposing party.

In Washington there is no authority by statute or court rule for the cross-claim outlined in the proposed rule, but there is case authority supporting such a procedure in certain situations. The Washington cases seem to be consistent with the idea that the plaintiff must be affected by the cross-claim, or possibly, in the alternative, that there is a claim of indemnity by one defendant against a co-defendant in connection with the cause of action asserted against them by the plaintiff.\textsuperscript{31} However, Washington authority is sparse, and the permissible


\textsuperscript{31} In a leading case, Hill v. Frink, 11 Wash. 562, 40 Pac. 128 (1895), plaintiff brought suit to foreclose a laborer’s lien on a certain quantity of wheat owned by Frink. Defendants who claimed a lien on the wheat asserted a cross-claim against a co-defendant who held a chattel mortgage on the wheat and was charged in the cross-claim with converting it. The court held that the cross-claim was in no way connected with or dependent upon the cause of action asserted by plaintiff and that it was not embraced in the plaintiff’s complaint. No very clear rule is established by this case. However, in Maher & Co. v. Farnandis, 70 Wash. 250, 126 Pac. 542 (1912), a second subcontractor sued the first subcontractor, the principal contractor, and the owner of a building to foreclose on a lien for excavation work for the building and to recover the reasonable value of his work and services. On an appeal the court held it was proper for the first subcontractor to deny liability to the plaintiff and to assert a cross-claim against the principal contractor for the contract price of the work he had sublet to the plaintiff (the second subcontractor), apparently on a finding that the principal con-
scope of a cross-complaint against a co-defendant is not clear.\textsuperscript{52} In contrast, the proposed rule states the scope of the cross-claim rather clearly. The wording referring to "transactions" and "occurrence" should be given the interpretation assigned to those words in the definition of a compulsory counterclaim.\textsuperscript{33} This concept adopts a general rule for cross-claims which is followed in some code pleading states.\textsuperscript{34}

Although the cross-claim authorized is limited to claims against co-parties, if a person not a party is also involved in a cross-claim against a co-party, he may be brought in as an additional party under subdivision (h) reproduced below. With this qualification, cross-claims under rule 13(g) involve only present co-parties to a suit, whereas third-party practice under proposed rule 14 involves the bringing in of persons who are not parties to the suit.

Typical suits in which a defendant might possibly assert that a co-defendant is liable to him include actions against surety and principal, employer and employee, persons alleged to be joint promisors, and other cases involving primary and secondary liability or liability for contribution as between defendants.\textsuperscript{35}

It is clear that rule 13(g) does not authorize a cross-claim by a defendant against an insurance company with which the defendant has a liability policy and which is not a party to the suit. Nor does it authorize the plaintiff to make such an insurance company a party to plaintiff's suit. However, when multiple defendants are proper parties under rule 19, the rule authorizes cross-claims.

The cross-claim must involve more than assertion of non-liability.
to the plaintiff or assertion that the co-defendant is solely liable to plaintiff. Although it must be a claim which would entitle the cross-claimant to affirmative relief against a co-party, the cross-claim may be contingent on the ultimate outcome of plaintiff's suit. This result follows from the last sentence of subdivision (g).

Rule 13 (h)

Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained [and their joinder will not deprive the court of jurisdiction of the action.].

This subdivision should not be confused with rule 14. It authorizes additional parties to be brought in if their presence is required to decide a counterclaim or cross-claim against parties already in the suit. In effect it means that rule 19 should be applied to counterclaims and cross-claims. That rule specifies when and how certain persons must be joined as plaintiffs or defendants.

No Washington authority exactly in point has been found, but it seems possible that cross-complaints which are now authorized against co-defendants in Washington may also include third parties as defendants, and such defendants may be brought into the suit if they are necessary parties.6

Rule 13 (i)

Separate Trials: Separate Judgment. If the court orders separate trials as provided in Rule [42 (b)]——, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule [54 (b)]—— [when the court has jurisdiction so to do], even if the claims of the opposing party have been dismissed or otherwise disposed of.

Here the philosophy of rule 13 is emphasized—counterclaims and cross-claims should be handled primarily with a view to trial convenience and fairness.

Since a permissive counterclaim could be any kind of claim against the opposing party, trial of the original claim and a permissive counterclaim in one suit might well be extremely inconvenient and unfair. The court is therefore authorized to order separate trials by federal rules 42(b) and 54(b), which rules are also proposed by the Judicial Council for adoption in this state. If it is inconvenient to try a com-

6 Rule 2(3), Rules of Pleading, Practice and Procedure, 34A Wn.2d; RCW 4.08.130
pulsory counterclaim or a cross-claim with an original claim, the court also could order separate trials and render separate judgments pursuant to those rules. This matter is discussed further in connection with proposed rule 42, below.

Proposed Rule 14
THIRD-PARTY PRACTICE

(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

A third-party practice much broader than the present Washington third-party practice would be authorized by this rule.37

In Washington only restricted procedures are available to a defendant if he has a claim or potential claim against a third person (who is not a party to the suit) for all or part of plaintiff's claim against him.

37 Prior to the adoption of the federal rule, a somewhat similar third-party practice had been in effect at least in limited areas in Texas, Louisiana, New York, Pennsylvania and Wisconsin. See 3 Moore, FEDERAL PRACTICE 462-490 (1948) for detailed discussion of the practice in Pennsylvania, New York and Wisconsin. See also 67 C.J.S. 1071-1073 (1950).
The principal existing procedure is that of "vouching in" a third person by giving him notice to come in and defend the suit. The third person cannot be made a party against his wish. But, if he does not come in and defend after notice from defendant, he is bound by a judgment against defendant when he is sued by defendant on his liability over.\textsuperscript{38} There is a further limitation of this procedure which is exemplified by the Washington cases but not discussed in any of the opinions. A third person is not bound by a judgment after notice of suit from defendant unless the third person is liable over by agreement or by law for the very judgment obtained against the defendant and, therefore, ought to have an obligation to defend in the suit against the defendant.\textsuperscript{39}

There is also an intimation in the Washington cases that a defendant could bring in another person liable over to him against that person's wish, but no conclusive authority for such a procedure has been discovered.\textsuperscript{40}

In contrast to the rules for "vouching in" a party, the provisions of proposed rule 14 are broader in scope as mentioned below and also contemplate bringing in the third party regardless of his desires. Of course, it would never be mandatory under rule 14 for the original defendant to bring in the third party. As an alternative he could later prosecute an independent suit against the third party. Nor would rule 14 replace or abrogate the practice of "vouching in" a third party.\textsuperscript{41} That practice could still be followed by defendants if they considered it desirable.

The rule would be applicable in any case in which an original defendant asserts that a third person, not a party to the suit, is or may be liable to the original defendant for plaintiff's claim against the original defendant. Typical cases in which the rule could be applied are those in which an indemnitor or surety is sued originally, those in which a person secondarily liable is sued, and those in which a defendant who is sued can claim contribution against a third party.\textsuperscript{42} It is

\textsuperscript{38}This doctrine is generally explained in 67 C.J.S. 1073-74 (1950); 50 C.J.S. 360-364 (1947); 1 Freeman, Judgments, 972-1002 (5th ed. 1925).
\textsuperscript{39}See footnote 51, infra, and related discussion.
\textsuperscript{40}In State ex rel Continental Casualty Co. v. Superior Court, 33 Wn.2d 839, 207 P.2d 707 (1949), the court held that it was within the discretion of the trial court to refuse a motion by a defendant-indemnitor to bring in the indemnitee as a defendant and settle the liability, if any, between indemnitor and indemnitee. It was said that had the motion been granted there would have been no abuse of discretion. A somewhat similar statement is contained in the opinion in Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 313 (1941). See also Randa v. Bear, 150 Wash. Dec. 392 (1957).
\textsuperscript{41}See 3 Moore, Federal Practice 408 (1948).
\textsuperscript{42}Cases are collected in 6 Cyclopedia of Federal Procedure 86-87 (1951) and 1956 Cum. Supp., 17-21.
important to note that the rule is merely procedural; it would create no substantive right of indemnity or liability of a third party over to a defendant. If there is such a liability in substantive law, then the rule would merely furnish the original defendant in a suit an optional method of enforcing the liability. For example, since the general Washington rule is that there is no contribution between joint tortfeasors, proposed rule 14 would not be available to one joint tortfeasor against whom a suit is brought.48

Space limitations forbid detailed discussion of many types of examples, but the rule could come into play in suits against an original defendant who had a liability insurance policy, or suits against a defendant on a warranty or for negligence involving injury from a product sold by defendant.44 It is thought that a clause in a liability policy which requires the insurer to cooperate in defending suits against the insured would prevent the bringing in of the insurer unless the insurer has disclaimed liability and refused to defend.45 Although impleader is in the discretion of the court, in most cases the federal courts have granted the impleader when the insurer disclaimed liability.46 The rule would permit an insured defendant to implead his insurer on a liability policy even though the policy had a so-called "no-action" clause.47 Perhaps the trial court could deny impleader in a jury case on the ground that the jury would be prejudiced by the presence of the insurer.48 But the usual course of the federal courts to avoid such prejudice has been to grant the impleader and order a separate trial in the impleader action.49

The Texas third-party rule deals with this matter in another way. Substantially a copy of federal rule 14, it contains the added provision that the rule "shall not be applied, in tort cases, so as to permit the

43 See Seattle v. Shorrock, 100 Wash. 234, 170 Pac. 590 (1918), and cases cited therein; Duncan v. Judge, 43 Wn.2d 836, 264 P.2d 865 (1953).
48 In Ballard v. Southern Cotton Oil Co., supra note 46, the federal court denied the impleader in part on this ground.
joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged. 50

Not only does rule 14 permit a third person to be brought in against his will, but also it is broader in scope than the “vouching in” process. For example, in the warranty case mentioned above, the present Washington cases do not seem to authorize the present procedure of “vouching in” the supplier who is the third party. By general rule “vouching in” is only authorized when it can be said that the third party has some obligation to defend the suit. That obligation does not seem to exist where, as in the above type of case, the third party is not liable to the defendant for the very claim which might be established against the original defendant. 51 This limitation does not exist under federal rule 14. It is only necessary that the original defendant attempt to transfer all or part of his liability by asserting resulting liability to him on the part of the third person. 52

In studying rule 14, several additional important points should be kept in mind. It should be emphasized again that if defendant’s claim is against a co-party and a third party, defendant would make a cross-claim against the co-party under proposed rule 13(g) and make a motion to bring in the third party to answer the cross-claim. 53 Rule 14 would apply only to a claim against “a person not a party to the action.”

The “impleader” procedure contemplated by the rule is not an interpleader procedure. Interpleader is governed by proposed rule 22.

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51 The limitations of the “vouching-in” procedure are outlined in 1 FREEMAN, JUDGMENTS 981-984 (1925). It is usually held, for example, that in a suit by a buyer against a seller on a purely personal warranty of goods by the seller, the seller cannot bind his supplier on the supplier’s warranty to the seller by giving the supplier notice of the suit of the buyer against the seller. Op. cit. supra at p. 983. In such a case there is no liability on the part of the supplier for the claim per se of the buyer against the seller. The Washington cases which have been found do not extend the procedure beyond such a limitation. See Denny v. Sayward, 10 Wash. 422, 39 Pac. 119 (1894) (principal and surety); Doremus v. Root, 23 Wash. 710, 63 Pac. 572 (1901) (dictum; employer and employee); Spokane v. Costello, 33 Wash. 98, 74 Pac. 58 (1903) (indemnity agreement); American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282 (1907) (principal and surety); Kibler v. Maryland Casualty Co., 74 Wash. 159, 132 Pac. 878 (1913), (insured and insurer indemnifying insurer against loss); National Surety Co. v. Fry Co., 86 Wash. 118, 149 Pac. 637 (1915) (indemnity bond); Cle Elum v. Yeaman, 145 Wash. 157, 259 Pac. 35 (1927) (city and contractor liable over); Abrahamson v. Burnett, 157 Wash. 668, 290 Pac. 228 (1930) (indemnity agreement); Inashima v. Wardall, 128 Wash. 617, 224 Pac. 379 (1924); Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140 (1907) (indemnity agreement); Seattle v. Reagan & Co., 52 Wash. 262, 100 Pac. 731 (1909) (indemnity agreement); East v. Fields, 42 Wn. 2d 924, 259 P.2d 639 (1953) (insured and insurer).
52 See discussion in 3 MOORE, FEDERAL PRACTICE 417-419 (1948).
53 See discussion of proposed rule 13.
Although the bringing in of the third party as a party to the suit might complicate the issues and the trial of a case, the court would have the power to protect the parties against the inconvenience or unfairness of one trial in particular cases by ordering separate trials under proposed rule 42, discussed below.

Delay of plaintiff's action could result if impleader were granted; but if it were shown that the plaintiff would be prejudiced unfairly by delay, impleader could be refused. In considering the plaintiff's objection of delay it should be remembered that a second suit would be eliminated.

Venue requirements present a problem. A few federal decisions have held that venue requirements must be met as to the third-party defendant. The majority of federal cases hold that the third-party complaint is ancillary and that venue requirements for original actions are not applicable. The purpose of avoidance of multiplicity of suits could not be as easily attained if venue objections were to be available to the third-party defendant. Here again, however, the third party would probably be able to assert venue objections if any applicable venue requirements were jurisdictional.

The rule spells out the rights of the third-party defendant, and also sets forth the right of a plaintiff to bring in a third party when a counterclaim is asserted against the plaintiff.

**Proposed Rule 15**

**AMENDED AND SUPPLEMENTAL PLEADINGS**

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised

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64 See discussion in 6 CYCLOPEDIA OF FEDERAL PROCEDURE 94-96 (1951).
65 Federal diversity of citizenship requirements need not be met according to some federal cases. 6 CYCLOPEDIA OF FEDERAL PROCEDURE 90 (1951). It is arguable that these cases would not be applicable to "jurisdictional venue" objections in a state court.
in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Proposed rule 15 would clearly replace most of the provisions of rule 6 of the Rules of Pleading, Practice and Procedure and rules 2 and 3(1) of the General Rules of the Superior Courts. But generally, the proposed rule would not make changes of any great importance in present amendment practice. Both the present and proposed rules contemplate liberality in allowance of amendments.

**Leave to Amend; Time for Responsive Pleadings.** At present the plaintiff or defendant may amend once prior to answer or reply without leave of court.56 This rule would be preserved with a modification to provide for a time limit when no responsive pleading such as a reply would be required.57

The general time limit for a responsive pleading would be changed from the present three-day limit.58 As at present, the court order could contain a different time limit.

**Grounds for Amendments.** Except for trial amendments, the only

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56 Rule 6(1), Rules of Pleading, Practice and Procedure; Rule 2, General Rules of the Superior Courts, 34A Wn.2d.
57 A reply is required only in accordance with the terms of proposed rule 7.
58 Rule 3(1), General Rules of the Superior Courts, 34A Wn.2d.
direction as to amendments is the provision that leave to amend shall be "freely given when justice so requires." Although there are federal cases to the contrary, this language has been interpreted by several federal courts to mean that an amendment may introduce a new or different cause of action which relates to the transaction or occurrence that was the subject of the original complaint. On its face, present rule 6(3) contains no limitation of amendments to include a new or different cause of action.

The tests for allowance of amendments which are outlined in present rule 6(2) would be generally preserved. The trial court would retain a wide discretion to grant or refuse leave to amend.

Under proposed rule 15(b), amendments that conform a complaint to evidence not objected to at the trial would be treated as they are now treated. The court also would be given discretion to allow amendments to cover evidence to which there is an objection. Except in one limited situation, this rule would do no more than grant the trial court a discretion which it already has during the trial. Perhaps the proposed rule directs greater liberality in this situation than is now exercised by some trial courts.

Impact of Statutes of Limitations. Proposed rule 15(c) is intended to indicate the circumstances under which a claim added by an amendment would not be barred by an applicable statute of limitations. In providing when such a claim would not be barred, it is somewhat more specific in wording than present rule 6(4) of the Rules of Pleading, Practice and Procedure. Under rule 6(4) the adverse party must have been fairly apprised of the added cause of action by the original pleading and that the plaintiff was claiming there-

69 See discussion in 3 Moore, Federal Practice 831-833 (1948).
60 3 Moore, Federal Practice 833-836 (1948). A liberal attitude in favor of allowance of amendment is indicated in many federal cases.
61 For a statement of the rule that a ruling will be reversed only for abuse of discretion see Young v. Garrett, 159 F.2d 634 (8th Cir. 1947). Leading Washington cases are Hendricks v. Hendricks, 35 Wn.2d 139, 211 P.2d 316 (1949); Palin v. General Construction Co., 47 Wn.2d 246, 287 P.2d 325 (1955).
62 Rule 6(9), Rules of Pleading, Practice and Procedure, 34A Wn.2d (amendment to conform to proof after trial). Kingwell v. Hart, 45 Wn.2d 401, 275 P.2d 431 (1954), and Flagg v. Flagg, 192 Wash. 679, 74 P.2d 189 (1937), illustrate the rule that the trial court should allow amendments to conform to proof or treat a pleading as conformed to the proof.
63 In Ikola v. Snoqualmie Falls Lumber Co., 12 Wn.2d 341, 121 P.2d 369 (1942), the court held that the trial court could not consider a pleading which did not state a cause of action conformed to evidence which was not within the pleading and to which there were objections, when defendant had properly challenged the complaint.
64 See discussion of the operation of the second part of rule 15(b) in 3 Moore, Federal Practice 848-849 (1948).
under. Under proposed subdivision (b) it is assumed that this notice exists when the added claim relates to the conduct, transaction or occurrence mentioned in the complaint.

In many jurisdictions an amendment setting forth a “new cause of action” will not relate back to the original pleading. The federal rule adopts this general approach but uses broader language.

Other Changes in Present Law. Subdivision (5), (6) and (7) of present rule 6 are not covered by the proposed rule. If they are considered necessary or desirable, they should be retained in the court rules.

Supplemental Pleadings. In present practice a supplemental pleading is permitted to show facts which occur after an original pleading is filed. Subdivision (d) incorporates a similar rule and probably would not expand the present scope of supplemental pleadings.

Proposed Rule 16

Pre-Trial Procedures; Formulating Issues

This rule is already in effect as present rule 16.

Proposed Rule 17

Parties Plaintiff and Defendant: Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

(b) Reserved. [Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated associa-

66 Thus in Gilmour v. Longmire, 10 Wn.2d 511, 117 P.2d 187 (1941), plaintiff brought suit on a note lost or stolen, by a complaint in the usual form of a complaint on a promissory note. It was held this complaint did not fairly apprise defendant of a proposed amendment to set up a cause of action on an open account with respect to which the originally alleged note had been given. The cause of action on the account was barred by the time the leave for amendment was sought.

67 Rule 6, Rules of Practice, Practice and Procedure, 34A Wn.2d.

68 RCW 4.36.250.
tion, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., § 754 and 949 (a).]

(c) **Infants or Incompetent Persons.** This rule does not affect statutes and rules concerning the capacity of infants and incompetents to sue or be sued. [Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.]

Subdivision (a) merely restates the language of RCW 4.08.010 and RCW 4.08.020 without any important change in meaning. It appears that various related statutes would be unaffected.

Subdivision (b) of the federal rule concerns a problem of choice of law in a federal case and is properly omitted from the proposed rule.

Subdivision (c) of the federal rule is necessarily very general and somewhat vague in comparison with RCW 4.08.050 and RCW 4.08.060. Therefore, the proposal to retain our present rules on this subject seems desirable. In some areas these present rules are not satisfactory in practical operation, but this subject is a matter for a separate and independent study. This subject is not of any importance in the general structure of the federal party rule system.

**Proposed Rule 18**

**JOINDER OF CLAIMS AND REMEDIES**

(a) **Joinder of Claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alter-
nate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rule 13 and 14 respectively are satisfied.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Subdivision (b) is now rule 18 of the Washington Rules of Pleading, Practice and Procedure.\(^7\)

Subdivision (a) of the proposed rule would make a very important change in present Washington law. The present controlling statute, RCW 4.36.150, would be abrogated.\(^3\) Enacted in 1854, this statute is similar to the New York Field Code provision of 1848 as amended in 1852.\(^4\) In specifying actions which may be joined it sets up categories of actions which the framers of the Field Code in 1848 and 1852 apparently felt could be conveniently joined. Then it sets forth the troublesome provision that in multiple party suits the causes of action which may be joined as set forth in the statute must affect all of the parties to the action. This later provision is dealt with in the discussion of proposed rule 20.

Underlying the proposed rule in part is the premise that the present statutory categories of actions which may be joined are somewhat arbitrary in nature. For example, the statute allows actions on express

\(^{72}\) 34A Wn.2d.

\(^{73}\) "The plaintiff may unite several causes of action in the same complaint, when they all arise out of,—

(1) Contract, express or implied; or

(2) Injuries, with or without force, to the person; or

(3) Injuries, with or without force, to property; or

(4) Injuries, to character; or

(5) Claims to recover real property, with or without damages for the withholding thereof; or

(6) Claims to recover personal property, with or without damages for the withholding thereof; or

(7) Claims against a trustee, by virtue of a contract or by operation of law.

(8) The same transaction.

But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated." RCW 4.36.150.

\(^{74}\) New York Code of Procedure, Sec. 143 (1848); New York Code of Procedure, Sec. 167 (1852).
or implied contract to be joined although there may not be the slightest relation between the joined actions in fact and in law. But when a plaintiff has a contract action and a tort action against a defendant and the actions have no relation in law or fact, he cannot join the actions in one complaint. At the same time actions which are related because they arose out of the same transaction may be joined, although they may or may not have related issues.\(^{75}\)

On the other hand, the proposed rule is drafted on the basis that whether joinder of particular causes will complicate and confuse a trial or prejudice a defendant often depends upon individual situations which cannot be adequately categorized by any general pleading rules. It takes the truly practical approach that the allowance of joinder of actions should depend upon trial convenience and fairness and not upon regulation by general rule of what actions may be joined in the complaint at the pleading stage.

On the basis of this theory the framers of rule 18 placed no restriction on joinder of causes of action at the pleading stage except for restrictions as to parties in proposed rules 19 and 20. However, there is protection against a “free-for-all fight.” Under proposed rule 42, the trial judge would be given the discretion to order separate trials if a joint trial of claims would be unduly complicated or prejudicial to the defendant.\(^{76}\) Thus the overall affect of this rule plus proposed rule 42 is to provide a treatment for joinder of actions based on pertinent considerations in individual cases (subject to the rules for joinder of parties in multiple party cases). After ten years of experience with the rule in Colorado, it was said that the rule had worked well in the opinion of the bench and bar of that state.\(^{77}\)

The prior discussion of alternative allegations applies generally to the provision of this rule for joinder of claims in the alternative.\(^{78}\)

Of course, the rule is merely permissive in effect.

Again, this rule would not affect venue or jurisdiction. Defendant could still make any appropriate venue or jurisdictional objections to any of the claims joined under the rule.\(^{79}\)

In multiple party suits in which several causes of action are joined, the requirements of rules 19 and 20 would be decisive and might limit

\(^{75}\) See further discussion in Clark, Code Pleading 442 (1947).

\(^{76}\) See discussion of proposed rule 42.

\(^{77}\) Groves, Parties, Rules 17-25, 23 Rocky Mt. L. Rev. 552, 554 (1951).


\(^{79}\) See discussion of jurisdiction and venue problems in the federal courts in 3 Moore, Federal Practice 1814-1819 (1948).
joinder of causes of action. But rule 18 alone would have no limiting
effect. This matter will be discussed further in connection with the
following rules governing multiple parties.

**Proposed Rule 19**

**NECESSARY JOINDER OF PARTIES**

(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 indis-
pendable, 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 jurisdic-
tion 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.

(c) **Same: Names of Omitted Persons and Reasons for Non-
Joinder to be Plead.** In any pleading in which relief is asked, the
pleader shall set forth the names, if known to him, of persons who
ought to be parties if complete relief is to be accorded between those
already parties, but who are not joined, and shall state why they are
omitted.

This rule and proposed rule 20 contemplate a classification of parties
which is not established by the present Washington cases. Parties
would be classified as “indispensable,” “necessary” (or “conditionally
necessary”), and “proper.” Indispensable parties are those persons
without whom the action may not proceed. Necessary parties are those
persons without whom the action may not proceed unless they cannot
be brought within the jurisdiction of the court. Proper parties are
those who may be joined but need not be joined as indispensable or
necessary parties. Rule 19 governs the joinder of indispensable parties
and of necessary parties; rule 20 governs the joinder of proper
parties.80

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80 These classifications are discussed at length in 3 Moore, Federal Practice 2114-
2204 (1948).
The present Washington law defining parties who must be joined is theoretically in a state of uncertainty. Prior to 1943 the governing rule was contained in the usual code pleading provision that parties united in interest must be joined.\(^8\) For some reason this statute was then repealed, and there now is no specific governing statute or court rule.\(^8\) However, unless a future case indicates otherwise, the court will probably follow decisions under the former statute. These decisions seem to classify parties as "necessary" or "proper." No decision has been discovered which distinguishes between "indispensable" and "necessary" parties as contemplated by proposed rule 19.\(^8\) This distinction would thus be new in Washington practice.

Under proposed rule 19, "indispensable" parties would include most of the types of parties who must now be joined as necessary parties under the present Washington decisions, and for this reason it appears that this rule would make little change in present compulsory joinder rules except as indicated below. For example, joint obligees are necessary plaintiffs in a suit on the obligation under Washington law; they are indispensable parties who must be joined under the proposed rule.\(^8\) A joint tortfeasor would not be an indispensable or a necessary defendant under rule 19; he is not a necessary defendant under present Washington law.\(^8\) The Washington rule concerning necessary joinder of husband and wife would probably continue.\(^8\)

A question of some importance is presented by RCW 4.28.190, which provides for suit against all the persons such as partners who are jointly indebted upon a contract, but further authorizes service on only one or more of such persons. If service of process is had on less

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\(^8\) Wash. Sess. Laws 1943, c. 206, § 1. RCW 4.08.130 provides that the court shall cause persons to be brought into a suit when a complete determination of a controversy cannot be had without their presence. This statute is sometimes referred to as providing a rule for determination of necessary parties, but it furnishes relatively little guidance in this respect. Originally it was probably intended to supplement the repealed statute.  
\(^8\) RCW 4.28.190, which is mentioned later in the text, treats joint obligors in a manner somewhat similar to the treatment of "necessary" parties under subdivision (b) of the proposed rule.  
\(^8\) See RCW 4.08.030.
than all joint obligors, judgment may still be had against the joint
property of all as well as the individuals served with process.87

Would this statute be abrogated? An argument could be made that
ordinarily under the federal rule joint obligors are necessary as dis-
tinguished from indispensable parties in the sense that all must be
joined except for those who cannot be properly served with process.88
This result is inconsistent with the statute, which would therefore be
abrogated. However, it might also be urged that the present statute
is supplementary to the proposed rule. The supreme court would
undoubtedly settle this matter when the rules were promulgated by
listing this statute as abrogated if it is inconsistent with proposed
rule 19.

Subdivision (b) deals with necessary parties. Under this rule the
parties who are necessary but not indispensable would be those parties
who should be present to settle all the issues in the suit. At the same
time the case must be of such a nature that an order only as to the
actual parties would not injure the absent necessary party nor the
actual parties.89 Although it is not restricted to such cases, this con-
cept of necessary parties is most often applied in equity-type cases
and embodies a general equity rule of procedure followed in many
states, as well as the rule in some code pleading states.90

Subdivision (c) provides that if parties are necessary but are not
joined, the complaint must explain why they are not joined.

The provision of subdivision (a) that a party who refuses to join
as plaintiff may be made a defendant is similar to a provision of the
former Washington statute concerning joinder of necessary parties.91
The provision that a person may be made an involuntary plaintiff
(when he must be joined) would be new. In federal courts its use has

87 "When the action is against two or more defendants and the summons is served
on one or more but not on all of them, the plaintiff may proceed as follows:
(1) If the action is against the defendants jointly indebted upon a contract, he may
proceed against the defendants served unless the court otherwise directs; and
if he recovers judgment it may be entered against all the defendants thus
jointly indebted so far only as it may be enforced against the joint property of
all and the separate property of the defendants served.
(2) If the action is against defendants severally liable, he may proceed against the
defendants served in the same manner as if they were the only defendants.
(3) Though all the defendants may have been served with the summons, judgment
may be taken against any of them severally, when the plaintiff would be en-
titled to judgment against such defendants if the action had been against them
alone."
88 See cases cited in 3 Moore, Federal Practice 2169-2170 (1948).
89 The cases are reviewed in the standard treatises on the rules.
90 The general rule is discussed in 67 C.J.S. 970 (1950).
been restricted to patent and copyright cases in which such a person was beyond the jurisdiction of the court.\textsuperscript{92}

If a person who had not been joined were an indispensable party, the defect in the suit would be challenged by motion to dismiss, by answer, or at a later time in the suit.\textsuperscript{93} When objection was raised the court could permit amendment of the complaint and proper service of the indispensable party if that could be had.\textsuperscript{94} Although the rule is uncertain in Washington, it is arguable that this general method of handling nonjoinder is also now authorized.\textsuperscript{95}

\textbf{Proposed Rule 20}

\textbf{PERMISSIVE JOINDER OF PARTIES}

(a) \textbf{Permissive Joinder.} All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) \textbf{Separate Trials.} The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

This rule is intended to define "proper" parties—parties who may be joined but who need not be joined. It is apparent that a somewhat liberal party joinder practice is contemplated.

Two requisites are laid down for permissive joinder of both plaintiffs and defendants. First, except as qualified at the end of this discussion of rule 20, the rights to relief of plaintiffs, and the rights of relief asserted against defendants, must relate to or arise out of

\textsuperscript{92} See Moore, \textit{Federal Practice} 2147-2150 (1948). The meaning of this provision is not at all clear.

\textsuperscript{93} See proposed rule 12.

\textsuperscript{94} Warner v. First National Bank of Minneapolis, 236 F.2d 853 (8th Cir. 1956), and cases cited therein. See also discussion of proposed rule 21.

\textsuperscript{95} See discussion of proposed rule 21.
the same transaction, occurrence, or series of transactions or occurrences. Second, a question of law and of fact which is common to all of the parties must arise in the suit. This latter condition does not mean that all of the questions of fact and law must be common to all of the parties, nor that the common question or questions of law and fact must affect the parties joined in the same way.

The present Washington law concerning permissive joinder of plaintiffs would not be changed. Rule 2(1) of the Rules of Pleading, Practice and Procedure, which governs permissive joinder of plaintiffs, is almost exactly the same as the proposed rule.

A question of whether rule 2(1) is now fully effective has been raised in a prior issue of the Washington Law Review. This question is whether the present rule abrogates the requirement of the present joinder of causes of action statute that all causes of action united must affect all of the parties to the action. Although dictum indicates that the statute may still be effective, actual decisions under the rule indicate that the statutory requirement is abrogated. This result seems well established; but if there is such a problem it would be settled, and the statute would be clearly abrogated by this proposed rule together with proposed rule 18. All causes of action in multiple party suits would not have to affect all plaintiffs as now contemplated by the statute.

Permissive joinder of defendants is now governed to a limited extent by rule 2(2) of the Rules of Pleading, Practice and Procedure, which

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96 See discussion cited in footnote 14.
97 The right to relief may affect the multiple parties (plaintiffs or defendants) "jointly, severally or in the alternative."
98 "(1) All persons may be joined in one action, as plaintiffs, in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise: Provided, That if, upon the application of any party, it shall appear that such joinder would embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled." Rule 2(1), Rules of Pleading, Practice and Procedure, 34A Wn.2d.
100 RCW 4.36.150.
101 In Lamb v. Mason, 26 Wn.2d 879, 176 P.2d 342 (1947), the court said in dictum that a plaintiff could not sue individually for her own injuries and for wrongful death in the same suit. However, the decisions on the facts in following cases indicate that the statutory requirement is abrogated: Karnes v. Flint, 153 Wash. 225, 279 Pac. 728 (1929); Koboski v. Cobb, 161 Wash. 574, 297 Pac. 771 (1931). See also dictum in State ex rel United Brotherhood of Carpenters v. Superior Court, 195 Wash. 426, 81 P.2d 286 (1938); State ex rel Shaffer v. Superior Court, 184 Wash. 316, 50 P.2d 917 (1935).
authorizes joinder of defendants in the alternative as outlined in the rule. This rule is continued by the proposed rule.

At present, unless rule 2(2) applies in a particular case, defendants must be affected by all of the causes of action joined in the suit. This statutory rule would be abrogated as to defendants by the proposed rule. Abolition of this statutory rule is one of the most important changes that proposed rules 19 and 20 would make in the present permissive joinder rules.

Another statute now provides that persons severally liable on an instrument may be joined in a suit on the instrument in accordance with the desires of the plaintiff. This rule would be continued under the proposed rules unless persons liable on the instrument would be "necessary" parties under proposed rule 19 in particular cases.

The common code pleading provision covering the joinder of permissive defendants is not contained in our statutes. Some of the present case law results would be changed; other results would not be. But generally speaking the present, sometimes vague, case law tests for permissive joinder would be abandoned. For example, joint tortfeasors are now proper parties and may be joined as defendants. This case law is merely a continuation of a common law rule under the codes. Under the proposed rule joint tortfeasors are proper parties because the cause of action against them involves the same transaction or occurrence and some common question of fact and law.

The proposed rule will not change substantive law, however. Thus

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102 "(2) Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties." Rule 2(2), Rules of Pleading, Practice and Procedure, 34A Wn.2d.

103 Joinder in the alternative is specifically mentioned by the proposed rule.


105 RCW 4.08.090.

106 The usual code provision states, "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, or settlement of the questions involved therein." Pomeroy, Code Remedies 303 (5th ed. 1929).


108 In Snavely v. Goldendale, 10 Wn.2d 453, 117 P.2d 221 (1941), plaintiff sued for damages resulting from alleged pollution of a stream. The court held it was proper to join as defendants a city on the ground that it was taking private property by its sewage disposal and a meat packing plant on the ground that it was creating a nuisance. The court said that under code pleading rules parties contributing to a common injury may be joined. It also cited rule 2(2) as a ground for joinder. Under proposed rule 20 in a somewhat similar case, a federal court held that claims against two different industrial companies for damages for emission of fumes from their factories could not be joined because they did not involve the same transaction or occurrence or series of transactions or occurrences, but it ordered a joint trial under federal rule 42. Stanford v. Tennessee Valley Authority, 18 F.R.D. 152 (M.D.Tenn. 1955). This ruling on joinder seems questionable.
it is arguable that at present a liability insurer who engages to pay losses for which the insured is legally liable is not liable directly for injuries caused by the insured as a matter of substantive law. If such a conclusion is correct, the insurer cannot be joined with the insured at present, and the insurer could not be so joined under the proposed rule. Of course, if an insurer were directly liable to the person injured by law or agreement with the insured, the insurer could be joined under the proposed rule just as it can be joined at present.

Only a short reference can be made to an important problem under the rule which has been discussed in detail elsewhere. Under rules 18 and 20 it would be proper to join two unrelated claims against all of two or more joint defendants. But could a claim against all multiple defendants be joined with an unrelated claim against part of the multiple defendants? One position (supported by the majority of federal cases) is that rule 20 prohibits such a joinder because the two claims do not relate to the same transaction or series of transactions. The opposing position is that the rule does not require both of such claims to relate to the same transaction. Under present state law, such a joinder is not possible because each defendant is not affected by both of the causes of action.

Subdivision (b) of the proposed rule merely ensures that the general rule embodied in proposed rule 42 will be applied in cases where proper parties are joined. It also authorizes additional measures to afford protection against a "free-for-all."

Proposed Rule 21

Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as

100 Keseloff v. Sunset Highway Motor Frt. Co., 187 Wash. 642, 60 P.2d 720 (1936) (agreement to pay any final judgment); Mitchell v. Cadwell, 188 Wash. 257, 62 P.2d 41 (1936) (same), are somewhat pertinent but no case exactly in point has been discovered. Under the proposed rule in Colorado the court held that under a similar policy joinder of the insurance company was not authorized by the proposed rule. Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950); Wheat v. Fidelity & Casualty Co., 128 Colo. 236, 261 P.2d 493 (1953). See cases cited therein. However, when the policy obligated the insurance company to pay "by reason of the liability imposed upon him [the insured] by law for damages," the Colorado court held that the defendant insured could be impleaded by defendant insurer under proposed rule 14. Pioneer Mutual Compensation Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952). See footnotes 46-50 and related discussion.


are just. Any claim against a party may be severed and proceeded with separately.

This rule is based on the idea that a defect in parties should have a minimum effect upon the final disposition of the suit. Since misjoinder of parties is not a ground for dismissal under the proposed rule, an objection to such misjoinder would not be made by a motion to dismiss or a defense in the answer. The objection would be made by a motion to drop the party who is misjoined or to sever his claim or the claim asserted against him.112

At present misjoinder of parties is not a ground for a demurrer.113 Presumably the majority code pleading rule now governs. This rule is that misjoinder of plaintiffs and defendants must be reached by a motion to dismiss or drop such persons.114 Also, a demurrer on the ground of misjoinder of causes of action may now be used if each cause of action in a suit does not affect all of the parties.115

The mechanics of objecting to nonjoinder of indispensable parties are not specifically covered by this rule. Such an objection would be taken by motion to dismiss or by answer. If such an objection were successful, the plaintiff could be granted the right to amend in case of nonjoinder if it were possible to make the missing person a party to the suit.116 At present it appears that a similar method of handling the matter is authorized.117

Rule 2(3) of the Rules of Pleading, Practice and Procedure would thus be replaced.

Necessary parties as classified under the federal rule may be added as parties. Rule 19(b) is also pertinent in this connection. Proper parties could also be added under this rule.

112 2 BARRON and HOLZTOFF, FEDERAL PRACTICE AND PROCEDURE 117-118 (1950).
114 1 BANCROFT, CODE PLEADING 341-342 (1926). This sort of motion appears to be contemplated by rule 2(3) of the Rules of Pleading, Practice and Procedure, 34A Wn.2d.
115 Hames v. Spokane-Benton County Natural Gas Co., 118 Wash. 156, 203 Pac. 18 (1922), is an example of such a use of a demurrer.
116 3 MOORE, FEDERAL PRACTICE 2205 (1948).
117 A demurrer may now be made for nonjoinder apparent on the face of the complaint. A nonjoinder objection not apparent on the face of the complaint may be pleaded in the answer. Whether plaintiff will be allowed to amend is not clear. The cases which hold that a court should order a necessary party to be joined seem to furnish authority for permission to plaintiff to amend and include such a party. See Toulouse v. New York Life Ins. Co., 39 Wn.2d 439, 255 P.2d 1003 (1951); Automobile Club of Washington v. Seattle, 49 Wn.2d 262, 300 P.2d 577 (1955), and cases cited therein. See also Washington Fish & Oyster Co. v. G. P. Halferty & Co., 44 Wn.2d 646, 269 P.2d 806 (1954).
Proposed Rule 22
INTERPLEADER

This rule is already in effect as present rule 22.

Proposed Rule 23
CLASS ACTIONS

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law [and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction]. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined by paragraph (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Class actions are now authorized by RCW 4.08.070 "when the question is one of common or general interest to many persons, or where the parties are numerous and it is impracticable to bring them all before the court." Some state courts have interpreted this statute to mean that there are two alternative requirements for a class suit;
others have held that a class suit is authorized only if there is a common or general question and if the parties are numerous and it is impracticable to bring them all in.\textsuperscript{118} There is no Washington decision on this question, although the rule as stated in various opinions is consistent with the latter interpretation mentioned above.\textsuperscript{119} Proposed rule 23(a)(1) and (2) would settle this question and adopt the latter viewpoint.

With this possible qualification, these subdivisions generally embody the rules for class actions which are contained in our code provision. There are not many Washington supreme court opinions concerning challenges to class actions, but it appears that in every discovered case in which such an action was challenged and upheld, the action would have been a class action under proposed subdivisions (a)(1) and (2).\textsuperscript{120} In cases in which a class action was held improper at least in part by our court, it is probable that there would not have been a proper class action under these subdivisions.\textsuperscript{121}

However, subdivision (3) would authorize what is termed a “spurious class action,” which is not authorized in Washington at present. The term “spurious” is used because the action authorized would not have the attributes of our present class actions. It is essentially a permissive joinder device which authorizes a number of separate claims to be joined. This is made clear by the fact that it has been held in federal court that a judgment in such an action is conclusive only upon persons who become parties to the suit and are actually before the court.\textsuperscript{122}

The standard example of such an action is a suit by some property owners of a larger group whose property has been damaged

\textsuperscript{118} CLARK, CODE PLEADING 399, note 214 (1947).
\textsuperscript{119} For example, in Lew You Ying v. Lew Kay, 174 Wash. 83, 24 P.2d 596 (1933), the court held the plaintiff could bring a representative action because “the question is one of common or general interest to many persons, and it is impractical to bring them all before the court.”
\textsuperscript{120} See the following cases: State ex rel. Cannery Workers and Farm Laborers Union v. Superior Court, 30 Wn.2d 697, 193 P.2d 362 (1948) (suit by member of unincorporated association); Fahrenwald v. Spokane Savings Bank, 179 Wash. 61, 35 P.2d 1117 (1934) (suit by shareholder of savings and loan society); Lew You Ying v. Lew Kay, 174 Wash. 83, 24 P.2d 596 (1933) (suit to quiet title by alleged heir); Hames v. Spokane-Benton County Natural Gas Co., 118 Wash. 156, 203 Pac. 18 (1922) (stockholders’ representative action); Perkins & Co. v. Diking District No. 3, 162 Wash. 227, 288 Pac. 462 (1931) (suit by bondholder against diking commissioners for mandatory injunction to require collection of unpaid taxes for payment of district bonds); Coleman v. Rathbun, 40 Wash. 303, 82 Pac. 540 (1905) (suit to restrain enforcement of assessment liens); Clay v. Selah Valley Irrigation Co., 14 Wash. 543, 45 Pac. 141 (1896).
\textsuperscript{121} Elston v. King County, 178 Wash. 210, 34 P.2d 906 (1934); South Seattle Land Co. v. King County, 183 Wash. 284, 48 P.2d 251 (1935); Vashon Fruit Union v. Godwin & Co., 87 Wash. 384, 151 Pac. 797 (1915).
\textsuperscript{122} See discussion in 3 MOORE, FEDERAL PRACTICE 3442-3455 (1948).
by a spreading fire started by the alleged negligence of the defendant."¹²³

Subdivision (b) has been subject to some criticism. It has been argued that the requirement that plaintiff aver his status as a stockholder at the time of the transaction of which he complains is a substantive rule of law and not a procedural rule.¹²⁴ This has not been the usual ruling in federal cases.¹²⁵ The rule expressed is the rule now in force in this state by case law.¹²⁶

The last sentence of subdivision (b) is not substantive and is consistent with dictum in a Washington case.¹²⁷

Finally, a complaint in a class action would have to indicate that the suit meets the requirements of rule 23.¹²⁸ Therefore, proposed rule 9, which dispenses with averments of capacity to sue, would not be applicable.

Proposed Rule 24

INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute [of the United States] confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute [of the United States] confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely applica-

¹²⁴ 3 Moore, FEDERAL PRACTICE 3493-3502 (1948).
¹²⁶ Davis v. Harrison, 25 Wn.2d 1, 167 P.2d 1015 (1946), and cases cited. The opinion states there is an exception to the rule "only in cases in which the wrongful acts were effectually concealed, and it appeared that the effects of the mismanagement continued to the stockholder's injury."
¹²⁷ In Goodwin v. Castleton, 19 Wn.2d 748, 144 P.2d 725 (1944), it was said that the stockholder should show he "has exhausted all his available means to obtain within the corporation itself redress of his grievances or the institution of an action in conformity with his wishes...."
¹²⁸ See cases cited and text in 2 Bender, FEDERAL PRACTICE FORMS 533-535 (1956).
tion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. [The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.]

Subdivision (a) is a more specific restatement of the intervention rule now embodied in RCW 4.08.190. Subdivision (b) would permit a type of intervention which is not now authorized, and therefore it would inaugurate a more liberal intervention practice than is now in effect.

Under our present statute, a person can intervene and become a party in a suit if he "has an interest in the matter in litigation in the success of either party, or an interest against both." In substance this means that a person may intervene in a suit if he will gain or lose by the direct legal operation and effect of the judgment. In most cases persons who have a right to intervene under the present statute are also proper parties under Washington cases defining persons who may join or be joined in a suit. On the other hand it would seem that some proper parties do not have the right to intervene at present.

These tests do not authorize intervention merely because the intervenor's claim or defense has a question of law or fact in common with the main action. This test of permissive intervention under subdivision (b) means that the applicant for intervention would not need to have a direct personal or pecuniary interest in the subject of litigation, and would not need to be a person who would have been a proper party at the beginning of the suit. A typical case for permissive

129 RCW 4.08.200.
130 State v. Roff, 178 Wash. 311, 34 P.2d 899 (1934).
131 Where two persons are injured in the same accident, both might join to sue the defendant under rule 2 of the Rules of Pleading, Practice and Procedure. This matter is in some doubt. See footnote 99 and related discussion. However, if one begins a suit against defendant, the other now has no right to intervene. The judgment would not have any legal operation or effect on the injured person who has not joined in such a suit.
132 Securities and Exchange Commission v. United States Realty and Improvement Co., 310 U.S. 434 (1940), is a leading case.
intervention would involve an applicant who has a claim against defendant which is similar to that asserted by the plaintiff. The Washington case, *Hutteball v. Montgomery*, furnishes another excellent illustration. Plaintiff brought suit against defendant, M, to recover for injuries incurred in an automobile collision. M's wife lost her life in the accident and M was appointed administrator of her estate. As such administrator he attempted to intervene to recover against plaintiffs for the wrongful death of his wife in the accident. Intervention was properly refused under the Washington statute. However, under subdivision (b) of the proposed rule it appears that it would be within the discretion of the trial court to allow intervention.

The intervention procedure outlined in subdivision (c) would not raise any difficulties.

Our present statute provides for intervention prior to trial, whereas the proposed rule provides for "timely" intervention.\textsuperscript{184}

**Proposed Rule 25**

**SUBSTITUTION OF PARTIES**

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court [within 2 years after the death] may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided [in Rule 5,] \textit{by statute for service of notices}, and upon persons not parties in the manner provided [in Rule 4,] \textit{by statute} for the service of a summons [and may be served in any judicial district]. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{183} 187 Wash. 407, 60 P.2d 80 (1936).
\item \textsuperscript{184} Under the proposed rule intervention could be disallowed if not requested before trial, but if a strong showing of necessity and excuse for lack of earlier action is made, it might be allowed even after judgment. See 2 Barron and Holtzoff, Federal Practice and Procedure 206-209 (1950).
\end{itemize}
\end{footnotesize}
(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Reserved.** [Public Officers; Death or Separation from Office. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.]

This rule is the least important of the proposed rules. Subdivision (a)(1) of the proposed rule embodies an unadopted amendment proposed by the former Advisory Committee of the United States Supreme Court and does not embody the present federal rule, which is indicated above by the material in brackets.\(^{135}\)

It has been said that this subdivision of the present federal rule is the least satisfactory of all of the federal rules. Its effect is not clear because it may be a substantive limitation rule.\(^{136}\) The proposed rule, however, is not such a limitation rule.

The present governing statute provides that an action shall not abate by the death, marriage or other disability of a party or by the transfer of any interest in the action if the cause of action survives or continues. The court may at any time within one year, on motion, allow the action to be continued by or against representatives or successors in interest.\(^{137}\) In and of itself this section does not describe what actions will not abate by death, etc.

Likewise, proposed rule 25 does not specify what actions shall abate

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\(^{136}\) Id.; 2 Moore, Federal Practice 510-512 (1950).

\(^{137}\) RCW 4.20.050.
or survive. It is merely a procedural rule which provides the methods by which a suit may continue if the right of action survives or continues.\(^{138}\)

Thus the statute would be replaced by the proposed rule except that the statute would still be effective as to abatement of an action by marriage.

It is also arguable that the statute would remain effective as a substantive statute of limitations concerning substitution of parties.\(^{139}\) If the statutory limitation period of one year is considered substantive, then the rule would mean that the substitution under subdivision (a) could be refused even within a year. The statutory period of one year could be shortened if substitution is not made within a reasonable time under particular circumstances.\(^{140}\)

**Proposed Rule 42**

**SEPARATE TRIALS: JUDGMENTS**

(a) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(c) Stay of Judgment Upon Multiple Claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in [Rule 54(b),] section (b) of this rule the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Subdivision (a) of the proposed rule is federal rule 42(b). Federal

\(^{138}\) Supra, note 135.


\(^{140}\) Supra, note 135.
rule 42(a), which deals with consolidation of actions, is not included. Subdivision (b) is federal rule 54(b). The remainder of federal rule 54, which deals with the effect of the demand for judgment on the pleadings and with costs, is omitted. The third subdivision of the proposed rule is federal rule 62(h). The remainder of federal rule 62 contains miscellaneous provisions for stay of proceedings covering situations not particularly related to multiple party cases or cases involving multiple claims.

The proposed rule therefore contains only those provisions from the federal rules which give the trial court discretion to order separate trials and render separate judgments in cases involving multiple claims or parties. If the liberal rules for joinder of claims and parties, for counterclaims, and for impleader of third persons are to be adopted, it seems necessary to give the trial court the power to order separate trials to avoid prejudice to parties in particular cases or to provide for convenient and manageable trials. Separate trials could be ordered for independent issues raised by original claims which are joined and issues raised by counterclaims, cross-claims, and third-party claims.

Proposed rule 20(b) should be read with this rule.

However, the power of the court to order separate trials would not be limited to cases involving joinder of multiple claims or parties. Affirmative defenses, or preliminary issues which might decide the entire suit, could be tried separately. The request for separate trial

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141 "(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Federal rule 42.

142 "(a) Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

"(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." Federal rule 54.

143 The following headings of the subdivisions of federal rule 62 indicate its general content. "(a) Automatic Stay; Exception-Injunctions, Receiverships, and Patent Accounting; (b) Stay on Motion for New Trial or for Judgment; (c) Injunction Pending Appeal; (d) Stay Upon Appeal; (e) Stay in Favor of the United States or Agency Thereof; (f) Stay According to State Law; (g) Power of Appellate Court Not Limited." Federal rule 62.
would be made after the pleadings were at issue.\textsuperscript{145}

No general Washington statute now authorizes similar separate trials; no definitive local case law on this subject has been found. However, present rule 2(1), which governs joinder of plaintiffs, authorizes separate trials when plaintiffs join pursuant to the rule.

The discretion to make separate judgments would be a necessary and desirable concomitant of the power to order separate trials. The proposed rule provides for an express direction for entry of a final judgment to avoid in part questions as to whether a particular judgment on one of several claims would be final.\textsuperscript{146} A final judgment on less than all of the claims in an action would not have to be made by the trial court; but if it were made, if it were final as to the claims affected, and if it were certified as final, it would be appealable under the present rules for appeals from final judgments.\textsuperscript{147}

The discretionary stay power mentioned in subdivision (c) would be supplementary to the power to grant separate judgments.

At present the power to grant separate judgments is limited and would not be sufficient to accomplish the purpose of the proposed rule.\textsuperscript{148}

A question of whether there is a right to a jury trial would probably not be affected by an order for separate trials. Generally speaking, it appears that the present Washington law on this subject would be applied to a case as made up in the pleading stage by the parties.

\textsuperscript{145} The granting of a separate trial is within the discretion of the trial court, but a case should not be tried piecemeal unless necessary to avoid undue delay or avoid prejudice. See cases cited in 2 Barron and Holtzoff, Federal Practice and Procedure 665-672 (1950). See the discussion of impleader of liability insurance companies under proposed rule 14.

\textsuperscript{146} 2 Barron and Holtzoff, Federal Practice and Procedure 665, 671 (1950).

\textsuperscript{147} However, the rule affects only multiple claim cases and is operative only for judgments (concerning one or more but less than all of several claims in a case) which are otherwise final (and not a partial adjudication) as to the claims affected. See extended discussion of related questions in 6 Moore, Federal Practice 208-226 (1953).

\textsuperscript{148} The rule is not intended to affect rules of appeal concerning interlocutory orders of any kind. In multiple claim cases it would indicate affirmatively which judgments on one or more of all claims would be final. Judgments disposing of such a claim would be final if designated as final and if they otherwise were final judgments as to such a claim under our present law. If no certificate or direction as to finality of judgment were made by the trial court as to a judgment which disposed of one of several claims in an action, then whether it were interlocutory or final would depend upon the present rules of appeal. See extended discussion in 6 Moore, Federal Practice 208-274 (1953).

\textsuperscript{146} RCW 4.56.030 provides, 'Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.'

RCW 4.56.040 provides, "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."

No case authority indicates that these statutes have been used as authority for separate judgments on separate causes of action pleaded in one suit but tried separately.