

## THE TEXAS AND THE FEDERAL RULES OF CIVIL PROCEDURE

By

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When twenty-one lawyers and judges bring to fruition in the short space of eight months a task so extensive as the preparation of the Texas Rules of Civil Procedure, it is obvious that a great deal of devoted effort, supported and made effective by a fine co-operative spirit, must have gone into the work. One who from outside the State views this achievement with some experience of the difficulties which attend an undertaking of such magnitude must necessarily express his admiration and tender his congratulations to those who shared in the accomplishment. Wisely he might well stop there, and avoid any attempt at detailed evaluation of the rules themselves. Unfamiliarity with local habits or peculiar local problems, indeed of vested interests in particular ways of doing things, may well suggest caution in deducing general and too extensive conclusions from a study of the product alone. But the movement for procedural reform which developed vigorous force with the adoption in 1938 of the Federal Rules of Civil Procedure is so important that any feature it brings forth, whether aiding or retarding the general hope, now so strong, of procedural simplicity and uniformity, should be weighed and carefully appraised. Only by study and attempted evaluation of the various state developments can we expect to keep the cause of procedural reform from becoming static, just as though all advance must end with 1938. Therefore, I have deemed it an obligation to respond as best I could to the request of the editors for a comparison of the Texas and the Federal Rules of Civil Procedure.

The impact of the federal rules on state procedure has shown itself in three different ways. Two states—Arizona and Colorado—have adopted the federal rules substantially in toto, even preserving the identical numbering of the individual rules.<sup>1</sup> This is the course which

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<sup>1</sup>ARIZ. RULES CIV. PROC., effective January 1, 1940; Sunderland, *Arizona's New Rules of Civil Procedure Effect Conformity with Federal Rules* (1940) 23 J. AM. JUD. SOC. 215; Lockwood, *Arizona and the New Federal Rules* (1940) 26 A.B.A.J.

has been recommended by bar associations; thus in Florida and Oregon, the associations or committees thereof have shown how the federal rules can be completely applied to the state system.<sup>2</sup> A second course is the adoption of substantial parts of the federal system, covering specific topics, with rejection—at least for the present—of the remainder. This has been followed by Pennsylvania and South Dakota.<sup>3</sup> This is a plan which requires the bar to learn a new system without obtaining the full benefits of modern procedural thinking. Moreover, it is a plan fraught with particular danger if not carried out with the greatest of care. Thus, South Dakota has adopted the new rules of joinder of parties, without considering the interrelation of this topic with joinder of causes of action.<sup>4</sup> By continuing the old code limitations on joinder of causes, South Dakota has made exactly the same mistake as was made in New York in 1921, where it led to some painfully and universally condemned decisions largely nullifying the reform. There followed in New York a struggle for change to the form which an enlightened committee had recommended long before, but the correction was only recently secured after some fifteen years of agitation.<sup>5</sup> That South Dakota may thus repeat the proven mistakes

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413; COLO. RULES CIV. PROC., effective April 6, 1941; Blount, *Improving the Administration of Justice—New Colorado Civil Rules of Procedure* (1941) 27 A.B.A.J. 158. This has not meant slavish adherence to all features of the new federal rules; for instance, Colorado preserves its own system of relation of judge and jury. COLO. LAWS 1939, c. 80, p. 264; COLO. RULES CIV. PROC. (1941) Rule 51.

<sup>2</sup>In Florida the Supreme Court has refused to proceed on the theory of inherent rule-making power and in the absence of a statute. (1941) 24 J. AM. JUD. SOC. 149, 190; Phillips, *Should the Rules of Federal Civil Procedure be Adopted in Florida?* (1940) 14 FLA. L. J. 339, 26 A.B.A.J. 873; (1940) 15 FLA. L. J. 91; (1940) 14 FLA. L. J. 234; (1940) 14 FLA. L. J. 305; (1940) 14 FLA. L. J. 382. In Oregon the report of the judicial administrative committee was voted down. (1941) 24 J. AM. JUD. SOC. 192.

<sup>3</sup>Pennsylvania has made some eleven changes along federal lines. 332 Pa. xlv, 335 Pa. xxxiv, 337 Pa. 1a, 12 PA. STAT., Appendix 85-176; Faught, *Work of Pennsylvania Rules Committee* (1940) 24 J. AM. JUD. SOC. 26. For South Dakota, see (1939) 23 J. AM. JUD. SOC. 20, and SOUTH DAKOTA RULES (1939), incorporated into S. D. CODE (1939) §§33.0101 *et seq.*

<sup>4</sup>S. D. Supreme Court Rule 113 (1939), S. D. CODE (1939) §33.0916. See Clark, *Dissatisfaction with Piecemeal Reform* (1940) 24 J. AM. JUD. SOC. 121.

<sup>5</sup>N. Y. LAWS 1935, c. 339, amending N. Y. CIV. PRAC. ACT §258. For the history of this reform, see FIRST REPORT OF JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1935) 44, and the many criticisms of *Ader v. Blau*, 241 N.Y. 7., 148 N.E. 771, 41 A.L.R. 1216 (1925), as listed in CLARK, CASES ON PLEADING AND PROCEDURE (2d ed. 1940) 748; 1 MOORE, FEDERAL PRACTICE (1938) 153; 2 *id.* at 2116, 2180; CLARK, CODE PLEADING (1928) 272, 297, citing also 1 Report of the N. Y. Board of Statutory Consolidation (1915), Rules 180, 181, rejected in N. Y. CIV. PRAC. ACT §258. For a somewhat similar experience in North Carolina, see *Grady v. Warren*, 201 N.C. 693, 161 S.E. 319 (1931).

of New York and other states does not speak well for the willingness of lawyers to learn by experience outside their own immediate jurisdiction. And the third and final course is rather complete rejection—in spite of the already outstanding success generally conceded it—of the federal system, a course which is unusual, but which seems to have been pursued in the new Alabama rules, whose admitted inspiration is the ancient English Chancery practice, with its old procedural distinctions now long since abolished in England and in almost all the states.<sup>6</sup>

Now the new Texas Rules of Civil Procedure, effective September 1, 1941, probably should be classed as of the second group, although this statement must be taken with very definite limitations. Notwithstanding persuasive arguments of a bar association committee and others that the federal rules should be adopted,<sup>7</sup> the result shows rather less use of these rules than in all the other jurisdictions cited except Alabama. First, we may note the general plan of statement of the rules, and particularly the amount of material presented. The federal rules were designed not only to provide for an uncomplicated, flexible, and uniform system of procedure, but also to be simple, concise, and clear in statement. Only 86 rules were needed to set forth this system. The Texas rules number 822, and previously existing statutes not listed or repealed are expressly continued by Rule 819. Although included are the rules of the appellate courts and of justices of the peace, yet these cover only a little more than one-quarter of the bulk. Herein are to be found various details of practice not usually stated in formal rules, such as the order in which a trial must proceed, beginning with the reading of the petition, and then of the answer, and so on (Rule 265), or who is leading counsel (Rule 8). Even though much of this material apparently comes from previously existing statutes, it is questionable whether it properly can be considered part of a concise, simply stated system which should give ample scope to the trial court's discretion.<sup>8</sup> Seemingly the plan followed was to

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<sup>6</sup>Sims, *New Alabama Equity Rules* (1940) 1 ALA. LAW. 13; Rep. Com. of the Bar Appointed to Aid the Supreme Court of Alabama in the Preparation of a New System of Rules for Equity Procedure in Alabama Courts (1939) 3-7.

<sup>7</sup>See Report of Committee on Remedial Procedure, *Federal Rules Would Remove Abuses* (1940) 3 TEXAS B. J. 299; Rogers, *Federal Rules for Texas* (1940) 3 TEXAS B. J. 235; and cf. Jones, *Procedural Reform and the Apostles of Status Quo* (1940) 3 TEXAS B. J. 137; McDonald, *Background of the Texas Procedural Rules* (1941) 19 TEXAS LAW REVIEW 229.

<sup>8</sup>Included also are other rules presumably necessary because of settled local views restricting the powers of a judge sitting with a jury, but objectionable where the common law view of the judge as a directing agency of justice obtains. See TEXAS

include in the rules substantially all statutes concerning procedure—of course with occasional alterations—together with the existing rules of the various courts and certain new reforms engrafted upon them. It is, in effect, the cumulative, not the integrative, method of procedural reform.<sup>9</sup>

Next, it appears upon examination that not a great amount of the federal material was actually adopted. Thirty-five of the federal rules are cited as being used in whole or in part. But of these, often only one subdivision or even a sentence or two of a rule covering several subdivisions has become a part of the local rule. By count of actual typed pages we find that just about one-fifth of the federal reform made its way into the new Texas system. Since therein included are many rules of a formal and certainly non-revolutionary character—such as those for time periods and enlargement thereof, assignment lists, taking effect of the rules, rules by other courts, and the like—the actual impact of the new reform on Texas procedure seems slight. This appears the clearer when the nature of the material adopted is considered. The chief topic explicitly adopted is that of joinder of parties; here the Federal Rules 19–23 are taken over practically in entirety in local rules 39–43, though the local rule on intervention (Rule 60) is continued in place of the Federal Rule 24. It seems only fair to note, however, that free joinder of parties has now become one of the commonplaces of procedural reform, perhaps the first matter regularly taken up; and since the federal system follows that initiated by England, and adopted by many states, such as New York, New Jersey, California, and Illinois, the innovation is not great.<sup>10</sup>

Beyond this, local rules showing a really substantial use of federal material are few, indeed. They include those adopting certain details only of the rules concerning averments in pleadings, pre-trial procedure, certain special topics in discovery, though not the general federal system, third-party and counterclaim practice (with important

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RULES CIV. PROC. (1941) Rules 272, 275, requiring among other things that the judge write out his charge and submit it to counsel at the close of the evidence, and then read it to the jury, *before* the argument is begun and *in the precise words in which it is written*. *Contra*, FED. RULES CIV. PROC. Rule 51.

<sup>9</sup>This appears particularly with respect to the present complicated statement of the rules of pleading proper, TEXAS RULES CIV. PROC. (1941) Rules 45–98, as contrasted with the, at least, clear-cut statement of the former District and County Court Rules 1–25, 104 Tex. 659, 142 S.W. xvii (1912). See note 28 *infra*.

<sup>10</sup>See Blume, *Free Joinder of Parties, Claims and Counterclaims*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 11 (1941); CLARK, CODE PLEADING (1928) cc. 6, 7, and 10; CLARK, CASES ON PLEADING AND PROCEDURE (2d ed. 1940) cc. 15–20; MOORE, FEDERAL PRACTICE (1938) cc. 13, 18, and 20; Legis. (1937) 37 COL. L. REV. 462.

limitations noted below), certain material from the rules on injunction (which were not original with the federal rules),<sup>11</sup> and certain of the material on making up the appellate record. This, I believe, is an entirely fair résumé; in some ways it makes the borrowing seem more extensive and less formal than it actually is, as may appear from the later discussion herein. It will be noticed how many federal rules are not touched at all—important rules such as those on summary judgments and declaratory judgments or the general examination before trial—and how limited is the borrowing in other aspects.

And that brings us, at length, to some consideration of the borrowing actually made. Has that improved the procedure, or has it perhaps at times introduced new problems? Of course, it is to be expected that at least some improvement has resulted. I think we can say dogmatically that the joinder rules are very good, even though only a limited and logical extension of existing procedure, and a commonplace of procedural reform, had the federal rules never existed. And if piecemeal reform is ever desirable, we may add that the good, so far as it goes, outweighs the bad in the changes. But that there is bad—sources of confusion and even downright retreat—seems clear. A striking case is found in the counterclaim rules, in a provision brought in, strangely enough, by amendment this spring after the original rules were adopted—a provision which is reminiscent of the South Dakota repetition of the New York mistake referred to above. The amended Rule 87 contains a new section (g) reading: "Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or connected with same." This goes against the whole spirit of modern joinder, which is that all points of irritation among the parties may (and even perhaps should) be brought out into the open and disposed of at one time, as a matter of convenience to the court and the parties, and as a sound policy to end litigation among them as promptly as possible.<sup>12</sup> And it brings back old procedural

<sup>11</sup>FED. RULES CIV. PROC. Rule 65, which repeats 28 U.S.C.A. §§381-383 and Equity Rule 73. See Advisory Committee's NOTES TO THE RULES OF CIVIL PROCEDURE (1938) Rule 65.

<sup>12</sup>Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure* (1937) 47 YALE L. J. 50; Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties* (1935) 44 YALE L. J. 1291 at 1307, 1308; Clark, *The Bar and the Recent Reform of Federal Procedure* (1939) 25 A.B.A.J. 22; Millar, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017 at 1034-1039; FED. RULES CIV. PROC. Rule 12. Compare, also, Blume, *Free Joinder of Parties, Claims and Counterclaims*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 11 (1941).

confusion by limiting adjudication within the confines of certain procedural forms which turn upon definitions not clear and precise in themselves. Indeed, the limitation is substantially that of the old codes which limit counterclaims to those "arising out of the same transaction," and which led to so much useless litigation.<sup>13</sup> In New York it took some sixteen years of agitation to secure its repeal after the initial practice act had unwisely included it.<sup>14</sup> I can see no argument whatsoever for what seems to me to be a decided step backward, and can only surmise the reasons which might have induced such a retreat after the rules had actually been adopted.

Another change which perhaps may be interconnected, since it came into the rules by the same course—late amendment—is one appearing in both the third-party and the counterclaim rules (Rules 38, 97). It is that each of these rules "shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged." Why such special favor, such unusual restriction, should be accorded for the benefit of one form of business is not indicated. For this is a quite usual type of situation to which the third-party rule is made applicable, and there seems no good reason for denying it here.<sup>15</sup> The Texas rule does include the novel feature of the federal rule introducing the additional concept of liability not only to the defendant, but also to *the plaintiff*, a feature of the rule which has been little used and the implications of which are not wholly clear.<sup>16</sup> But its inclusion affords no reason for this restriction. Possibly there may be some thought of unfair prejudice to an insurance company before a jury, and so on; but that is completely taken care

<sup>13</sup>Compare authorities cited in note 10 *supra*, and Note L. R. A. 1916C 445-514.

<sup>14</sup>N. Y. Laws 1936, c. 324, incorporated into N. Y. CIV. PRAC. ACT, §§262, 266; SECOND REPORT OF JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1936) 117, 123; Legis. (1937) 37 COL. L. REV. 462.

<sup>15</sup>Compare Commentary (1940) 2 FED. RULES SERV. 650; 3 *id.* at 696; PROCEEDINGS OF THE INSTITUTE AT CLEVELAND (1938) 276, 329; Nesbit, *New Federal Rules of Civil Procedure and Defense of Tort Action Covered by Casualty Insurance* (1939) 25 A.B.A.J. 348; Poteat, *Third Party Practice Under the New Rules* (1939) 25 A.B.A.J. 858; Appleman, *Joinder of Policyholder and Insurer as Party Defendant* (1938) 22 MARQ. L. REV. 75; and McKenna, *Joining the Insurer and Insured in Automobile Cases* (1933) 17 MARQ. L. REV. 114; and compare Gregory, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936) *passim*, and §7 of the *UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT* (1939), proposed jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

<sup>16</sup>(1940) 88 U. OF PA. L. REV. 751; Commentary (1940) 3 FED. RULES SERV. 775; (1941) 4 *id.* at 900; Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure* (1941) 4 FED. RULES SERV. 1010 at 1012.

of, as experience elsewhere demonstrates, by the provision for separate trials in Rules 97(h) and 174(b).<sup>17</sup> That a major restriction on the procedure can thus be so easily secured at the very outset bodes ill for the general and unexceptional use of the effective impleader practice.

Mention may be made of others of the 1941 amendments which seem to be retrogressive: the incorporation of strict venue provisions into third-party practice, Rule 38g; the restriction in Rule 67 of "amendments" to conform to issues tried without objection (taken from Federal Rule 15b) to those formally made before submission instead of "at any time, even after judgment"; the elimination of the provision for the "physical and mental examination of persons," Rule 168, after the federal rule had been sustained in *Sibbach v. Wilson & Co.*<sup>17a</sup>; and the restoration of the required claim of jury in open court, in addition to the adequate and unambiguous requirement of a jury fee.<sup>18</sup>

It does not seem desirable for the purpose I have in mind that a separate examination of detached rules be made. But a final glance at the system of pleading here contemplated—the heart of any procedural system—will, I think, make entirely clear my reactions to the recent Texas revision. The well understood objective of the federal rules was not merely brief rules simply stated, but a form of general concise pleading which should require little time of the parties and the court in debate on questions of form and should prevent successive shadow boxing on pleading issues to the delay of actual trial on the merits.<sup>19</sup> To the same end, provision was made for aids in getting to the issue rapidly, or discovering all features of one's own or one's opponent's case and making them available for trial, or summarily disposing of cases where no real issues were presented—the important pre-trial, deposition and discovery, and summary judgment procedures.<sup>20</sup> There is no question that this system has met with practically universal

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<sup>17</sup>See note 16 *supra*; Comment (1937) 12 WIS. L. REV. 531 at 536.

<sup>17a</sup>312 U.S. 1 (1941).

<sup>18</sup>TEXAS RULES CIV. PROC. (1941) Rule 216. For the need for and the clear working of simple provisions for jury claim, see James, *Trial by Jury and the New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 1022; Pike and Fischer, *Pleadings and Jury Rights in the New Federal Procedure* (1940) 88 U. OF PA. L. REV. 645.

<sup>19</sup>See note 12 *supra*.

<sup>20</sup>FED. RULES CIV. PROC. Rules 16–37, 56. Laws and Stockman, *Pre-Trial Conferences*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 4 (1941); Clark, *Summary Judgments and a Proposed Rule of Court* (1941) 25 J. AM. JUD. SOC. 20, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 5 (1941); 4 FED. RULES SERV. 1005.

approval of bench and bar, and has gone into effect without a substantial ripple of difficulty.<sup>21</sup> That is why it is now considered a model which other procedures may well follow.

Now in comparing the Texas pleading rules with the federal system we may consider first the detailed rules and second the pleading system as a whole. As to the first, there is no question of the desire of the Texas revisers to provide for simple informal statements; indeed, that was in line with the previous experience in the State. Hence here (in Rules 45 *et seq.*) they have adopted many of the federal rules for simple clear statements, for alternative or hypothetical pleading, for joining many claims. And yet, as if to make assurance doubly sure, they have not only rewritten the federal rules to a considerable extent, but then have also incorporated their own local rules.

If the result achieves the simplicity the draftsmen have in mind, certainly one should not protest the method. But it is clear that the decisive precedents already being developed in the federal practice can be applied only to a limited extent, if at all, to the rewritten rules; it seems possible that the repetition of admonitions in different language may cause difficulties of interpretation; and if experience elsewhere is a guide the very excess of protestation may create new problems. Thus the federal rule (8a) requires of a pleader simply "a short and plain statement of the claim showing that the pleader is entitled to relief." And perhaps more important from the standpoint of practical assistance are the twenty-seven official forms designed to indicate "the simplicity and brevity of statement which the rules contemplate."<sup>22</sup> In the Texas rules there are no forms to guide, but in addition to various other admonitions, there are two different statements of their main rule. The first, Rule 45, says that pleadings "shall . . . (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection

<sup>21</sup>A complete bibliography of the already extensive literature appears in 3 ANNUAL HANDBOOK OF THE NATIONAL CONFERENCE OF JUDICIAL COUNCILS (1941) 43-96; and see also (1941) 4 FED. RULES SERV. (Bibl.) 1-6. Compare, for example, (1941) 27 A.B.A.J. 494; Ford, *Federal Rules of Civil Procedure, Pleadings, Motions, Parties and Pre-Trial Procedure* (1940) 1 FED. RULES DEC. 315; Yankwich, *Jurisdiction and Procedure of Federal District Courts Compared with California Procedure* (1940) 1 FED. RULES DEC. 453; Armstrong, *Adaptation of Procedural Reform to Tennessee Practice* (1939) 15 TENN. L. REV. 614 at 620; Hunter, *One Year of Our Federal Rules* (1940) 5 MO. L. REV. 1.

<sup>22</sup>FED. RULES CIV. PROC. Rule 84. Texas lawyers may miss the former District Court Rule 2, note 9 *supra*, which approved of "modes of expression wrought out by long judicial experience, perpetrated [*sic*—but so in the Johnson reprint] in books of forms"!



when fair notice to the opponent is given by the allegations as a whole." And they must also contain any other matter required by law or rule for particular actions. The second is in Rule 47, which states that a pleading which sets forth a claim for relief "shall contain . . . (a) a short statement of the cause of action sufficient to give fair notice involved."

Now these statements may mean the same thing and in turn be equivalent to the federal rule. But it is not difficult to think of questions. Thus, do the rules contemplate that system advocated by some, but not followed usually in this country, and certainly not in the federal rules, of "notice pleading"?<sup>23</sup> If not, what does "fair notice" mean?<sup>24</sup> On the other hand, the statement of the "cause of action" brings back those litigation-breeding words and suggests that details of the cause or ground of suit, rather than a statement of claim showing a right to legal relief, are to be required.<sup>25</sup> It is believed that the added and emphasized protestation makes for confusion, rather than clarification.

Other rules call for like comment, such as the some six rules dealing with amendments—Rules 62–67—in addition to the rules concerning supplemental pleadings referred to below, the requirement of verification of the pleadings in some fifteen instances<sup>25a</sup> (which should be either in all or none, preferably the latter, in view of the formal character of the act),<sup>26</sup> and so on.<sup>27</sup> It is curious, too, to find every

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<sup>23</sup>Cf. Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501; CLARK, CODE PLEADING (1928) 29, 30, 36, 37, 163; CLARK, CASES ON PLEADING AND PROCEDURE (2d ed. 1940) 182.

<sup>24</sup>Without illustrative forms it would seem almost impossible to give specific content to this rule. Cf. Cook, "Facts" and "Statements of Fact" (1937) 4 U. OF CHI. L. REV. 233; Cook, *Statements of Fact in Pleading under the Codes* (1921) 21 COL. L. REV. 416; Clark, *The Complaint in Code Pleading* (1926) 35 YALE L. J. 259; CLARK, CODE PLEADING (1928) 150–163; (1935) 9 CONN. B. J. 282–297. On the other hand, pleading under the new federal rules has developed with reasonable clarity. See Comment (1941) 10 FORDHAM L. REV. 252; (1940) 28 CALIF. L. REV. 235; Commentary (1941) 4 FED. RULES SERV. 890; *id.* at 954. Compare Fisher, *A Vindication of Simplified Pleading* (1940) 35 ILL. L. REV. 270, with McCaskill, *Easy Pleading* (1940) 35 ILL. L. REV. 28.

<sup>25</sup>In addition to the articles cited in note 24 *supra*, see Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354; and Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817.

<sup>25a</sup>TEXAS RULES CIV. PROC. (1941) Rule 93.

<sup>26</sup>As in FED. RULES CIV. PROC. Rule 11.

<sup>27</sup>There are instances where the purpose of the federal rule was not understood, and a rewriting here makes the rule formal and innocuous. Such a case is FED. RULES CIV. PROC. Rule 8(c), last sentence, to the effect that a defense mistakenly designated a counterclaim or vice versa is to be treated as properly designated.

now and then a recognition of ancient obstructions, as when in Rule 41 "each ground of recovery improperly joined may be docketed as a separate suit between the same parties" [Query, is joinder not then free, as Rule 51 says?], or when the first stated matter for pre-trial conference is that of "dilatory pleas" [sic].<sup>27a</sup>

Nevertheless the intent for uncomplicated form of averment may be assumed. It is when we come to the pleading scheme proper—the number and kind of pleadings to be filed—that our greatest question arises. Now I do not find it entirely easy to discover the exact system. It is not set forth seriatim, as was, for example, the course of proceeding at trial of Rule 265, referred to above; and obviously the statements of Rules 45–98, particularly of 69–98, rely on previous experience set forth in either statute or rule.<sup>28</sup> But it seems reasonably clear (a) that each party files not only his original petition or answer, as the case may be, but also as many supplemental petitions and answers as he desires by way of "a response to the last preceding pleading by the other party,"<sup>28a</sup> and (b) that while general demurrers are forbidden, all kinds of "defect, omission or fault in a pleading either of form or of substance" or any "defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations or the pleading excepted to" may be taken advantage of either by "special exception" in a supplemental pleading or *by motion*.<sup>28b</sup> (There is also the attempt to provide for waiver of defects of substance, if not so raised, Rule 90—an attempt doomed to non-success unless we get judges willing to penalize litigants for the mistakes of their lawyers.<sup>29</sup>) One can only wonder when pleading can ever come to an end. The answer would seem to be not until the lawyers are exhausted. The system is just the contrary of the English system, substantially adopted in the federal rules, which aims to do away with a series of useless hearings not on the merits and to cut short all dilatory preliminary sorties and assaults.<sup>30</sup> This seems to me a final proof of

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This was to avoid the difficulty and dispute over the nature of equitable defenses. CLARK, CODE PLEADING (1928) 429, 432, 443, 885; Clark, *Trial of Actions Under the Code* (1926) 11 CORN. L. Q. 482; 1 MOORE, FEDERAL PRACTICE (1938) 568. In TEXAS RULES CIV. PROC. (1941) Rule 71, the provision is made to apply indiscriminately to the misnomer of any pleading.

<sup>27a</sup>TEXAS RULES CIV. PROC. (1941) Rules 166, 175.

<sup>28</sup>The former rules were clearly stated; see note 9 *supra*.

<sup>28a</sup>TEXAS RULES CIV. PROC. (1941) Rules 69, 70, 78, 80, 83, 98.

<sup>28b</sup>TEXAS RULES CIV. PROC. (1941) Rules 90, 91, 80, 98.

<sup>29</sup>FED. RULES CIV. PROC. RULE 12(h); *Troy Automobile Exchange v. Home Ins. Co.*, 221 N.Y. 58, 116 N.E. 786 (1917); CLARK, CODE PLEADING (1928) 370.

<sup>30</sup>See note 12 *supra*.

rejection by the Texas rules of the major premise of the newer procedural reforms which definitely subordinates and shortens the issue-formulating stage of adjudication to place the emphasis upon trial on the merits.

I hope I have not rushed in too boldly where lack of intimate experience may leave me defenseless. But I have spent much of my life in advocating reforms in judicial administration and I like to see energetic and vigorous reform movements of our profession come to effective fruition. Of course, my natural bias in favor of the federal rules is obvious. But I hope I am no slavish follower of merely what is already written, and I have not hesitated to advocate changes in that system which I believe are in the direction of even added simplicity and clarity.<sup>31</sup> I trust that in time machinery will be developed through a functioning standing committee where such changes can be thoroughly weighed, and, if desirable, adopted.<sup>32</sup> But whether it be the federal, the English, or some other system, I do think simplicity and lessened emphasis upon the formal exchange of paper documents before trial is an essential. And I could wish that the Texas committee, which has shown itself so effective in reaching its conclusion and in making that known with great celerity, had given more attention to this feature of proposed reform, or, if it intended definitely to reject this feature, had stated its reasons for so doing. Such a course would have been of material assistance to us who still hope to labor both for pleading simplicity and pleading uniformity.

Elsewhere I have stated my view that piecemeal reform may often be less desirable than no reform at all. For it may serve to upset the bench and bar by the need of learning a new system which is little advance and thus prejudice the securing of complete reform for many years.<sup>33</sup> I fear that my study of the Texas rules does not conduce to a change in those views. For it seems to me many undesirable things have been perpetuated in a form unfortunately likely to be more or less permanent. And the few definite reforms actually

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<sup>31</sup>Compare my suggestion as to changes in the federal summary judgment rule, contained in the Judicial Administration Monograph *Summary Judgments and a Proposed Rule of Court* (1941) 25 J. AM. JUD. SOC. 20, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 5 (1941), 4 FED. RULES SERV. 1005, and in *United States v. Adler's Creamery, Inc.*, 107 F.(2d) 987 (C.C.A. 2d, 1939), and as to bill of particulars in (1939) 25 A.B.A.J. 22.

<sup>32</sup>Recommendations for a continuing committee were made in earlier reports of the Advisory Committee. See Preliminary Draft of Rules of Civil Procedure (1936) Rule A, pp. 170-171, also Report of Advisory Committee (April, 1937) vii. As there pointed out, they are in line with the views of students of procedural reform generally. 3 MOORE, FEDERAL PRACTICE (1938) 3453, 3454, and authorities cited.

<sup>33</sup>Clark, *Dissatisfaction with Piecemeal Reform* (1940) 24 J. AM. JUD. SOC. 121.

achieved, such as party joinder and pre-trial, could have been made the subject of brief independent amendatory statutes and rules, to which could easily have been added the vitally important declaratory and summary judgment procedure. But as it is, this revision, even if not extensive in substance, appears in form so portentous that reaction from it has apparently seemed appropriate. And so we already have a retreat in the amendments of 1941. One may express the hope that this does not adequately forecast the future of procedural reform in Texas.