THE FEDERAL RULES IN STATE PRACTICE

CHARLES E. CLARK∗

With pleasure I respond to the invitation of the Editors to participate in a timely symposium on the Federal Rules of Civil Procedure and their effect in state and federal procedure. Because these rules have been so brilliantly successful in their own original jurisdiction; because, too, they are having an important and an abiding effect upon state practice throughout the union, such a symposium, viewed as both a place of rest for a backward look and a point of departure for the future, is most appropriate. My own writings have been, alas, too numerous to justify me in long further excursions at the moment. Hence I trust my contribution will be understandingly brief. But a quick survey of the considerable and constantly increasing stimulus to state practice of the rules may well be of interest and value. In giving this report I have tried to make it as up-to-the minute as my information, including my correspondence as Reporter to the federal committee, will permit. It is, however, quite possible that developments have occurred of which I have not yet learned or that others will have occurred before this issue is published.1

The Federal Rules of Civil Procedure were submitted to the Supreme Court by the Advisory Committee in the fall of 1937, and, being adopted by the Court, became effective on September 16, 1938. Since then there has occurred a spread of interest in procedural reform in the states fairly comparable to that which took place upon the enactment of the original Field Code in New York in 1848. Within ten years, twelve states had enacted the Field Code; within twenty-five years, half of our present states had accepted the new procedure; and soon there was and remained a substantial majority of states which, to use the customary nomenclature, are "code states."2 Beginning ninety years later, we observe a like legal phenomenon. True, of course, the two are not completely parallel. The older code did enact in statutory form a major change in both procedure and court organization, the merger of the law and equity courts and pro-

∗Judge, U.S. Court of Appeals, Second Circuit.
1For the Federal Rules in state practice, see my text on CODE PLEADING 46, 50-54 (2d Ed. 1947) and thereafter passim throughout the book, and my later essays, The Influence of Federal Procedural Reform, 13 LAW & CONTEMP. PROB. 144 (1948), Code Pleading and Practice Today, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 67-70 (1949), and Experience under the Amendments to the Federal Rules of Civil Procedure, 8 F.R.D. 497, 504, reprinted in FEDERAL RULES OF CIVIL PROCEDURE 1, 9 (1950 Rev. Ed.). In view of the specific citations of codes and rules there made, like specific references are not repeated here or below; the footnotes, infra, are confined to the still more recent developments, together with such other particularized information as it is desired to stress herein.
cedures; while the later reform was, in contemplation and effect, more a refinement, bringing back the practice to the ideals and objectives of the earlier enactment, than a reversal of trends. Nevertheless it is interesting to see how much the present state development follows the line of the earlier history.

The Federal Rules were adopted as the governing civil practice in Arizona, Colorado, and New Mexico successively in 1940, 1941, and 1942. More lately the rules have been adopted, likewise substantially in toto, in New Jersey and Utah, in Delaware in the courts of law, and in the territorial practice for Puerto Rico. A draft to the same effect is now pending in Minnesota, though a like one in Wyoming seems to be in abeyance at the moment. A draft actually adopted for Nebraska by its supreme court was repudiated by its legislature, the only case of the kind to date. Of all of these, possibly New Jersey affords the most interesting example in the distance it quickly traveled from the most ancient of divided systems to leadership not merely in the use of the complete Federal Rules, but also in court organization and direction as well.

Next to this group of states there should be named a considerable number where the federal example led either to a complete re-examination and revision of the entire local procedure, with substantial, though not complete, acceptance, or to adoption of substantial portions, though less than the whole, of the federal practice in substitution for large parts of the local system. Of the first group are Florida, Iowa, Maryland (in courts of law), Missouri, and Texas. Of the second are Pennsylvania and South Dakota, then New York and Washington, then California, Connecticut, and North Dakota—grouped according to the extent of acceptance of the federal system. Those states show interesting variations. Thus many have adopted the federal joinder-of-actions provisions in full, while accepting less of the federal directions as to the pleadings proper; though others have taken the precisely opposite course, while others show an intermixture. Taken as a whole this picture discloses an extensive in-

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*Thus, New York and Pennsylvania accept the joinder provisions, Florida, the
filtration of federal ideas and veritable language into state practice, though the variations are regrettable as destroying uniformity without presenting any distinctively workable or attractive substitute. Finally, many jurisdictions have adopted isolated Federal Rules, such as Rule 50 for the motion for a directed verdict, some at least of the rules for discovery, and pre-eminently Rule 16 for the pre-trial conference—the model which has shaped that popular and valuable procedure. This is true of states such as Arkansas, Illinois, Indiana, Montana, Nebraska, New Hampshire, North Carolina, West Virginia, and Wisconsin, and probably others, as well as of local areas within a particular state.7

One of the striking and important characteristics of this reform is that it has been professionally, rather than lay, inspired. Whereas other major reforms, notably the long English struggle for court improvement, have witnessed the phenomenon of lay goading of a backward profession into action, this movement was inspired, led, and kept alive for years by a devoted group in the American Bar Association; while its execution, both in the federal system and later in the states, has been strictly legal and professional.8 That the bar has thus become widely awakened to its responsibilities is one of the major accomplishments, perhaps the one greatest accomplishment, of the reform. Hence to have the full picture of present-day procedural reform we must look, too, at bar activity which may not yet have been crowned with success. In practically all the states listed above, we can point to either organized bar or else individual lawyer

pleading and discovery sections, while South Dakota, the earliest state to act—1939—has a somewhat curious mixture accepting federal rules of both pleading and party joinder, but retaining older provisions for joinder of causes apparently oblivious of all the trouble such a combination has made in New York and elsewhere. See note 18 infra. This, too, is pointed out, in a discussion of the Texas glosses on federal practice, in my article, The Texas and the Federal Rules of Civil Procedure, 20 Tex. L. Rev. 4 (1941). Florida is one of the states (cf. note 13 infra) where the court has set itself against a strong bar movement for the Federal Rules. See articles cited in Clark, Code Pleading 52, 53 (2d Ed. 1947); Code Pleading and Practice Today, supra note 1 at 67, 68. Learned articles giving detailed criticisms of the Iowa, Missouri, Pennsylvania, and Texas reforms in some detail are cited in Clark, Code Pleading 51, notes 145, 146 (2d Ed. 1947). Washington has just now added the special verdict rule to the Federal Rules it has accepted. Rule 48, 34A Wash.2d 107 (1951); Driver, The Special Verdict—Theory and Practice, 26 Wash. L. Rev. 21, 27 (1951).

I have discussed this in my articles, Dissatisfaction with Piecemeal Reform, 24 J. Am. Jud. Soc. 121 (1940), The Texas and the Federal Rules of Civil Procedure, supra note 5, at 5, and—with Professor Wright—The Judicial Council and the Rule-Making Power: A Dissent and a Protest, 1 Syracuse L. Rev. 346 (1950), as well as in my text, supra note 1, at 62, 63.

Vanderbilt, Minimum Standards of Judicial Administration 142, 206-218, 234, 235, 518-535, and elsewhere (1949); Nims, Pre-Trial (1950) passim; and references in note 1 supra.

stimulus to the reform. Outstanding among examples is of course that given above of New Jersey. Looking to the future, there are printed recommended drafts for Minnesota and Wyoming adopting the Federal Rules; there appears to be the start of a like program in Louisiana, Oregon, and West Virginia, while Connecticut is at least studying the possibilities of a fully integrated court system. Perhaps a dozen additional states show more or less promising bar movements aimed at reform; in only a handful is the working of the federal yeast not yet apparent.

Since Colorado was so early an adherent of the new federal system, it can take proper pride, as I understand its lawyers do on the whole, in the worth and accomplishments of that system. I have been told that some discontent has been expressed by lawyers away from metropolitan centers, as to the inconvenience of attendance upon the

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*note 3 supra; compare note 20 infra.


*In Louisiana the State Law Institute is initiating an extensive study, as is pointed out in the first article cited in note 12 infra. See also Lugar, Common Law Pleading Modified versus Federal Rules, 52 W. Va. L. Rev. 137, 53 id. 27, 142 (1950, 1951), and references in note 1 supra.


Some of the most recent movements are cited in the first article in note 12 supra in addition to the other references earlier. A promising movement in Rhode Island has apparently now been halted by the Supreme Court. Rhode Island Supreme Court Rejects Proposed Civil Rules, 84 J. Am. Jud. Soc. 153 (1951). Compare Hull, Challenge to the Law (1949), a reprint of articles from The Providence Journal Bulletin. In Virginia the new rules of the Supreme Court of Appeals, Feb. 1, 1950, follow federal concepts as to pre-trial, summary judgment, and some of the provisions for the record on appeal, but otherwise reject the federal model. In Massachusetts pending legislation seeks the adoption of three important federal reforms. Ford, Current Proposals for Third-Party Practice, Summary Judgment and Depositions for Discovery, 22 THE BAR BULLETIN (Boston) 81-85 (1951). Some of the bar activities cited by me in my CODE PLEADING 53, n. 149 (2d Ed. 1947) may of course be too hopefully stated; thus activities in Indiana, North Carolina, Ohio, and Tennessee may more properly be considered law school than lawyer ferment. It seems proper, however, to look for signs of spring wherever they appear.

*Neither traces of federal reform nor bar activity to that end seem apparent in Alabama, Idaho, Kansas, Kentucky, Maine, and Nevada; while in Michigan, Nebraska, since the commencement of 1949, note 4 supra, and in New Hampshire, and Vermont federal influence seems limited to the pre-trial rule. A check of the states in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949) appears to support my conclusions.

*Thus the adoption of the federal system has been cited as the reason for the high rating of Colorado among states in their acceptance of minimum standards of (civil) judicial administration. A. W. Scott, Jr., Colorado Criminal Procedure—Does It Meet the Minimum Standards, 28 Dicta 14, 21, 22 (1951), referring to Porter, Minimum Standards of Judicial Administration: The Extent of Their Acceptance, 36 A.B.A.J. 614 (1950).
court for motions in connection particularly with the deposition and discovery practice. It is not possible for one at a distance to attempt to appraise fairly the queries thus suggested; certainly I have no information leading me to doubt the conclusions of informed local lawyers that they do not reflect a widespread or deep-seated discontent with the new procedure. In drafting the original rules, the Advisory Committee did have in mind the inconvenience for many of continued attendance upon the court and did all it could to discourage preliminary formal attacks involving mere shadow-boxing of counsel, not reaching the merits of litigated matters. For example, the motion to dismiss for form has been largely subordinated to the summary judgment or the answer on the merits. Due to the newness of the deposition procedure, and the fear of abuse, at least in its introduction into a procedural system, it seemed impossible to deny appeals for protection to the court, although compulsory motions to start the process were kept at a veritable minimum. Possibly such appeals could be further curtailed now; and this is a matter to which the federal and state rules committees may well give further attention. Further, there is so much general flexibility in the system that trial judges may largely control the time and occasion for such appeals and keep them within the bounds of convenience and fairness. With the flexibility must go sufficient force to keep the procedure properly working. For this system does recognize and rely upon the key importance of the trial judge. It gives him power and means to run his court well; it can and does aid, but cannot create, judicial skill and competence.

Of course some have regretted the trend of modern reform in centering responsibility in the public official charged with the duty to act; it is said that modern procedure may be fine for the able judge, but the mediocre judge needs specific and binding rules for his guidance and control. As I have often had occasion to point out, there was never a greater misconception than the latter aphorism. The seemingly precise abstractions of the older codes were simply snares of confusion for lawyer and judge alike. The mediocre judge could do no more than a good judge with the old joinder of causes of action “connected with the same transaction or transactions connected with the same subject of action” or of persons “having an interest in the subject of the action, and in obtaining the relief demanded;” now they both can at least strive for convenience, according

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17 See, e.g., Simplified Pleading, supra note 16, also Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vanderbilt L. Rev. 498 (1950); Clark, Code Pleading 60-62, 69-71 (2d Ed. 1947).
to their respective lights. There is not only this practical reason for the newer flexible trends. There is perhaps the greater one that this system is attuned to the present habits and thoughts of our profession and the litigants they serve. It is not only undesirable to go back to the past ideals of strict pleaders; it is impossible. Neither courts nor counsel can force themselves to do so, nor face lay litigants with the extreme penalties anciently regarded as due for any violation of venerable and esoteric principle.

It is doubtful in fact if the ancient system ever operated in successful detail, contrary to what we have been taught to think; at any rate, the spirit of our times is now so against the idea that we cannot even make a pretense of obeisance. We need rules which aid quickly in reaching the merits and place a minimum of advantage on forms. Hence the modern procedural rules do stress devices for discovering the real issues promptly—discovery, pre-trial, summary judgment—while they consistently minimize mere procedural shadow-boxing. Because the Federal Rules in particular so intend, because they so well carry out their intent, they have made a new birth of interest in effective law administration, as well as of solid accomplishment in the federal judicial establishment, as all competent observers from Chief Justices Stone and Vinson on down so generally attest. That same success is now being attained in those state practices which are operating in the light of and upon the experience of the federal system. The sound reasons for this success attest that

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18The history is stated in Clark and Wright, supra note 6, at 357-359, also CLARK, CODE PLEADING 355-372, 382-392, 438-440, 452-456 (2d Ed. 1947).

19Compare the discussion in my pamphlet on SIMPLIFIED PLEADING, supra note 16. Perhaps the nearest approach was the disastrous attempt of Baron Parke to enforce the Hilary Rules so well pilloried in HAYES, CROGATE'S CASE: A DIALOGUE IN OLD SHAPES ON SPECIAL PLEADING: REFORM (c. 1830), reprinted in 9 HOLDSWORTH HISTORY OF ENGLISH LAW 417 (2d Ed. 1938). See also Holdsworth, THE NEW RULES OF PLEADING OF THE HILARY TERM, 1834, 1 CAMBRIDGE L. J. 261 (1923); POLLOCK, THE GENIUS OF THE COMMON LAW c. 5, "Surrebutter Castle," pp. 27 et seq. (1912).

20Of the many encomia which might be cited, the following are representative: Remarks of Chief Justice Harlan F. Stone, 1 THE RECORD 144, 149, 150 (1946); BURTON, JUDGING IS ALSO ADMINISTRATION: AN APPRECIATION OF CONSTRUCTIVE LEADERSHIP, 35 A.B.A.J. 1099, 1166, 1167 (1947); CHESTNUT, IMPROVEMENTS IN JUDICIAL PROCEDURE, 17 CONN. B. J. 238, 243 (1943), and other references set forth particularly in the articles, THE INFLUENCE OF FEDERAL PROCEDURAL REFORM, supra note 1, and THE JUDICIAL COUNCIL AND THE RULE-MAKING POWER: A DISSENT AND A PROTEST, supra note 6. The complete working of the federal system in practice is set forth in the extensive statistical records appearing each year in the REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE UNITED STATES COURTS—a mine of information not yet well enough known to either the profession or scholars. SHAFROTH, FEDERAL JUDICIAL STATISTICS, 13 LAW & CONTEMP. PRON. 200 (1948); REPORT OF COMMITTEE ON JUDICIAL STATISTICS, 7 FED. B. J. 292 (1946). An analysis of each rule against its legal and historical background, as in my text on CODE PLEADING, op. cit. supra note 1, will show what is intended and is being accomplished. The literature, including texts, casebooks, courses, and articles, is already enormous; some bibliographies are cited in my CODE PLEADING, at 39, n. 105.

21The material from New Jersey, which also adopted the federal system for collecting and collating judicial statistics, is the most complete. VANDERHILT, OUR NEW JUDICIAL ESTABLISHMENT: RECORD OF THE FIRST YEAR, 4 RUTGERS L. REV. 355 (1949); HARTSHORNE, PROGRESS IN NEW JERSEY JUDICIAL ADMINISTRATION, 3 RUTGERS L. REV. 161 (1949); STOFFER, WORK OF THE JUDICIAL SYSTEM: 1949-1950, 5 RUTGERS L. REV. 525 1950-1951.
it will continue as the federal practice continues its progress in the
states.

Rev. 1-18 (1950); Woelpert, Administrative Office of Courts in New Jersey, 25
N. Y. U. L. Rev. 56 (1950); The Record of the Courts of New Jersey, 1948-1949,
reprinted from N. J. L. J. Sept. 1, 1949; and the yearly reports of Administrative
Director Woelpert. The federal precedents are naturally widely quoted in and go
far to shape the imitating state practice; such a case as Hickman v. Taylor, 329
U.S. 495 (1946), on discovery of lawyers' files, seems destined to have substantially
as extensive effect in state as in federal practice.