

# OBJECTIONS TO PLEADINGS UNDER THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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FROM its origin in the fourteenth century until the beginning of English procedural reform the chief office of the demurrer had been to compel pleaders to follow the exact forms and phrases to which long usage had lent sanctity. As late as 1797, Chief Justice Eyre, discussing a trifling defect in pleading, observed:

"You must argue it as a mere point of form; if you attempt to argue on substance, you must fail. This is a slip in form; but *it is always the best way to make the party pay for this kind of slip*, if advantage is taken of it by special demurrer. Infinite mischief has been produced by the facility of courts in overlooking these errors; it encourages carelessness, and places ignorance too much upon a footing with knowledge among those who practise the drawing of pleadings. . . . *The party . . . must pay for his blunder.*"<sup>1</sup>

This purpose the demurrer accomplished very effectively: the plaintiff recovered judgment if the demurrer was overruled; the defendant if it was sustained. There is no doubt that the extreme penalty of failure on demurrer trained expert craftsmen in the art of pleading. And in an earlier view of the judicial process this discipline was of value.<sup>2</sup>

But adherence to form is no longer viewed as an end in itself. The present-day objective of pleading is generally assumed to be the efficient determination of the real issues to be tried, and we are now inclined to doubt the wisdom of punishing a litigant for the failure of his counsel to observe the strict letter of the rules of pleading. The demurrer, in keeping with this change in attitude, has consequently lost its lethal effect. Thus, if the demurrer is sustained, the pleader is not penalized by loss of judgment, but is given the opportunity to amend his pleading;<sup>3</sup> if

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1. *Morgan v. Sargent*, 1 Bos. & P. 58, 59-60 (C. P. 1797) (italics added).

2. See Lord Hobart's observation on the Statute 27 ELIZ., c. 5 (1585), requiring that demurrers for matters of form be special: "Now the moderation of this statute is such that it does not utterly reject form: for that were a dishonour to the law, and to make it in effect no art. . . ." *Heard v. Baskerville*, Hob. 232 (K. B. 1615); see CHITTY, PLEADING \*639; see also (1897) 10 HARV. L. REV. 238.

3. See ANNUAL PRACTICE (1935) 458 *et seq.*; see also p. 65 *et seq.*, *infra*.

the demurrer is overruled the demurrant is free to plead<sup>4</sup> and his admission *arguendo* of the facts alleged in the pleading attacked may not be invoked against him at the trial.<sup>5</sup>

Desirable as is this recasting of values, the demurrer has proved to be ill-adapted to perform its new function, for it is susceptible to abuse. In an earlier period, when the ruling on the demurrer terminated the action, it was strategic to demur only for clear defects of form or substance.<sup>6</sup> But since the ruling no longer serves to end the litigation but merely postpones the trial, the demurrer is used as a convenient means of delay by counsel with too much business or too little ambition. And where further delay is desired counsel may invoke separately the several motions which exist concurrently with the demurrer: motions to strike, expunge, elect or separate; motions to make more definite and certain or for a bill of particulars. This multiplicity of weapons has inevitably led to a host of tenuous distinctions: whether demurrer or motion is proper, what kind of demurrer, what kind of motion. By the use of successive demurrers and motions, it is possible, then, not only to delay but also to discourage altogether the party whose pleading is subjected to this barrage of objections.<sup>7</sup>

One of the most worthwhile aspects of the proposed Federal Rules of Civil Procedure,<sup>8</sup> now before the Supreme Court for consideration,

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4. *E. g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 472; MINN. STAT. (Mason, 1927) § 9279; OHIO GEN. CODE (Page, 1926) § 11362. Even at common law the courts eased the rules to allow the defendant to "withdraw" his demurrer and plead. See *Bouchaud v. Dias*, 3 Denio 238 (N.Y. 1846). But the traditional view is expressed by an early writer: "If a Demurrer be entered, it cannot be waived, as is said, except both the Plaintiff and Defendant do consent unto it, nor then without leave of the court; because by the Demurrer, both Parties have submitted the Matters in Law in Question betwixt them, to the Judgment of the Court." GARDINER, INSTRUCTOR CLERICALIS, BEING A COLLECTION OF LAWS RELATING TO DEMURRERS (1714) 1b.

5. *Sprague v. New York & N. E. R. R.*, 68 Conn. 345, 36 Atl. 791 (1896); *Blizzard v. Brown*, 152 Wis. 160, 139 N. W. 737 (1913).

6. See Lord Coke in *Lord Cromwell's Case*, 4 Co. 12b, 14b (K. B. 1581); BRODIE-INNES, *COMPARATIVE PRINCIPLES OF THE LAWS OF ENGLAND AND SCOTLAND: COURTS AND PROCEDURE* (1903) 421.

7. Sometimes delay is a means to an end more vital than mere discouragement. If the original complaint does not state a cause of action, the statute of limitations may run and bar the amended complaint. *Walters v. Ottawa*, 240 Ill. 259, 88 N. E. 651 (1909); Wigmore, *Civil Procedure and Football—Defeating a Valid Claim by Pleading and Then Demurring, While the Statute of Limitations Runs* (1910) 4 ILL. L. REV. 344. See p. 68, *infra*.

8. These Rules, designed to provide uniform procedure in law and equity for the federal courts, were authorized by 48 STAT. 1064, 28 U. S. C. §§ 723b, 723c (1934). Two drafts of the Rules have been published: PRELIMINARY DRAFT OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA (May, 1936); REPORT OF THE ADVISORY COMMITTEE

is the attempt to minimize the dilatory effect of objections to pleadings. Under Rule 12 the demurrer is abolished and superseded by the answer or motion. Motion practice itself has been simplified by the expedient of requiring all objections to the pleadings to be made simultaneously. A complete understanding of these reforms requires a consideration of the demurrer and the various procedural forms which in the past half century have been designed to replace it.

## I. THE DEMURRER AND ITS COUNTERPARTS

Four existing forms analogous to the ancient demurrer in law<sup>9</sup> were considered as important precedents in the drafting of the Rules: the modified demurrer found in most states, the objection in law found in England, the motion to dismiss of the Federal Equity Rules, and the motion for judgment used in New York and in some other states.

The demurrer practice on the law side of the federal courts, which follows the procedure of the several states under the Conformity Act,<sup>10</sup> hardly furnished a suitable pattern for reform. The statutes of some states, patterned after the English Common Law Procedure Act of 1852,<sup>11</sup> eliminate the purely formal grounds of demurrer.<sup>12</sup> Others have preserved the special demurrer for formal defects as provided in the English Statute of 1585.<sup>13</sup> The Codes of some western states, for ex-

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OF THE UNITED STATES SUPREME COURT ON RULES FOR CIVIL PROCEDURE (April, 1937). These are hereafter cited as PRELIMINARY DRAFT and COMMITTEE REPORT, respectively.

On the movement for the adoption of the Rules and their general scope see Clark and Moore, *A New Federal Civil Procedure: I. The Background* (1935) 44 YALE L. J. 387; *II. Pleadings and Parties* (1935) *id.* at 1291; Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 HARV. L. REV. 1303; Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116; Pike, *The New Federal Rules of Civil Procedure* (1937) 12 CALIF. STATE BAR J. 192; (1936) 22 A. B. A. J. 787, 809 (symposium).

9. For a complete discussion of the early history of the demurrer and its civil law counterparts, see Millar, *The Fortunes of the Demurrer* (1936) 31 ILL. REV. 429, (1937) *id.* 596.

10. REV. STAT. §§ 914-916 (1875), 28 U. S. C. §§ 724, 726, 727 (1934), providing that pleading and practice in the district courts shall conform as nearly as possible to the practice in the courts of record of the state in which the district court is located. See CLARK, CODE PLEADING (1928) 23-24; Comment (1922) 35 HARV. L. REV. 602.

11. 15 & 16 VICT. c. 76, § 50; see BRODIE-INNES, *loc. cit. supra* note 6.

12. ALA. CODE ANN. (Michie, 1928) § 9479 ("No demurrer in pleading can be allowed but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer."); FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 4304; HAWAII REV. LAWS (1935) §§ 4091-4092; MASS. ANN. LAWS (Lawyers' Co-op. 1933) c. 231, § 18 (also allows demurrer for misjoinder of causes); TENN. CODE ANN. (Williams, 1934) § 8784. In some of these jurisdictions formal defects may be attacked by a motion to strike. See note 82, *infra*.

13. 27 ELIZ., c. 5 (1585). This statute was clarified by 4 ANNE, c. 16 (1706).

ample, indicate "uncertainty," "ambiguity" and "unintelligibility" as three distinct grounds of demurrer, and counsel customarily raise each ground specifically and separately, fearing—with some justification—that each term differs in application.<sup>14</sup> In another group of states the requirement found in the special demurrer that the ground of insufficiency be specifically stated has been extended to the general demurrer, that is, the demurrer for insufficiency in law.<sup>15</sup>

The motion to dismiss provided in Rule 29 of the Federal Equity Rules of 1911 furnished a more encouraging precedent.<sup>16</sup> This motion was in large part derived from the English procedure under the Judicature Act.<sup>17</sup> Pursuant to the power given it by this Act, the English Supreme Court in 1883 abolished the demurrer and substituted a simpler procedure.<sup>18</sup> Objections to a point of law may be raised in the pleadings along with the answer on the facts;<sup>19</sup> the case proceeds, and the objections are disposed of at or after the trial. In this fashion the use of the demurrer as a dilatory expedient is prevented. The orders provide two methods

14. CAL. CODE CIV. PROC. (Deering, 1935) §§ 430(7), (8), (9). Similar provisions are found in Colorado, Idaho, Montana, Nevada, Utah, and Porto Rico. There is apparently some basis for the practise of specifying each ground. In *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137 (1889), the defendant demurred on the three grounds in the conjunctive; the demurrer was sustained. The California Supreme Court reversed on the ground that, although the complaint was clearly uncertain, it was not ambiguous, and probably not unintelligible; hence it was not "ambiguous, unintelligible and uncertain." The court, after quoting a couplet from Milton, reasoned that uncertainty did not include ambiguity. Other decisions seem to have viewed the words as synonymous. See *Churchill v. Lauer*, 84 Cal. 233, 234, 24 Pac. 107, (1890); *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375 (1888).

15. MASS. ANN. LAWS (Lawyers' Co-op. 1933) c. 231, § 18. Similar provisions are found in Alabama, Indiana, Iowa, Tennessee and other states. For the text of the Alabama section, see note 12, *supra*.

16. 226 U. S., 649-674 (1911). On the merits of Rule 29 see Lane, *Working under Federal Equity Rules* (1915) 29 HARV. L. REV. 55, 66.

17. 35 & 36 VICT., c. 66 (1873). As amended the Act appears in ANNUAL PRACTICE (1935) 2347 *et seq.*

18. RULES OF THE SUPREME COURT (1883) O. xxv, r. 1; see ANNUAL PRACTICE (1935) 422. In the first Orders adopted by the Supreme Court under the Act, the demurrer for failure to state a cause of action had been preserved. RULES OF SUPREME COURT (1875) O. xxviii; see GRIFFITH, PRACTICE UNDER THE JUDICATURE ACTS (1875) 215.

19. The mode of stating an objection at law is indicated by examples given in an appendix to the Rules. If the case is for slander actionable only by reason of special damage, the defense, in law and fact, may be: "The defendant says that: (1) The defendant did not speak or publish the words. (2) The words did not refer to the plaintiff. (3) The defendant will object that the special damage stated is not sufficient in point of law to sustain the action." RULES OF THE SUPREME COURT (1883) App. E, § 3, No. 2; ANNUAL PRACTICE (1935) 1695.

In special circumstances a point of law may be set down for argument before trial even though not raised by the pleadings. *Mangena v. Wright*, [1909] 2 K. B. 958.

to effect the primary purpose of the objection in law — the raising of issues of law apart from issues of fact in order to render a trial on the facts unnecessary. First, the court may order a pleading struck out if it discloses no reasonable cause of action or ground of defense.<sup>20</sup> This is proper only when the plaintiff's failure to state a cause of action is so evident that any judge can say at once that the declaration is insufficient, even if the averments be proved, to entitle the plaintiff to what he asks.<sup>21</sup> Secondly, by consent of the parties or by order of the court on the application of either party, an objection in law may be set down for a hearing to be held at any time before the trial.<sup>22</sup> If the decision on the point of law disposes substantially of the action or defense, the court may dismiss the suit or make any other appropriate order.<sup>23</sup>

Under Equity Rule 29, demurrers and pleas were abolished, and "every defense in point of law arising upon the face of the bill" was to be made by a motion to dismiss or in the answer.<sup>24</sup> Though similar to the English order, this rule differs in two particulars. First, while the English order provided that the objections be raised in pleadings only, the equity rule

20. RULES OF THE SUPREME COURT (1883) O. xxv, r. 4; see ANNUAL PRACTICE (1935) 424.

21. *Hubbuck v. Wilkinson*, [1899] 1 Q. B. 86, 91 (C.A.); see *Burstall v. Beyfus*, 26 Ch. D. 35, 38 (1884).

22. RULES OF THE SUPREME COURT (1883) O. xxv, r. 2. Under some circumstances the point of law may be argued at the trial as a preliminary matter. *Osborne v. Society of Railway Servants*, [1911] 1 Ch. 540. But this requires an order.

23. *Ibid.* Considerable liberality is allowed the court in its disposition of the matter. If the objection taken on the record is upheld, and yet the court feels that the pleading can be corrected by amendment, the court will generally grant the party in fault leave to amend, assessing him for the costs of the argument. *Richards v. Butcher*, 62 L. T. R. (N.S.) 867 (Ch. D. 1890). But if the decision on the hearing substantially disposes of the controversy, the court will dismiss the action with costs. *O'Brien v. Tyssen*, 28 Ch. D. 372 (1885); *Percival v. Dunn*, 29 Ch. D. 128 (1885).

The order of dismissal may be final or interlocutory. *Bozson v. Altrincham Dist. Council*, [1903] 1 K. B. 547; *In re Croasdell*, [1906] 2 K. B. 569. *Contra*: *Salaman v. Warner*, [1891] 1 Q. B. 734 (court has no power to make an interlocutory order of dismissal).

24. The rule reads: "Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."

For a detailed discussion of the present practice under Rule 29, see pp. 59-62, *infra*.

perpetuated an unnecessary step by permitting the alternative of a motion to dismiss. Secondly, the equity rule states that "every point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing in the discretion of the court." Although in the English procedure the materiality of the issue is a criterion in deciding whether to dismiss the action after the preliminary hearing on the objection in law,<sup>25</sup> materiality is not a limitation on the English courts in deciding whether to grant this hearing,<sup>26</sup> and if the parties consent, the court is compelled to decide the issue before trial. Here the federal equity procedure appears to be preferable,<sup>27</sup> for unless it be required that the point of law raised by the objection go "to the whole or a material part of the cause" of action, the utility of the separate hearing on the issue of law in terminating the action will not be achieved in practice, and the purpose of the abolition of the ancient demurrer will be defeated.<sup>28</sup>

In this respect the provisions in the four states which have followed the Federal Equity Rules in abolishing the demurrer represent a retrogressive step. The New Jersey provision of 1912 lacks the test of materiality: a hearing is required in any event when the objection is raised by motion; and the court may determine the question before trial on the motion of either party if the objection is raised in the pleadings.<sup>29</sup> Under the New York Civil Practice Act of 1920, since all objections in law are to be made by a motion for judgment, the elimination of the preliminary hearing is made impossible.<sup>30</sup> This is also the result of the Pennsylvania<sup>31</sup> and Illinois<sup>32</sup> provisions. The difference between the operation of the abolished demurrer and of the pre-trial hearing

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25. See note 31, *supra*.

26. In practice the materiality of the issue is often the criterion. *Robinson v. Fenner*, [1913] 3 K. B. 835. But even where the issue is material, a preliminary hearing will not be granted, if the trial is likely to throw more light on the matter. *Isaacs & Sons v. Cook*, [1925] 2 K. B. 391.

27. The rule proposed in the model Rules of Civil Procedure of the American Judicature Society has a similar limitation of materiality. (1919) *AM. JUD. SOC. BULL.*, No. xiv, 68-69.

28. See p. 57, *infra*.

29. N. J. PUB. LAWS 1912, p. 377, Schedule A, Rule 26; see HARRIS, *PLEADING AND PRACTICE IN NEW JERSEY* (1926) § 338 *et seq.* Similar provisions are found in MICH. COMP. LAWS (1929) § 14,120.

30. N. Y. CIV. PRAC. ACT (1920) § 277. For a comparison of the New York and New Jersey provisions see REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE, N. Y. LEG. DOC. NO. 111 (1919) 191.

31. PA. STAT. ANN. (Purdon, 1931) tit. 12, §§ 385, 471, enacted in 1915. Under this statute, the objection is raised by an "affidavit of defense."

32. ILL. ANN. STAT. (Smith-Hurd, 1935) c. 110, § 169. For a general discussion of the reforms in pleading under the new Illinois Act see Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209.

required by the statutes of these three states is so slight that apparently only the name "demurrer" has been eliminated.

## II. THE PROPOSED FEDERAL RULE

In the preliminary draft of the new Federal Rules,<sup>33</sup> the recommendations of the Advisory Committee of the Supreme Court for the rule on defenses<sup>34</sup> adopted the best features of the English procedure and of the Federal Equity Rules of 1911. All objections of law or fact, except several that were specified, were to be raised in the answer—in effect the provision of the English order.<sup>35</sup> And in granting the separate hearing on the objection the criterion was whether the decision on the sufficiency of the pleading would "finally dispose of the whole or a material part of the issues"—the provision of the federal equity rule.

In the final draft, presented to the Supreme Court in April, 1937,<sup>36</sup> several modifications appear, two of which seem undesirable. First, objections may be raised by motion as well as by answer, as under the Equity Rules—a provision that adds another and an unnecessary procedural step. Secondly, a hearing on an objection may be granted at the request of either party, unless the court orders otherwise.<sup>37</sup> Under this rule a hearing on the objection will, perhaps, be the normal practice; the preliminary draft was worded to make the hearing the exception. This change is regrettable. While it is true that in some instances rulings

33. See note 8, *supra*.

34. PRELIMINARY DRAFT, Rule 16.

35. Another precedent for the junction of objections of law and of fact in the answer is furnished by an early Virginia statute providing for optional junction. Act of Dec. 22, 1788, § 40, 12 STAT. AT LARGE (Hening, 1792) 745; see Millar, *supra* note 9, at 628.

36. The provision on "Defenses—How Presented by Pleading and Motion" reads: "Every defense, in law or fact, to a claim for relief in any pleading, whether an original claim, counterclaim, cross-claim or third-party-claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." COMMITTEE REPORT, Rule 12(b).

37. The rule on "Preliminary Hearings" provides: "The defenses specifically enumerated (1)–(6) in subdivision (b) of this rule [see note 36, *supra*], whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." COMMITTEE REPORT, Rule 12(d).

on demurrer or on motion to dismiss may dispose of the controversy without a trial of the facts, judicial statistics show that such cases are few.<sup>38</sup> That in the large number of cases the demurrer does not terminate the action may indicate in part the frivolity of the objection. Perhaps the best solution of the problem is to be found in the test of materiality rejected in the final draft, for while the federal courts have varied considerably in applying this criterion under the Equity Rules, it appears that the test was well devised to separate the frivolous or immaterial objection from the well-grounded or material objection. Advance determination has been encouraged, for example, where its use might avoid the expense of a long and burdensome hearing on the merits,<sup>39</sup> or where the legal issues were complicated and the fact issues were relatively simple.<sup>40</sup> Generally, however, the aim of eliminating the preliminary step of a hearing on objections in law has been achieved by a proper exercise of judicial discretion in refusing to grant a hearing.<sup>41</sup> This attitude is well expressed in *Boyd v. New York & Harlem Railroad*.<sup>42</sup>

"I am of opinion that no legal point (going to less than the whole case) should be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting the other aspects of the litigation."

Despite these probable defects in the final draft of the rule on defenses, it embodies definite advances over the present demurrer practice. There

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38. Clark and Moore, *A New Federal Civil Procedure: II. Pleadings and Parties* (1935) 44 YALE L. J. 1291, 1294, 1308, n. 76. In a survey of Connecticut cases it was found that in only 25 cases of 363 in which a demurrer was filed was judgment entered as a result. CLARK & SHULMAN, LAW ADMINISTRATION IN CONNECTICUT (1937) 218; cf. A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES (1934) c. v and vi; (1919) AM. JUD. SOC. BULL. No. xiv, 69.

39. Chase Nat. Bank v. Sayles, 6 F. (2d) 403 (D. R. I. 1925), *rev'd on other grounds*, 11 F. (2d) 948 (C. C. A. 1st, 1926).

40. Mallinson v. Ryan, 242 Fed. 951 (S. D. N. Y. 1917) (case involved the infringement of simple design patents; a mere inspection of the patent was all that would be necessary on final hearing); see Chase v. Reliable Mfg. Co., 58 F. (2d) 676 (N. D. Ill. 1932); I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593, 596 (D. Mass. 1920); cf. Loughran v. Quaker City Chocolate & Confectionery Co., 231 Fed. 186 (E. D. Pa. 1922).

41. Cf. Ralston Steel Car Co. v. National Dump Car Co., 222 Fed. 590 (D. Me. 1915); Wright v. Barnard, 233 Fed. 329 (D. Del. 1915); O'Keefe v. New Orleans, 273 Fed. 560 (E. D. La. 1921), *aff'd*, 280 Fed. 92 (C. C. A. 5th, 1922). Where the case involves many intricate details whose full import is not apparent from the pleadings, the court is likely to require the matter to go to proof and decide the question of law later. Loughran v. Quaker City Chocolate Confectionery Co., 281 Fed. 185 (E. D. Pa. 1922).

42. 220 Fed. 174, 179 (S. D. N. Y. 1915).

has been more than a change in name. Since the answer may be used for objections in law, unnecessary delay may be obviated by those defendants who desire a speedy adjudication of the issues. Moreover, the hearing on the objection may be eliminated, at least in some cases, by progressive judges. And, while it was not certain under the Equity Rules whether the motion could be made only before the answer,<sup>43</sup> the new rule removes this doubt by a provision that the motion "shall be made before pleading if further pleading is permitted."<sup>44</sup> Finally, the entirely new provision for a consolidated motion<sup>45</sup> makes almost impossible the worrying of plaintiffs by a succession of demurrers and motions: with the exception of defenses as to jurisdictions, process, and venue,<sup>46</sup> and the motion for judgment on the pleadings, all objections which a party may want to raise by motion, including the motion to make more definite and certain and for a bill of particulars,<sup>47</sup> the motion to strike,<sup>48</sup> and the objection in law, must be raised at one time — either concurrently or in a consolidated motion. Once a motion is filed, the right to raise by further motion objections not included is in effect waived.<sup>49</sup> And under the language of this provision a party may, if he wishes, include in the consolidated motion objections as to jurisdiction, process, and venue. Because of the retention of the familiar motion for judgment on the pleadings, objections as to the substance of the cause of action or defense

43. Compare *United States v. Railway Employees Dept.*, 286 Fed. 228, 230 (N. D. Ill. 1923) with *Andrew Jergens Co. v. Bonded Products Corp.*, 9 F. (2d) 114 (E. D. N. Y. 1925).

44. COMMITTEE REPORT, Rule 12(b); see note 36, *supra*.

45. "*Consolidation of Motions*. A party who makes a motion under this rule may join with it the other motions herein provided for; and if he makes such a motion and does not include therein all grounds of motion which are then available to him, he shall not be permitted thereafter to make a motion based on any of the grounds so omitted; except that prior to making any other such motions under this rule he may make a motion presenting objections to the jurisdiction of the court over the subject matter or over the person, or to the sufficiency of the process or its service, or to venue; and except that he may make a motion for judgment on the pleadings, as stated in subdivision (h) of this rule." COMMITTEE REPORT, Rule 12(g).

46. Provided for in COMMITTEE REPORT, Rule 12(b).

47. COMMITTEE REPORT, Rule 12(e). See pp. 62-65, *infra*.

48. COMMITTEE REPORT, Rule 12(f). See p. 62, *infra*.

49. More explicit on the subject of "Waiver of Defenses" is subdivision (h): "Except as stated in this subdivision of this rule, a party waives all defenses and objections if he does not present them either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. The defenses or objections for failure to state a claim upon which relief can be granted even though previously presented, or to state a legal defense to a claim, may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings, or at the trial on the merits; but if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence which may have been received. Whenever it appears by suggestion of the parties, or otherwise, that the court has not jurisdiction of the subject matter, it shall dismiss the action." COMMITTEE REPORT, Rule 12(h).

may be raised at any time after the pleadings are closed and "in such time as not to delay the trial."<sup>50</sup> After the trial has begun counsel may still object to the legal insufficiency of the opposing pleading; but in ruling on the objection at this time the court will dispose of the motion in the light of the evidence that has been received.<sup>51</sup>

The new rule does not pretend, however, to adumbrate all the details in the picture: whether on objection the averments of the complaint are to be taken as true, whether facts outside of the attacked pleading may be considered, whether *res judicata* applies to a dismissal on the motion, and so forth. As was true under the Federal Equity Rules, such questions must be determined with little help from the language of the rule itself; hence it is necessary to advert to the motion practice under the Equity Rules and the earlier demurrer practice precedents. Yet a *caveat* is necessary. Since, prior to the adoption of the Equity Rules, the demurrer was used in federal equity cases for defects both of substance and of form,<sup>52</sup> many cases decided before 1911 are not pertinent. Equity Rule 29 limited the motion to dismiss to defects of substance and of joinder,<sup>53</sup> similar limitations are found in the new rule.

In many respects the theory of the motion under the federal equity practice has followed the theory of the demurrer.<sup>54</sup> The motion to dismiss may not tender an issue of fact,<sup>55</sup> like the demurrer, it may raise legal issues only.<sup>56</sup> Similarly, for the purpose of the motion all the

50. COMMITTEE REPORT, Rule 12(c). This motion, common in code states, calls for an immediate judgment founded on the pleadings without the hearing of any evidence. While somewhat similar to the general demurrer and its counterpart motions, it differs in that it is made after issue is joined and the decision upon it is a judgment. N. Y. RULES CIV. PRAC. (1936) Rule 112 is a typical provision.

51. COMMITTEE REPORT, Rules 12(h) and 15(b).

52. See generally 1 BATES, FEDERAL EQUITY PROCEDURE (1901) §§ 177 *et seq.*; SHIPMAN, EQUITY PLEADING (1897) 364.

53. *Cf.* Tilden v. Barber, 227 Fed. 1010 (D. N. J. 1915). Clearly the motion in equity was not intended to be coextensive with the old demurrer. It is therefore not accurate to say, as several federal courts have said, that "defenses which would previously have been presented by demurrer must be presented by motion to dismiss." General Bakelite Co. v. Nikolas, 207 Fed. 111 (E. D. N. Y. 1913); see also Martin v. James B. Berry Sons' Co., 83 F. (2d) 857 (C. C. A. 1st, 1936); HUGHES, FEDERAL PRACTICE (1931) § 4352. Objections to form may not be raised by a motion to dismiss. United States v. American Brewing Co., 1 F. (2d) 1001 (E. D. Pa. 1924); United States v. Ali, 7 F. (2d) 728 (E. D. Mich. 1925). But *cf.* Hodgman v. Atlantic Refining Co., 274 Fed. 104 (D. Del. 1921) (bill dismissed for prolixity).

54. The courts have regarded the two practices as sufficiently alike so that where a "demurrer" is filed it will be viewed as a "motion to dismiss." Thome v. Lynch, 269 Fed. 995 (D. Minn. 1921).

55. Badger Co. v. Arnold, 282 Fed. 115 (C. C. A. 1st, 1922); *cf.* Western Distributing Co. v. Public Service Comm., 58 F. (2d) 239 (D. Kan. 1931).

56. A demurrer which introduces allegations of fact is a "speaking demurrer" and may be disregarded. United States v. Forbes, 259 Fed. 585 (M. D. Ala. 1919), *aff'd sub. nom.*, Forbes v. United States, 268 Fed. 273 (C. C. A. 5th, 1920); Union Trust Co. v. Wilson, 182 N. C. 166, 108 S. E. 500 (1921).

allegations of the bill are taken as admitted.<sup>57</sup> The theory of the motion, like the theory of the demurrer, is that the motion will be granted if the complaint is insufficient to state a cause of action even though all its allegations are assumed to be true. Moreover, there is the familiar rule that every intendment must be in favor of the pleader.<sup>58</sup> Finally, the two practices have in common the general principle that no facts outside of the attacked pleading may be considered on the hearing.<sup>59</sup> Allegations in the answer, statements of counsel, and information in affidavits are all irrelevant for this purpose.<sup>60</sup> Nothing outside of the bill may aid in its support, and, conversely, the defect to which the objection is directed must in fact appear on the face of the bill. This, of course, is in accord with the theory of the demurrer.

In those instances where the motion is granted, what effect does the dismissal have? Clearly, if the dismissal is for want of jurisdiction, it must also be without prejudice, since the very filing of the complaint is viewed conceptually as a nullity.<sup>61</sup> A dismissal for lack of equity jurisdiction on the ground that the complainant has an adequate legal remedy, likewise must be without prejudice.<sup>62</sup> But there is some confusion in the cases as to the effect of a dismissal under Equity Rule 29—confusion which may continue under the language of the new rule.

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57. *Woodall v. Clark*, 254 Fed. 526 (C. C. A. 4th, 1918); *Everglades Drainage League v. Broward Drainage Dist.*, 253 Fed. 246 (S. D. Fla. 1918), *appeal dismissed*, 251 U. S. 567 (1920); see 3 LONGSDORF, *CYCLOPEDIA OF FEDERAL PROCEDURE* (1928) § 834. As in the case of the demurrer, this rule does not extend to the conclusions of the pleader. *Amalgamated Royalty Oil Corp. v. Hemme*, 282 Fed. 750 (C. C. A. 8th, 1922). Nor does it extend to allegations inconsistent with matters of which the court must take judicial notice. *Nev-Cal Elec. Securities Co. v. Imperial Irr. Dist.*, 85 F. (2d) 886 (C. C. A. 9th, 1936). In any event the "admission" may not be urged against the demurrant at the trial. See note 5, *supra*.

58. *Bayley & Songs v. Blumberg*, 254 Fed. 696 (C. C. A. 2d, 1918). See p. 62, and cases cited in notes 71-73, *infra*.

59. *Betts v. Lewis*, 19 How. 72 (U. S. 1856); *Krouse v. Brevard Tannin Co.*, 249 Fed. 538 (C. C. A. 4th, 1918). A bill of particulars or an attached exhibit is regarded as part of the bill. *American Voting Mach. Co. v. City of New York*, 2 F. Supp. 191 (S. D. N. Y. 1933). Compare the rule applied under demurrer practice in *Bates & Rogers Const. Co. v. Board of Comm'rs*, 274 Fed. 659 (N. D. Ohio, 1920).

60. *Conway v. White*, 292 Fed. 837 (C. C. A. 2d, 1923) (allegations in answer); *Arneson v. Denny*, 25 F. (2d) 988 (W. D. Wash. 1928) (allegations in answer); *Jackson v. Hooper*, 171 Fed. 597 (C. C. S. D. N. Y. 1909) (statements of counsel); *Ussesa Saxen Co. v. Josam Mfg. Co.*, 2 F. Supp. 190 (S. D. N. Y. 1933) (affidavits). But see *Puget Sound Power & Light Co. v. Seattle*, 271 Fed. 958 (W. D. Wash. 1921), where the bill was dismissed on the strength of an affidavit showing that the question at issue had become moot; *Boyd v. New York & H. R. R.*, 220 Fed. 174 (S. D. N. Y. 1915), where the court was willing to take into consideration the allegations and admissions of defendant's pleading, the motion to dismiss having been made after answer.

61. *General Inv. Co. v. New York Cent. R. R.*, 271 U. S. 228 (1926).

62. This was settled long before the adoption of the Equity Rules. *Horsburg v. Baker*, 1 Pet. 232 (U. S. 1828); *Lacassagne v. Chapuis*, 144 U. S. 119 (1892).

Here again the demurrer practice may furnish an analogy. According to the better view, the mere sustaining of the demurrer affects no rights; thus the ruling on the demurrer is not an appealable order.<sup>63</sup> The judgment *after* the demurrer, however, is *res judicata*.<sup>64</sup> It is necessary to maintain this distinction under the motion practice if the federal cases are to be reconciled, for it has been held that, while a decree of dismissal is *res judicata*,<sup>65</sup> the granting of the motion to dismiss is not.<sup>66</sup> Yet "granting the motion to dismiss" would seem to be equivalent to a "dismissal." The dichotomy is clearly unnecessary and should not be retained in interpreting the new Rules.

The motion practice, however, departs from the demurrer precedents at several points. In theory there is a difference in the significance of the paper filed before the hearing. In one case, the document which the defendant files and serves upon the plaintiff is itself the "demurrer."<sup>67</sup> The subsequent oral hearing, "the argument on the demurrer," has a subsidiary character; the effective legal act is the filing and serving of the paper. But the paper filed and served upon the plaintiff is merely a "notice of motion"; the motion itself is made at the hearing and is the effective legal act. Of more practical significance is the change under the motion practice in the effect of a general objection to a complaint containing several counts. Although a general demurrer to the whole of a pleading will fail if any count is good,<sup>68</sup> a motion to dismiss that goes to the entire bill may be sustained as to part.<sup>69</sup> But where the defendant intends to attack only part of the pleading, his motion must specify that part and must indicate the particular ground of objection.<sup>70</sup>

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63. Statutes and decisions are collected in (1925) 34 YALE L. J. 905.

64. Although it is generally agreed that the judgment is *res judicata*, there is a conflict over the extent of its effect. Under one rule although no later suit can be brought upon the same facts nor can the affirmative allegations used in the first suit be denied, the *omission* of an essential allegation may be corrected in the later action. Under the other rule the judgment is viewed as an adjudication of the whole controversy and concludes both the issues actually passed upon and those which could have arisen had the action continued. CLARK, CODE PLEADING (1928) 367.

65. Hickey v. Johnson, 9 F. (2d) 498 (C. C. A. 8th, 1925), *mandamus to enforce decree granted*, 22 F. (2d) 787 (C. C. A. 8th, 1927).

66. San Francisco v. McLaughlin, 9 F. (2d) 390 (C. C. A. 9th, 1925); Westinghouse Traction Brake Co. v. Orr, 252 Fed. 392 (C. C. A. 3d, 1918).

67. Before the introduction of formal pleadings the term "demurrer" denoted the ruling of the court on the objection. But since the fourteenth century it has indicated the objection itself. See note 4, *supra*.

68. SHIPMAN, COMMON LAW PLEADING (3d ed. 1928) 281.

69. General Inv. Co. v. Lake Shore & M. S. R. R., 250 Fed. 160 (C. C. A. 6th, 1918).

70. Everglades Drainage League v. Broward Drainage Dist., 253 Fed. 246 (S. D. Fla. 1918), *appeal dismissed*, 251 U. S. 567 (1920); Commodore Point Terminal Co. v. Hudnall, 283 Fed. 150 (S. D. Fla. 1922).

Different, too, is the liberal attitude of the courts in their treatment of the pleading attacked. Mere indefiniteness of statement will not support a motion to dismiss if, generously construed, the bill seems to state a cause of action.<sup>71</sup> As stated in a leading decision, "A case in equity involving important matters should go to issues and proof, where a doubtful question is presented by the pleadings."<sup>72</sup> With the merger of law and equity under the new Rules<sup>73</sup> this liberality should, of course, extend to both types of action.

### III. OBJECTIONS AS TO FORM

Although the new federal rule on defenses has in general attempted to discourage objections for form it recognizes that for at least two types of formal defects a remedy is desirable. First, if the complaint is vague the defendant may be hampered in preparing his answer. The motion for more definite statement and for bill of particulars is provided to attack this defect. Second, if the complaint is encumbered with irrelevant counts or allegations, the pleadings will fail in one of their functions, guidance of the trial by the limitation of issues. For defects of this kind the new Rules provide the motion to strike.<sup>74</sup>

The provision for the latter motion has preserved the phraseology of the Equity Rules, which in turn had adopted the terms familiar in federal and state practice.<sup>75</sup> Thus at the motion of any party or on its own initiative the court may at any time "order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading."<sup>76</sup> But on motions as to certainty the Federal courts are at present applying under the Conformity Act a welter of rules. While some courts have been fairly liberal in attitude,<sup>77</sup> others, in attempting to develop nice distinctions between the motion for bill of particulars and the motion to make

71. *United States v. United Shoe Mach. Co.*, 234 Fed. 127 (E. D. Mo. 1916).

72. *United States v. Railway Employes' Dept.*, 286 Fed. 228, 230 (N. D. Ill. 1923). And the bill need not be dismissed even where it appears that there is an adequate remedy at law if the subject-matter of the action is within the jurisdiction of the court, *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 225 Fed. 769 (E. D. Pa. 1915); *Bankers' Trust Co. v. Kiehne*, 277 Fed. 65 (C. C. A. 8th, 1921).

73. COMMITTEE REPORT, Rules 1 and 2.

74. As already indicated, the procedure for objections to pleadings should be considerably expedited by a requirement that objections in law, motions to make more certain and for bill of particulars, and motions to strike be raised concurrently and be heard at one time.

75. See Equity Rule 12.

76. COMMITTEE REPORT, Rule 12 (f); see also PRELIMINARY DRAFT, Rule 17.

77. See, e.g., *Conover v. Knight*, 84 Wis. 639, 642, 54 N. W. 1002 (1893); *Stocklen v. Barrett*, 58 Ore. 281, 114 Pac. 108 (1911).

more definite and certain,<sup>78</sup> have created disharmony and inconsistency. In some western states only the motion for bill of particulars is recognized, and it is limited to suits upon an account.<sup>79</sup> In these jurisdictions the function of the motion to make more definite and certain is somewhat fulfilled by special demurrers for uncertainty, ambiguity, and unintelligibility<sup>80</sup> — three more nice distinctions. In two states the situation is even further complicated by the recognition, in addition to these three special demurrers, of both the motion to make more definite and certain and the motion for bill of particulars.<sup>81</sup> There are thus five devices for substantially the same purpose! Again, in some jurisdictions, uncertain pleadings may be attacked by a motion to strike.<sup>82</sup>

The proposed federal rule should avoid the difficulty and confusion attendant on the use of separate motions. The motion is defined to eliminate any quibble over the distinction between a motion to make more definite and certain and a motion for a bill of particulars:

“Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.”<sup>83</sup>

A single remedy will be available whenever there is such vagueness or lack of particularity in a pleading that the opposite party may be in doubt as to its full extent and meaning. The rule also requires that the motion point out specifically the defects complained of and the details desired.<sup>84</sup> And by the provision that “a bill of particulars when filed becomes part of the pleading which it supplements,” Rule 12 specifically rejects the narrow views adopted by some courts that the bill adds noth-

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78. *Wilson v. Pearson*, 13 Fed. 386 (C. C. N. Y. 1882); *Groton Iron Works v. United States Shipping Board Emergency Fleet Corp.*, 283 Fed. 812 (D. Conn. 1922); *Harrington v. Stillman*, 120 App. Div. 659, 105 N. Y. Supp. 75 (3rd Dep't 1907).

79. California practice is typical. The requirement of the particulars of an account is not enforced by motion and order; instead the plaintiff is precluded from introducing evidence in regard to those items as to which he has not furnished defendant with a bill of particulars within five days after a demand for it. CAL. CODE CIV. PROC. (Deering, 1935) § 454.

80. See note 14, *supra*.

81. COLO. CODE CIV. PROC. ANN. (Mills, 1933) §§ 56, 66; NEV. COMP. LAWS (Hillyer, 1929) §§ 8596, 8623.

82. *Banco Nacional Ultramarino v. Newton*, 278 Fed. 207 (E. D. N. Y. 1921); *Hartford-Connecticut Trust Co. v. Campbell*, 95 Conn. 399, 111 Atl. 864 (1920); *Folsom v. Brawn*, 25 N. H. 114 (1852); *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 849 (1905).

83. COMMITTEE REPORT, Rule 12(e); see also PRELIMINARY DRAFT, Rule 17.

84. COMMITTEE REPORT, Rule 12(e).

ing to the complaint or that it even limits its broader allegations to the matters specified in the bill.<sup>85</sup>

But the motion to make more definite and certain and the motion for bill of particulars may be used for delay as easily as the demurrer. A recognition of the dilatory character of the latter motion<sup>86</sup> has in two states led to efforts toward reform. The Pennsylvania Practice Act has been construed as imposing upon the pleader the duty of furnishing particulars in the first instance, with a right in the other party to enforce compliance by motion.<sup>87</sup> New York has chosen the opposite expedient of allowing the defendant to demand particulars of the plaintiff without motion and placing the burden upon the plaintiff to contest the defendant's right.<sup>88</sup> Since the defendant is usually as aware as the plaintiff of the details of the transaction sued upon, the furnishing of particulars is useful in but few cases. The New York provision — one, in effect, for particulars as a matter of course — while eliminating *sub judice* hearings to some extent, still involves a dilatory step. From this point of view the Pennsylvania solution is, at least in theory, preferable to the New York one. It establishes a norm which has a definite effect upon usage. But the procedural step of a motion will not be eliminated in cases where the plaintiff in fact fails to supply particulars or where, particulars having been supplied, the defendant deliberately seeks delay. And the very standard the statute sets up is likely to afford encouragement to lengthy, detailed pleading — a result which the new Federal Rules are seeking to avoid. By limiting the right to the statement of matters "not averred with sufficient definiteness or particularity to enable him [the other party] to prepare his responsive pleading or to prepare for trial," the proposed federal rule sets up a flexible yard stick for determining when particulars should be given. This pragmatic approach is certainly in advance of the present attitude of the many courts which attempt to measure the pleading in the light of some general standard of particularity of allegation; but it probably would have been preferable to limit the right even further, placing definitely upon the party making the motion the burden of establishing his need for further statement. The provisions for

85. *Marshall v. Sackett & Wilhelms Co.*, 166 App. Div. 141, 151 N. Y. Supp. 1045 (2d Dep't, 1915); *Colby v. Wilson*, 320 Ill. 416, 151 N. E. 269 (1926).

86. See SECOND REPORT OF THE N. Y. JUDICIAL COUNCIL (1936) 147; ASS'N OF THE BAR OF THE CITY OF N. Y., YEAR BOOK (1932) 273.

87. See PA. PRACTICE ACT (1915) §§ 5 and 21; SMITH, PENNSYLVANIA PRACTICE ACT (4th ed. 1936) 164. It has been observed that the motion for bill of particulars has become obsolete under the Practice Act, for every proper claim embodies a bill of particulars. *King v. Brillhart*, 271 Pa. 301, 305 (1921); see *Philadelphia Storage Battery Co. v. Air Reduction Sales Co.*, 274 Fed. 216, 217 (E. D. Pa. 1921).

88. N. Y. RULES OF CIVIL PRACTICE, Rule 115, authorized by N. Y. C. P. A. § 246, as amended by N. Y. LAWS (1936) c. 241.

discovery, without encumbering the pleadings, provide the opposite party ample opportunity for preparing his case.<sup>89</sup>

#### IV. AMENDMENT OF PLEADINGS

Liberal provision for the amendment of pleadings is a desirable complement to restriction of objections for substance and form; and, indeed, in the course of procedural reform efforts towards these ends have closely paralleled each other. Before the use of written pleadings, demurrers and other technical objections were not recognized, and parties were permitted to amend freely. Holdsworth suggests that the rule that a pleader's words were not effective until endorsed by his client no doubt made a pleading capable of amendment until one was reached by which the attorney could abide.<sup>90</sup> When in the fourteenth century written pleadings were introduced, formalism developed, and cases were often dismissed and judgments arrested and reversed for formal defects. Amendment was rarely allowed.<sup>91</sup> Since the beginning of the last century, the tendency has been in the opposite direction. It culminated in the Rules adopted under the Judicature Act, which provided that at any stage of the proceeding either party may, with the permission of the court,<sup>92</sup> "alter or amend his endorsement or pleadings, in such manner and on such terms as may be just. . . ." <sup>93</sup> But amendments without leave may be made by the plaintiff at any time within the period limited for his reply; a similar privilege is accorded to the defendant at any time before his answer to the reply is due.<sup>94</sup>

Before the drafting of the new rules the federal practice at law and in equity differed. Under the Conformity Act the usual variety of rules has governed the practice in suits at law. The codes have tended, however, to follow the English provision,<sup>95</sup> for example, in California "Any pleading may be amended once by the party of course, and without costs, at

89. See generally COMMITTEE REPORT, Rules 26-37.

90. Holdsworth, *Pleading*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 614.

91. See generally CLARK, CODE PLEADING (1928) 495.

92. The progressive attitude of the courts in interpreting their discretion under this Rule is indicated by the statement of Bramwell, L. J., in *Tildesley v. Harper*, 10 Ch. D. 393, 396 (1878): "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." See also Brett, M. R., in *Clarapede v. Commercial Union Assn.*, 32 W. R. 262, 263 (1883).

93. RULES OF THE SUPREME COURT (1883) O. xxviii, r. 1; see ANNUAL PRACTICE (1935) 458 *et seq.*

94. RULES OF THE SUPREME COURT (1883) O. xxviii, rr. 2 and 3; see ANNUAL PRACTICE (1935) 467.

95. For complete list of statutes, see CLARK, CODE PLEADING (1928) 497, n. 29.

any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended . . . "96 But this amendment as a matter of right is not allowed under the Federal Equity Rules; Rule 19 provides only that the court may permit amendment "at any time in furtherance of justice, upon such terms as may be just." Under this language it has been held that amendment is always at the discretion of the court, whose leave must be sought upon application.<sup>97</sup>

The proposed federal rule<sup>98</sup> represents a compromise between the present equity rule and the practice obtaining in England and under the codes. Amendment before trial is allowed as a matter of right only before the other party has served his responsive pleading.<sup>99</sup> Afterwards "a party may amend his pleading only by leave of court or by written consent of the adverse party."<sup>100</sup> It is specifically stated, however, that leave "shall be freely given when justice so requires."<sup>101</sup>

In the provision for amendments during the course of trial the new Rules take advanced ground. Of course, in all jurisdictions such amendments are now allowed under some circumstances.<sup>102</sup> Rule 22(b) of the preliminary draft, however, made actual amendment during trial unnecessary in some cases. During the trial the pleadings were to be "deemed amended to conform to all the evidence received without objection." And if a party objected that evidence offered at trial was outside the scope of the pleadings *and* could show actual prejudice to the maintenance on the merits of his action or defense, the court had power to sustain the objection or to allow amendment of the pleadings. In the latter case the court could grant a continuance "upon such terms as are just." But, the rule added, ". . . if the objecting party fails to show to the satisfaction of the court that the admission of such evidence would actually prejudice him in maintaining his action or defense upon the merits, the

96. CAL. CODE CIV. PROC. (Deering, 1937) §472. Amendment at a later point in the proceeding, however, is allowed only upon application to the court.

97. *Ball v. Breed*, Elliott & Harrison, 294 Fed. 227 (C. C. A. 2d, 1923); *Electric Management & Engineering Corp. v. United Power & Light Corp.*, 19 F. (2d) 311 (C. C. A. 8th, 1927); *cf. Merten v. Fertig*, 281 Fed. 908 (C. C. A. 8th, 1922).

98. COMMITTEE REPORT, Rule 15; see also PRELIMINARY DRAFT, Rule 22(a).

99. Under the English Rules and most of the codes, as already pointed out, a party may amend as a matter of right until some specified time *after* the responsive pleading is filed.

100. COMMITTEE REPORT, Rule 15 (a).

101. *Ibid.*

102. The courts are naturally less generous in allowing amendments during the trial than before the trial has begun. *Cf. Todd v. Bettingen*, 102 Minn. 260, 113 N. W. 906 (1907); *Christen v. Christen*, 184 Ky. 822, 213 S. W. 189 (1919). But the present attitude is, on the whole, rather liberal, particularly in an absence of prejudice to the opposite party. *Ebner Gold Min. Co. v. Alaska-Juneau Gold Co.*, 210 Fed. 599 (C. C. A. 9th, 1914); *Western Coal & Min. Co. v. McCallum*, 237 Fed. 1003 (C. C. A. 8th, 1916).

court shall overrule the objection and the pleadings shall be deemed amended so that the evidence objected to becomes admissible under the pleadings."

The final draft of the provision<sup>103</sup> varies in two particulars. Where no prejudice to the other party is shown the court may order a party to amend the pleadings to conform to the evidence; under the preliminary draft the pleading would be deemed amended without more. And where prejudice to the other party is shown, the court apparently must sustain the objection to the introduction of evidence, while under the earlier rule the court had the alternative of allowing actual amendment. The difference in the two drafts is perhaps not so great as their language would seem to indicate; the flexibility of the concept of "prejudice" will allow courts freedom in sustaining objections to evidence outside the scope of the pleadings, or in allowing amendment, or in granting continuances whenever desirable. But one virtue of the preliminary draft, the provision for implied amendment in all cases where no prejudice is shown on the objection, is not present in the final draft, which limits implied amendment to cases where no objection is made. Actual physical amendment of the pleadings during the course of the trial would seem to be a gesture resulting merely in delay. However, the final draft does provide that "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 in the pleadings." While this relates primarily to the situation where evidence is received without objection,<sup>104</sup> it would seem broad enough to embrace also the situation where evidence is objected to as outside the scope of the pleadings, leave to amend is granted but not acted upon, and the parties assume that the amendment has been made. In many jurisdictions the pleading is deemed amended in such a case,<sup>105</sup> and the new rule will probably be similarly applied.

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103. COMMITTEE REPORT, Rule 15 (b).

104. This principle is considerably more liberal than the common law doctrine of "aider by verdict". See TIDD, PRACTICE \*826; CLARK, CODE PLEADING (1928) 519.

But the broader attitude adopted by the new rule is now followed in many jurisdictions. *Kansas City Southern Ry. v. Rogers*, 146 Ark. 232, 236, 225 S. W. 640, 641 (1920) (complaint failed to allege necessary elements of statutory remedy); *Arkansas Bankers' Assn. v. Ligon*, 174 Ark. 234, 295 S. W. 4 (1927) (in suit for reward complaint failed to allege that plaintiff was motivated by offer); *Gould v. Gould*, 99 Wash. 204, 169 Pac. 324 (1917) (reply denied alteration of note rather than raising defense of alteration by stranger which was established at trial); *Apfelbacher v. State*, 167 Wis. 233, 167 N. W. 244 (1918) (complaint framed on theory of prescriptive rights rather than riparian rights which were established at trial). Accord: *Radio C. A. Victor Co. v. Daugherty*, 191 Ark. 401, 86 S. W. (2d) 559 (1935); *Newman v. Kirk*, 164 Okla. 147, 23 Pac. (2d) 163 (1933).

105. See, e.g., *Brantz v. Marcus*, 73 Iowa 64, 35 N. W. 115 (1837); *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408 (1891); *Horne v. Meakin*, 115 Mass. 326 (1874); *United States v. Trollinger*, 81 Fed. (2d) 167, 169 (C. C. A. 4th, 1936). In *Kuhn v.*

The provision on the "relation back" of amendments represents another forward advance in pleading reform:

"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."<sup>106</sup>

The general doctrine represented by this section is already recognized.<sup>107</sup> But there has been considerable confusion as to how great a change may be made in the complaint where, for example, the Statute of Limitations has run against the cause of action. The usual rule has been that the amended complaint may not set up a new "cause of action."<sup>108</sup> Some courts have tended to apply the formulary theory of the common law and have made "cause of action" virtually synonymous with "form of action."<sup>109</sup> The more sensible rule, and the one now in more general favor in the federal courts,<sup>110</sup> is to view the cause of action as a group of operative facts; the extent of the cause of action is determined pragmatically, with an eye to trial convenience.<sup>111</sup> The proposed new rule clearly adopts such an approach by its use of the phrase "conduct, trans-

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Gustafson, 73 Iowa 633, 35 N. W. 660 (1887), the declaration was deemed amended even though defendant objected to the introduction of evidence which was proper only under an allowed amendment, where he did not call to the attention of the court that the amendment was never made. For the view contrary to these cases see, *e.g.*, *Hausken v. Coman*, 66 N. D. 633, 268 N. W. 430 (1936).

Pleadings and writs have been deemed amended also where leave to amend was granted before trial but never acted upon [*Carter v. Fischer*, 127 Ala. 52, 28 So. 376 (1900); *Sobiesky v. Chicago*, 241 Ill. App. 180 (1926); *Ufford v. Lucas*, 9 N. C. 214 (1822) (writ)], and where leave to amend to substitute or add parties was granted but such amendment was not made. *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766 (1899); *Ferris v. Jones*, 78 Okla. 154, 189 Pac. 527 (1920). *Contra*: *Motiejaitis v. Johnson*, 117 Conn. 631, 169 Atl. 606 (1933).

106. COMMITTEE REPORT. Rule 15 (c).

107. See generally CLARK, CODE PLEADING (1928) § 116.

108. *Capps v. Atlantic Coast Line R. R.*, 183 N. C. 181, 111 S. E. 533 (1922), (1922) 32 YALE L. J. 198; *Walters v. Ottawa*, 240 Ill. 259, 88 N. E. 651 (1909). In the *Capps* case the plaintiff changed his claim from one under the Federal Employers' Liability Act to one under a local statute; the holding was that this was a new "cause of action" and was barred by limitations. *Cf.* *Luce v. New York, C. & St. L. R. R.*, 241 N. Y. 541, 150 N. E. 546 (1925), *aff'g.* 213 App. Div. 374, 211 N. Y. Supp. 184 (4th Dep't 1925).

109. See, *e.g.*, *Taylor Co. v. Anderson*, 14 F.(2d) 353 (C. C. A. 7th, 1926), *aff'd*, 275 U. S. 431 (1928); *Hall v. Louisville & N. R. R.*, 157 Fed. 464 (N. D. Fla. 1907); *Chicago, B. & Q. R. R. v. Jones*, 149 Ill. 361, 37 N. E. 247 (1894). On the common law background of this approach see SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 296; CHITTY, PLEADING \*219. For a defense of this theory see (1919) 3 MINN. L. REV. 132; (1926) 10 *id.* 417, 424.

110. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 (1933).

111. See Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354.

action, or occurrence set forth or attempted to be set forth,"<sup>112</sup> instead of the more easily narrowed phrase "cause of action." This is apparently the first provision to outlaw so definitely the formulary attitude.<sup>113</sup>

## V. FORMULATION OF ISSUES

The rigidity of written pleadings should be somewhat modified by the pre-trial procedure proposed in Rule 16 of the new Rules:

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

"(1) The simplification of the issues;

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

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

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

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

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

The method of operation of this new principle is furnished in the provisions for a discretionary pre-trial calendar and for an order embodying the results of the conference.<sup>114</sup>

Continental law has inherited the Roman law tradition of "orality" in the development of issues.<sup>115</sup> After informatory statements by the litigants, the magistrate determines the issues of fact involved in the controversy. These issues are then written down by a court official and

112. COMMITTEE REPORT, Rule 15 (c).

113. Some modern statutes have attempted to avert the "cause of action" muddle by stating some other criterion. The Washington code, for example, provides that the action shall not be barred "if the adverse party was fairly apprised of its nature by the original pleading, and that the plaintiff was claiming thereunder, provided no new party is added thereby." WASH. REV. STAT. ANN. (Remington, 1932) § 303-3. For a somewhat different effort in this direction see ALA. CODE ANN. (Michie, 1928) § 9513.

114. "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions." COMMITTEE REPORT, Rule 16.

115. For a comparative study see Clark, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517; see also BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* (1931) 346 *et seq.*; SOHM, *INSTITUTES* (Ledlie trans. 1901) 237 *et seq.* The development of modern Continental practice from the Roman background is traced in Millar, *Legal Procedure* (1934) 12 ENCYC. SOC. SCIENCES 439, 442-445.

henceforth guide the course of the trial and the introduction of evidence.<sup>116</sup> On the other hand, common law procedure, always with an eye to the limitations of the jury system,<sup>117</sup> has felt the necessity of developing precise issues by means of written pleadings.<sup>118</sup> Whether such pleadings are in fact necessary is debatable;<sup>119</sup> but in any event it is clear that the flexibility of the civil law system is an advantage, and that any reform contributing this element to the Anglo-American system is a distinct gain.

In the 1921 report of the Massachusetts Judicial Commission it was said:

"A century ago Jeremy Bentham made a suggestive classification of methods of procedure into 'epistolary' methods and 'confrontatory' methods, and he made caustic remarks about the 'epistolary' kind. The comparison may be simply translated into the statement that one can generally find out more quickly about facts by talking directly to a man who knows about them than by conducting a long and cautious correspondence with him or with somebody representing him. This simple idea has been very gradually forcing its way into legislation and rules of court relative to procedure."<sup>120</sup>

One of the results, perhaps, of Bentham's trenchant criticism of the whole system of written pleadings<sup>121</sup> was the adoption of section 42 of the Common Law Procedure Act.<sup>122</sup> It provided that when the parties to a cause are agreed on the questions of fact to be litigated and there are no legal issues, they may proceed to trial of the factual questions after the writ is issued and by order of the judge, without the necessity of formal pleadings.<sup>123</sup> This provision is repeated in substance in the

116. Millar, *Some Comparative Aspects of Civil Pleading under Anglo-American and Continental Systems* (1926) 12 A. B. A. J. 401.

117. See Carmody, *Effect on Trial by Jury of Certain Reforms in Pleading* (1927) 4 N. Y. U. L. Q. REV. 104.

118. See CHITTY, PLEADING \*235; (1897) 10 HARV. L. REV. 238.

119. For an opinion that precise issues were better developed under the formulary procedure see Kocourek, *The Formula Procedure of Roman Law* (1922) 8 VA. L. REV. 337, 338.

120. SECOND REP. OF MASS. JUDICIAL COMM. (1921) 107; see REP. OF N. Y. BOARD OF STATUTORY CONSOLIDATION (1915) 21, 205-07.

121. Bentham, *Rationale of Judicial Evidence* (1893) 7 WORKS 270-72; Bentham, *Principles of Judicial Procedure* (1893) 2 WORKS 48-49.

122. 15 & 16 VICT., c. 76 (1858).

123. In contrast to this procedure is the statutory "submission of controversy without action," which is appropriate where the parties disagree as to the legal effect of facts not in dispute. The parties submit the controversy to court of proper jurisdiction on an agreed statement of facts accompanied by an affidavit that the controversy is a real one and the proceeding is had in good faith. See, e.g., CAL. CODE CIV. PROC. (Deering, 1937) § 1138; IDAHO CODE ANN. (1932) c. 7, §§ 1001-03; MO. STAT. ANN. (Vernon, 1932) §§ 1097-98; N. Y. CIV. PRAC. ACT §§ 546-47. Apparently the procedure was

Rules adopted under the Judicature Act.<sup>124</sup> But here is found the additional provision that "Where in any cause or matter it appears to the court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues shall, if the parties differ, be settled by a court or a judge."<sup>125</sup> It is difficult to determine how widely this procedure has been used. But Sir George Jessel said, in 1876, "My practise is always to get the counsel on both sides to agree what are the issues of fact to be tried before we start. For instance, in a patent case we settle before we begin whether the issue is novelty or infringement."<sup>126</sup>

The purpose of this type of procedure, of course, is to be certain that the issues to be tried are those over which there is actual dispute. A somewhat similar problem prompted the suggestion made in 1927 by the Committee to Propose Specific Reforms in the Law of Evidence. Realizing that loss of time and confusion of the jury and of the witnesses result from objections to evidence, the committee proposed that the court exclude such objections when the evidence relates to matters not in dispute.<sup>127</sup> It was believed that such a rule would do much to eliminate the "sporting" approach to the lawsuit. However, the committee might have gone farther and suggested that no evidence at all be heard on matters not in honest dispute. This is the logical result of their criticism of the existing practice, and forms the basis of proposed Rule 16.<sup>128</sup>

Because the use of this pre-trial procedure is left to the discretion of the court, it is possible that many district judges will not employ the

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unknown at common law. It is not specifically provided in the new Rules but should be available under the broad provisions for summary judgment. See COMMITTEE REPORT, Rule 38.

124. RULES OF THE SUPREME COURT (1883) O. xxxiv, r. 9; ANNUAL PRACTICE (1935) 570.

125. RULES OF THE SUPREME COURT (1883) O. xxxiii, r. 1; ANNUAL PRACTICE (1935) 551. This particular provision seems to contemplate a further definition of issues *after* written pleadings have been filed. Hence it is more clearly the precedent for American reforms in this direction than is O. xxxiv, r. 9, which dispenses with formal pleadings. In Massachusetts and New Jersey the "framing of issues" is not in lieu of pleadings, but in addition to it. MASS. ANN. LAWS (Lawyers' Co-op. 1933) c. 214, §§ 34-36; N. J. RULES OF THE SUPREME COURT (1929) Rule 31; N. J. PRAC. ACT (1903) § 126. This is true of the proposed federal rule, already discussed.

126. *Lowe v. Lowe*, 10 Ch. D. 432, 433-34 (1878). For a description of the practical operation of the procedure, see Higgins, *English Courts and Procedure* (1924) 7 J. AM. JUD. SOC. 185, 213-14. A related procedural device is the "summons for directions," which is a disposal of this and all other preliminary issues before masters. See ODGERS, PLEADING AND PRACTICE (10th ed. 1930) 8 *et seq.*; Leaming, *Masters: The Time Savers* (1920) 5 MASS. L. Q. 250. For a construction of the rule on framing issues, see *Howell v. Dering*, [1915] 1 K. B. 54, 66, holding that the rule applies only where there is no doubt as to the actual subject of the dispute.

127. See MORGAN, AND OTHERS, THE LAW OF EVIDENCE (1927) 1-7.

128. See p. 69 and note 111, *supra*.

unfamiliar practice here contemplated. However, from the experience of those courts which are willing to frame issues, much may be learned about the practicality of reforms in this direction.<sup>129</sup> It is certain that where applied the new procedure will tend to make less of a straight-jacket of written pleadings, and will aid to clarify issues and shorten trials. If successful enough, the English practice might be followed and such formulation used as an alternative to written pleadings.

Whether the elimination of written pleadings should be an ultimate ideal of procedural reform it is certainly too early to say. But it is important in the settlement of controversies that matters of pleading should not bulk too large. This is an objective of the new Federal Rules. The demurrer, encrusted with formality, has been replaced by the less onerous answer and motion. Procedural steps will be eliminated by the requirement of consolidation of motions. The motions to make more definite and certain and for bill of particulars have been somewhat restricted. Pleadings may be freely amended. And an informal method of orally arriving at the real issues of the case—apart from the pleadings—has been furnished. There is ample reason to hope that under the new federal procedure the role which pleadings play will be subordinated to the general objects of the judicial process.

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129. Efforts in this direction have met with considerable success. See (1937) 20 J. AM. JUD. Soc. 247 (experience in Suffolk County, Massachusetts); *id.* at 249 (experience in Los Angeles County, California). Similar rules are in force in Detroit and Cleveland, and one substantially like the proposed federal rule is under consideration in New York. N. Y. LAW SOCIETY, A PROPOSAL FOR MINIMIZING CALENDAR DELAY IN JURY CASES (1936); N. Y. JUDICIAL COUNCIL, PRE-TRIAL PROCEDURE AND ADMINISTRATION (1937); *cf.* ASS'N OF THE BAR OF THE CITY OF N. Y., REPORT OF THE COMMITTEE ON LAW REFORM ON TWO PROPOSALS BEFORE THE JUDICIAL COUNCIL FOR REFORM IN PRE-TRIAL PROCEDURE (1936).