THE AMENDED FEDERAL RULES*

THE amendments to the Federal Rules of Civil Procedure, adopted by the Supreme Court of the United States in December, 1946, became effective March 19, last. These represent the culmination of ten years of experience in uniform simplified procedure on a nationwide scale. This may well be the occasion for a little stock-taking, with now and then a glance at state practice in New York—always a shining target for legal reformers or scholars. The wonder is that so few real changes were found necessary as a result of the federal experience. Nearly all the amendments are limited to clarification and re-emphasis of the original objectives. Indeed the real innovations are limited to two concerning appeals. One reduces the time for notice of appeal from the usual three months to 30 days in most cases, or 60 where the United States is a party. The lengthy delay provided by the now superseded statute—unusual in state practice—seemed unjustified, particularly in that the simple and informal notice itself merely begins the appellate process. The other is a provision authorizing appellate courts to review cases on the original papers—a final step, approaching the English system, in a steady trend toward dispensing with the waste of time, expense, and brain power caused by the ancient deification of the printed record. A single other amendment—that dealing with impleader of third parties—represents something of a withdrawal from an advanced position to that steadily held in England and now in New York since the

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1 In view of the full discussion of these subjects in my text on Code Pleading (2d ed. 1947) and my article, The Influence of Federal Procedural Reform, 13 Law & Contemp. Prob. 144 (Winter, 1948), I think footnote citations may be kept to a minimum.

* This article is the substance of an address before the Bronx County Bar Ass'n, April 22, 1948, which was reported in the New York Law Journal, July 26, 27, 28, 1948, with footnotes added for publication.
revision here in 1946. The original rules provided for a citing in at the instance of a defendant not only of a third party liable to him solely or together with the plaintiff, but also of one liable to the plaintiff alone. This adaptation from admiralty practice did not prove too successful in forcing a new defendant on an unwilling plaintiff, especially in view of the exigencies and restrictions of federal jurisdiction. It is the sole instance of retreat, and may still suggest possibilities for experimentation in the states where the rigidities of federal jurisdiction do not obtain.

If, then, all the rest and the major portion of the amendments were directed to clarification and re-emphasis of original objectives, why was amendment considered necessary or even desirable? The answer has an important bearing upon the issue—now of some prominence in New York—of control of court procedure through court rule-making as opposed to legislative codification. Statutory grants of substantive rights generally ought not to be made uncertain by changes not going to the essence, even if perhaps better worded than the originals. Procedural code-making tends to a like difficulty, if not rigidity. Only rarely does such a code undergo a complete and expert revaluation and revision. Legislative tinkering with details only hits a defect here and there and all too often confuses, rather than clarifies, the general practice. On the other hand, court rule-making signifies continuous expert supervision of the procedural process. Court procedure, like all routine red tape, while quite necessary, does have an inveterate tendency to petrify. One cannot continue to do the same tasks recurringly without developing a routine. That natural trend is accelerated in the courts by two factors, first the public charge upon judges to act impartially, and not ad hoc, among litigants, and second the American business practice of publishing and selling precedents. If I had my way, I would have no procedural decisions published, but would leave with the lawyers only the original rules, with such changes as a continuing committee may suggest. But, unfortunately, as soon as a judge speaks, his words become a commercial asset of some one else. And there is a Gresham's law of procedural precedents whereby the bad drive out the good, the technical overshadow the liberal. This is quite natural; a restrictive interpretation calls attention to itself if only for the pitfalls it creates or suggests, while a nonrestrictive one merely applies the written rule. Hence to counteract this tendency and to return the
rules to their original pristine state, as well as to clarify any ambiguities, this continuing supervision is quite desirable, if not necessary, as students have long pointed out. Of this, too, the new federal amendments are a practical demonstration.

In considering the system of procedural control with respect to a state like New York, it is necessary to bear in mind not only the advantage of this continuous supervision of the adjective processes—the making of the dispensing of justice simple, fair, and direct—but also the great gain of an initial general revision of procedure. It seems almost impossible to get rid of procedural cobwebs by anything short of a new start. Here the contrast between the federal and the New York experience should be instructive. Federal practice in the old days of conformity was one of the worst. The struggle to secure reform was long delayed and at times seemed hopeless. But when it came the country appeared to be prepared for it. At any rate, the submission of successive drafts by the committee to the fullest criticism of the profession led both to general enlightenment and general agreement upon the program. Now there is hardly any one to dispute that this is the best procedure in the country. One could call upon the testimony of many, from Chief Justice Stone's comment upon the system as "concise, simple, adaptable, and efficient" and the rules as "highly successful in operation" to that of Judge Chesnut, who, against the background of his vast experience, has "yet to note an instance in which they have been found lacking." Even more convincing is the new spirit and attitude toward procedure evinced by both bench and bar as shown by case after case. It is not merely that they desire to comply wholeheartedly with the rules; rather they show a developing enthusiasm for simplified procedure as a true instrumentality to promote justice.

In New York the possibility of a like experience was opened in 1915 through the report of the Board of Statutory Consolidation under the chairmanship of Justice A. J. Rodenbeck. This board, first

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\item This is developed more extensively in my article, The Proper Function of the Supreme Court's Federal Rules Committee, 28 A. B. A. J. 521 (1942), and my text, Code Pleading 59-71 (2d ed. 1947).
\item Stone, 1 THE RECORD 144, 150 (1946); Chesnut, Improvements in Judicial Procedure, 17 CONN. B. J. 238, 243 (1943); cf. Carey, In Favor of Uniformity, 18 TEMP. L. Q. 145, 5 F. R. D. 503, 507 (1943) ("one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law").
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created in 1904, had been charged by specific direction of the legislature in 1912 to present a detailed plan for the revision of practice. Their report in 1915, recommending a short practice act and detailed rules of court, following English precedents, is still one of the most forward-looking systems yet devised. How much time and anguish, how much saving in man-power hours to such an overworked court as the Appellate Division, First Department, would have resulted had that advanced system gone into effect in 1915! It is always a source of wonder to observe how much work the New York courts can turn off; what a boon it would have been to have avoided the sheer burden of the infinite appeals on small procedural technicalities. But that was not to be. The legislature created its own committee in 1919, and the resulting hybrid of some new and much old, the New York Civil Practice Act, was passed in 1920. Reluctantly the State Bar Association voted to accept it as half-a-loaf and to ask the Governor to sign it as he did. After a quarter century’s experience we may perhaps conclude that the other would have been the wiser decision. Better it is to wait for complete reform than to accept the paralyzing force of temporizing tinkering.4

Perhaps it may be thought ungracious of me as more or less a visitor to the local judiciary to be thus critical of the course of the procedural process in New York. But may I crave your indulgence to speak more as a professor, as I was for twenty years, than as a judge, as I have been for a mere nine years. In the latter capacity I may be only a “ventriloquist’s dummy” as to state law;5 in the former I have become accustomed to speaking ex cathedra, daunted by neither presiding justices nor chief judges in person. I started in to teach procedure at the Yale Law School about 1920, and immediately became fascinated with the New York practice and the decisions about it. There was so much of it and so many of them. Indeed one could find support for practically any position he chose, such was the variety of precedent and the lack of any uniform philosophy of pleading. In 1925, I wrote an article, The Union of Law and Equity,6 wherein I criticized the court’s emphasis, notwithstanding the code union of

1848, upon "the inherent and fundamental difference between actions at law and suits in equity . . ."? Then the New York Law Journal started to reprint my article in installments; but my smug satisfaction was next rudely destroyed by an editorial—I think from the gifted pen of Professor I. Maurice Wormser—assailing me for having launched an unjustified attack on the New York courts. Quite a discussion then ensued among various correspondents in the columns of that estimable publication. I remember that Francis R. Stark, distinguished counsel for Western Union, perhaps summed it all up by saying in substance that after all the trial calendars were so far behind that a few more digressions along procedural bypaths would not add much to the delays of the law in New York.

My procedural education went on apace that same year in another direction. I was teaching in the summer session at Cornell when there was handed down the famous or infamous case of Ader v. Blau, where the court (Judge Cardozo dissenting) held most surprisingly that when the legislature set out to adopt the English rules of joinder of parties in the Civil Practice Act it had failed in its objective because it had not thought to change the older restrictions on joinder of causes of action. Judge Cuthbert Pound was staying at Cornell that summer, and I was privileged to become intimate with one of your greatest and most lovable judges. All that summer we argued the merits and demerits of Ader v. Blau. I certainly convinced myself that I had convinced him, and thereafter looked upon the case as an old friend, or as almost a whipping boy for teaching purposes. And, indeed, I might, for, although its legislative quietus came in ten years' time, its dry bones were still shaking last November.

Indeed, the two examples I have presented, though by no means isolated, well illustrate the vicissitudes of New York procedural reform under present conditions. They concern the very minima of modern practice, namely, an amalgamated procedure for the formerly separated law and equity cases and provisions of extensive joinder of parties and of claims. Once definitely and thoroughly established, they cause substantially no concern or litigation, as the federal experience beautifully demonstrates. Yet approached in a halfhearted

7 Jackson v. Strong, 222 N. Y. 149, 154, 118 N. E. 512, 513 (1917).
and unconvincing way, they afford almost infinite possibilities of confusion. Thus the statements on the union of law and equity in New York are so diverse as to seem to come from different systems of law altogether. A few months ago—a century after the merger of law and equity written into the statutory law by David Dudley Field and his co-codifiers—the Appellate Division, Second Department, decided, three to two, that where foreclosure of a mechanic's lien could not be had (for lack of a lien) the trial judge could not go on to enter a judgment for the amount due. The reason forsooth was that the action was "in equity" and could not be continued "at law." The court cited and relied on *Terner v. Glickstein & Terner, Inc.*, which certainly does lend it support. It could, however, have reached the opposite and, I submit with deference, the preferable result by citing *Wainwright & Page, Inc. v. Burr & McAuley, Inc.*, which was not overruled by the *Terner* case, since it was not mentioned there. Elsewhere I have collected the cases turning on the question whether a complaint should be considered or dismissed as brought on the "wrong side of the court" on motion for judgment on the ground of a claim of the wrong relief. This goes back to the code provision of the New York Civil Practice Act, Section 479, limiting relief to that demanded "if no answer is filed," which of course should apply only in case of default of appearance as in Federal Rule 54(c).

Perhaps even more direct is the history of the joinder rule. Immediately upon its inception, that hardworking and able body, your Judicial Council, urged legislative reversal of *Ader v. Blau* in a scholarly discussion in its report. So the restriction on joinder of causes was removed by statute in 1935, and upon counterclaims in 1936. That left in force only the English provisions for free joinder. Yet last November the Court of Appeals had to admonish lower courts that that was not only the purpose, but also the result, of the statutory change, and that a court could not, as a matter of law,

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10 283 N. Y. 299, 28 N. E. (2d) 846 (1940).
11 272 N. Y. 130, 5 N. E. (2d) 64 (1936).
12 See cases cited in Clark, Code Pleading (2d ed. 1947), particularly at pp. 86, 87; also, Clark, Law and Equity in New York—Still Unmerged, 55 Yale L. J. 826 (1946); Shentag, Moulders of Legal Thought 149 (1943).
deny a joinder in the alternative.\textsuperscript{12} I have noted the unusual satisfaction with the existing system expressed by a committee of the State Bar Association in criticism of the proposal then being considered by the Judicial Council, supported by the American, City, County, and other associations, for rule-making in the courts. I have also noted appreciatively the barbs aimed against the Federal Rules by the distinguished lawyer and teacher for whom as winning counsel the \textit{Adler} case was indeed a professional triumph—that they constituted the "new look" sprung "straight from the head of Jove," that the Advisory Committee was not as democratically selected as the state Judicial Council, that already the number of decisions suggested an increasing absence of uniformity which the local system of interlocutory appeals would tend to achieve.\textsuperscript{14} Such suggested criticisms are a healthy and useful thing for the federal procedure; I only wish that he had made more explicit his views which are thus suggested. In passing, it might be noted that the considerable number of confirmatory decisions exploited by publishers hardly furnishes a standard to test procedural efficacy and that a system fostering interlocutory appeals on procedural points naturally overemphasizes the technical objections, as the \textit{Adler} case itself so well exemplifies. But more generally still, it is urged with all deference that a system of procedural control must be considered too dilatory, too weighted with the dead hand of the past when it takes over a quarter of a century, with the help of the Judicial Council, two legislative acts, and the Court of Appeals, to achieve a reform rather clearly envisaged in 1921 and only then in doubt because of errors of draftsmanship.

Let me emphasize again that my criticisms go to the system and that I still think it a tribute to the personalities involved that so


\textsuperscript{14} See Rep. of Committee to Co-operate with the Judicial Council, 69 N. Y. St. Bar Ass'n Rep. 342, 351-367 (1946), contra to Memorandum on Proposal to Empower the Court of Appeals to Make Rules of Procedure for the Courts of the State of New York, 2 \textit{The Record} 12-26 (1947), signed on behalf of committees of the American Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Citizens Committee on the Courts. \textit{See also} Rothschild, \textit{Reformulating the Jurisdiction of the Court of Appeals}, 13 \textit{Brooklyn L. Rev.} 14, 16, 17 (1947), and the same author's review of Frasher, \textit{Cases and Materials on New York Pleading and Practice}, in 14 \textit{Brooklyn L. Rev.} 141, 142 (1947); his earlier justification of the \textit{Adler} decision as being required—however unfortunately—by the then code is found in 26 \textit{Col. L. Rev.} 30 (1926); 3 \textit{N. Y. L. Rev.} 429 (1925).
much of improvement has been accomplished. The Judicial Council has been alert and unceasing in pressing for detailed reforms, and over the years its record is substantial. The judges seem increasingly to be doing their part; the new local rule for pre-trial conferences, simple, concise, and direct, is a credit to the leadership of the Council and of the Appellate Division, First Department, and its chief, Justice Peck. I understand, too, that it is working well, with results comparable to the success achieved by Judge Knox in the Southern District federal court. Such a showing of expert and devoted attention to procedural reform certainly affords a guaranty of effective action on a wider scale if the entire responsibility is committed to such expert hands in substitution for the existing system of statutory tinkering.

May I now turn back directly to the Federal Rules and the new amendments, for these, I think, sustain my thesis of the capacity of a court-controlled system to maintain and reinforce its purpose and intent in the light of actual experience. This general purpose may be stated as one of de-emphasis upon pleading proper and encouragement of the use of devices for quickly reaching the merits of a case. The former is accomplished by the simplified pleading provided for in the rules and illustrated in the attached forms, the latter by the devices of discovery, pre-trial conferences, and summary judgments. Some have thought to find conflict between these two approaches. I suggest, on the other hand, that they are a part of a considered entire program and that all are necessary to make it operate effectively. In a sense we are taking procedure out of the control of the lawyers and restoring it to the control of the courts and the use of the parties. Indeed we have gone so far as to take away the element of surprise. Discovery under the Federal Rules is based on the premise that it is legitimate for each side to come to court knowing all there is to be known about the case and thus ready to present it fully to the judge, who in turn is to make the adjudication in the full light of disclosure thus complete and not deceptively partial.

Hence as experience has taught, it is hardly worth while to expect sophisticated counsel by the process of setting forth "mutual alterations" of fact or law, as they used to be termed, to expose their strategy sufficiently so that the case may be boiled down to a single essential dispute, as was the original conception of common-law
pleading. A shortened pleading stage, with machinery for developing the actual facts from the parties or from the witnesses, as provided by the pre-trial, the discovery, and the summary-judgment rules, enables the court to proceed at once to the merits. The use of these latter devices is necessary lest the very broadness and simplicity of the pleadings prove a means whereby the weakest case may cause the delay and expense of useless trials. Thus I regard the summary judgment as an important corollary of the modern federal process. If we are to take away from the litigants, as we have done, the old demurrer, which did provide a means of raising at least formalistic issues without a long trial, we must provide some rational substitute for a lengthy trial of an utterly worthless case. Fairness to litigants involves protection against abuse of process, as well as the opportunity to litigate real issues. The summary judgment well supplies what would otherwise be a serious lacuna in the process.

What has happened to these principles under the newly adopted amendments? I hope and believe that they have been made more clearly apparent and more simply operative. Rule 16, governing pre-trial conferences, has not been changed at all; it is being more widely and successfully used in both federal and state practices. I have already called attention to its utility in the Southern District here and in New York County—and informally also in Kings County. The discovery rules, through the process both of amendment and of interpretation by the Supreme Court, have been clarified. This covers various details, such as the time of seeking discovery without court order, the integration of proceedings for protective orders in all


forms of discovery, together with a clearer statement of objectives. Thus amended, Rule 26(b) states: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." And in the now famous case of Hickman v. Taylor,\textsuperscript{37} the Court settled the mooted question of discovery of "lawyers' files," i.e., of materials obtained by the lawyers in preparation of a case. It rejected the extreme claim of complete privilege, and, while restricting discovery of such material in the ordinary situation, recognized its occasional use where necessary to the full and fair development of the facts in a particular case.

The other major clarification is to be found in the limitation of the processes for the making of purely procedural objections and the closer integration of the motions for judgment under Rule 12(b) and (c) and for summary judgment under Rule 56. Thus the motion for a bill of particulars has been eliminated as unnecessary and dilatory (Rule 12e), and an extra stage of motion and hearing for objections to jurisdiction, venue, and process has been eliminated (Rule 12b).\textsuperscript{38} A quite interesting provision added to Rule 12(b) and (c) is that a motion directed to the insufficiency of the pleadings, i.e., to pleading forms, becomes one for summary judgment, i.e., on the merits, when "matters outside the pleading are presented to and not excluded by the court." No better illustration than this can be found of the objective of the new rules to direct the attention of the court to the merits, rather than to the mere surface allegations of the parties. Unless, therefore, the court specifically limits it to the face of the pleadings (as it still may wish to do when the issues are purely legal or when other factors, such as delay of a party, make such a course the fairer), the case automatically turns into a search for the real problems which divide the parties.\textsuperscript{39}

\textsuperscript{37} 329 U. S. 495 (1947).

\textsuperscript{38} Thus making impossible the wasteful successive appeals in cases such as Miller v. National City Bank of New York, 147 F. (2d) 798 (C.C.A. 2d 1945) and 166 F. (2d) 725 (C.C.A. 2d 1948), and W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, 155 F. (2d) 521 (C.C.A. 2d 1946), and Ira S. Bushey & Sons v. W. E. Hedger Transp. Corp., 167 F. (2d) 9 (C.C.A. 2d 1948), where the earlier reversals of district court dismissals for lack of jurisdiction led only to ultimate affirmance in each case for lack of legal claim, when that issue was at length presented.

\textsuperscript{39} Among amendments not specially noted here, particular reference may be made to amended Rule 54(b), clarifying the rule of final judgments and thus the determination of appealability of orders and judgments. See Petrol Corp. v. Petroleum Heat & Power
To the student of procedure as to the judge, and I believe the lawyer also, all these developments, especially the informed and aroused interest in the profession to accept responsibility for improvement in judicial administration, come as the dawn of a new day. I hope it means the development of a real procedural jurisprudence in the sense not of abstract formulas, but rather of a philosophy which defines appropriate objectives and then creates natural means for their achievement. And I hope it means a lessening of "procedural particularism" whereby abstract proceduralisms are concocted almost ad hoc to decide cases, it is true, but, in so doing, to conceal and confuse the judicial process.\textsuperscript{20}

Charles E. Clark

\textsuperscript{20}For discussion of "procedural particularism" see my article, note 1 \textit{supra} and my text, \textit{Code Pleading} 59, 69-71 (2d ed. 1947).