

University of Nebraska Section

THE NEBRASKA RULES OF CIVIL PROCEDURE

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THE request of the editor of the Review that I comment upon the new Nebraska rules of civil procedure, which become effective ninety days after the adjournment of the legislature next year, was one which I felt I could not refuse in view of my general interest in procedural reform. But now that I have spent some time in study of the rules and their background, I wonder if I was wise in yielding. For my experience in practice, in teaching, and in writing, and as judge seems to have so conditioned me in favor of a very simple—even “loose,” according to some people—system of pleading that I instinctively react for or against a new set of rules as they may or may not fit in with my views. Of course, that is a natural reaction of any critic; but I have the added difficulty that I have so often expressed my views as to make anything more I may say at least lack novelty. I am prompted to this confession (unusual for a judge, particularly an ex-law professor) especially by Mr. Shackelford’s vigorous dissent from the Nebraska rules; for his arguments are those with which I have been disagreeing for years and, indeed, which I attempted to combat more than a dozen years ago in a text on Code Pleading.¹ Another iteration of my views, therefore, may not be helpful to Nebraskans; but I expect I am in honor bound to fulfill my commitment.

Since the Nebraska rules do largely follow those conceptions of pleading which to my mind are supported by the best experience of our times, they have my warm approval except in the few particulars

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¹ Published by the West Publishing Company in 1928. Among later statements, I refer to my monograph on Simplified Pleading, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 18 (1942) (of which an earlier draft appeared in (1942) 27 IOWA L. REV. 272), containing a bibliography; also my articles, *The Handmaid of Justice* (1938), 23 WASH. U. L. Q. 297; *The New Federal Rules of Civil Procedure* (1937), 23 A. B. A. J. 976, and my remarks at Proceedings at A. B. A. Institutes, Cleveland (1938), 219 *et seq.*, Washington (1938), 39 *et seq.*, New York (1938), 235 *et seq.* See also, 1 MOORE, FEDERAL PRACTICE (1938), § § 7-12, 15; Fisher, *A Vindication of Simplified Pleading* (1940), 35 ILL. L. REV. 270; Hunter, *One Year of Our Federal Rules* (1940), 5 MO. L. REV. 1; Henry, *The Proposed Code of Civil Procedure for Missouri—Parties and Pleadings* (1942), 7 MO. L. REV. 1.

noted below. Those conceptions are most completely embodied at the present time in the civil procedure of England and of the federal courts. In general they envisage a wide content to the single civil action, with practically free joinder of claims, as well as of parties, where there is a "common question of law and fact" affecting them; and they also contemplate a simple and flexible system of procedural steps wherein the merits of the case are at all times stressed and little attempt is made to force the parties into admissions by the paper pleadings. These principles are at variance with more ancient views that the issues must not be complicated by many claims or many parties in the same case, as well as the hope (always vain, as I see it) that the issues can be narrowed by *forced* admissions of the parties obtained through detailed preliminary pleadings. The modern view, however, holds that the fear of complication of issues has been greatly exaggerated at the expense of quick and speedy determination of similar matters between many parties or of extensive points of irritation between the same parties. Further, the attempt to secure admissions and dispense with proof by the pleadings has always been unsuccessful simply because no lawyer of sense will give his case away before actual trial. Hence, the pleadings do not dispense with proof except as to matters about which the parties are quite willing to make admissions. Therefore, all preliminary procedure devoted to polishing up the formal allegations, without going quickly to the merits of the case, is sheer waste. All too often such procedure leads to technical and unjust results; at best it is productive of delay and false starts, wasting the time of courts and litigants, and thus means justice delayed and hence denied. Preliminary shadow-boxing should, therefore, be reduced to a minimum; the case should be brought quickly to issue on the merits.²

Often these principles are thought of as an entirely new system at variance with all past practice. That is not the fact. They are in the main but the natural progression, the neater working out, of means to secure objectives definitely sought for from the beginning of nineteenth century procedural reform, at least. In a very real sense the new rules are but code pleading refined in the light of modern experience. There is a definite sequence from the original New York or Field Code of 1848 (adopted in Nebraska in 1857) down through the English procedural reform of 1873 and later amendments, the Federal Equity Rules of 1912, various state reforms, and the Federal Rules of Civil Procedure of 1938 to the Nebraska rules of 1942. In the original code were provisions for wide joinder of parties and of actions (following

² See the references given in note 1, *supra*, particularly the monograph on Simplified Pleading. With particular reference to free joinder of actions, see monograph by Professor Blume, *Free Joinder of Parties, Claims, and Counterclaims*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 11 (1941), reprinted in 2 F. R. D. 250; 2 MOORE, FEDERAL PRACTICE (1938), chaps. 13, 18, 20; CLARK, CODE PLEADING (1928), chaps. 6, 7, 10; and Comment, *Recent Trends in Joinder of Parties, Causes, and Counterclaims* (1937), 37 COL. L. REV. 462 (citing many law review articles).

equity practice), for simple fact pleading, for the one form of civil action and the united law and equity procedure. But that code was a statute framed in arbitrary and unconditional language, which unfortunately proved most vague and ambiguous when the attempt was made to translate it into practice. Now we have progressed to the point of expert court rules, framed as directives rather than mandates, to trial courts, and to clarifying the old ambiguities which caused such difficulty in application. But the steps have been those of orderly progress, not of revolution.

How far do the new Nebraska rules follow these modern principles? The answer is that, since they are so largely built upon the new federal rules of civil procedure, they go far in achieving the results thus visualized. With respect to joinder of actions and parties, discovery, and selection of form of trial (court or jury), these rules are substantially identical with the federal rules. With respect to pleading proper, they seem to me in places to shy away from their own logical implications, they omit any reform of appellate procedure, and they disclose some backsliding in various other particular rules. On the whole, however, the reform is actual and substantial. I should say in summary that it is not so complete as in the new rules of Arizona, Colorado, and New Mexico; but it is not the halfhearted revision unfortunately adopted in some states which I have elsewhere criticized.³ Thus, it ranks close after the three states named. In some regards, notably in the statement of new rules of evidence, it actually goes beyond the federal rules.

The new reform seems to have come into being with a minimum of difficulty. There was the initial advantage of a simple and direct enabling statute conferring full rule-making authority on the supreme court of the state.⁴ This was modeled on the federal enabling act of similar character, with provisions for submission of the new rules to the legislature and for the supersession of all acts in conflict with the rules when finally adopted.⁵ Fortunately, it did not contain some of the points of ambiguity still left in the federal statute.⁶ Thereupon, the Nebraska Supreme Court assumed the responsibility tendered it by the legislature and created an advisory committee of twenty-five. The

³ Clark, *The Texas and the Federal Rules of Civil Procedure* (1941), 20 TEX. L. REV. 4; Clark, *Dissatisfaction with Piecemeal Reform* (1940), 24 J. AM. JUD. SOC. 121. See also, Graubart, *Pennsylvania Is Moving Backwards* (1941), 12 PA. B. A. Q. 137; Graubart, *A Critic Replies* (1942), 13 PA. B. A. Q. 23. Although Nebraska authorities, note 7, *infra*, credit Connecticut as having recently reformed its procedure, that, unfortunately, is not true. An advanced procedure was adopted in 1880, but it has not been revised; and the trend of court decisions is now against the earlier liberality, as I have pointed out in *Simplified Pleading in Connecticut* (1942), 16 CONN. B. J. 83.

⁴ Legislative Bill No. 172, 53d Sess., Neb. Leg., approved June 5, 1939.

⁵ Act of June 19, 1934, chap. 651, § 1, 2 (48 Stat. 1064), 28 U. S. C. A. §§ 723b, 723c.

⁶ See Clark, *The Proper Function of the Supreme Court's Federal Rules Committee* (1942), 28 A. B. A. J. 521, 523; Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936), 49 HARV. L. REV. 1303, 1309, 1310; 3 MOORE, FEDERAL PRACTICE (1938), 3448-3452, and Supp. 231, 232; *United States v. Adler's Creamery*, 107 Fed. (2d) 987, 992 (C. C. A. 2d, 1939).

committee worked for nearly a year through its various subcommittees, and then its reports were correlated by the Assistant Director of the Statute Revision Commission to appear as Tentative Draft No. 1 submitted to the committee on September 8, 1941. Certain changes were made by the committee, whose Final Draft was submitted to the court in November, 1941. The Court held a public hearing on December 8, 1941, and thereafter received suggestions from the State Judicial Council and others. After consideration by a committee of the Court and by the Court, and conference with the Council, the chairman of the committee, and others, the Court on April 20, 1942, unanimously adopted the general rules which it ordered reported to the Nebraska legislature at its next regular session, as required by the enabling statute.⁷

There thus are published and available for study and comparison three drafts of the rules: the Tentative Draft, the Final Draft, and the Rules as adopted by the Court. It is interesting to note the changes in the drafts and to speculate on the reasons which led to them. Apparently a small, but rather active, minority in the committee caused it to modify some of the rules of the Tentative Draft.⁸ That the court gave the rules careful and conscientious study appears generally from a comparison of its work with the earlier drafts, but is particularly demonstrated by the fact that in not a few instances it restored the original form of the suggested rules. That, I believe, was a wise step, for the modifications represented, on the whole, a retreat from the implications of the general position taken. Usually they had been the rejection of a particular federal rule and the substitution of some older (and usually more limited) state statute. This restoration by the Court of the federal rule occurs with reference to Rules 26 through 32, and 37, concerning discovery;⁹ perhaps less important are Rules 63 (Dis-

⁷ This history is recited in the order of the supreme court of May 25, 1942, for publication of the rules, in the West Publishing Company's draft (but not in the draft appearing in (1942) 11 NEB. SUP. CT. JOUR. 882). See also, the Tentative Draft (1941), 11 NEB. SUP. CT. JOUR. 1, and the Final Draft (1941), 11 NEB. SUP. CT. JOUR. 105; Bongardt, *The Final Draft Report, Nebraska Rules of Civil Procedure, "Pro"* (1942), 21 NEB. L. REV. 76; Shackelford, *Why Adopt New Rules of Pleading and Practice?* (1942), 21 NEB. L. REV. 94. Professor Bongardt, as member of the committee and as Assistant Director of the 1943 Statute Commission, seems to have served in effect as reporter for the committee. The committee chairman was the Honorable John W. Delehant, more lately United States District Judge for Nebraska. His remarks, in presenting the rules to the court on December 8, 1941, are quoted in (1942) 21 NEB. L. REV. 71-75.

⁸ Cf. Shackelford, *supra*, n. 7, 22 NEB. L. REV. at 103, referring to Rule 14, Third-Party Practice: "very much modified by the committee. Being unable to induce the committee to reject the rule in its entirety, I favored the modification as a long step in the right direction."

⁹ The Court, accepting Federal Rule 26(a), restored Rule 26, subdivisions (b) and (f), broadened new subdivision (g), which had been omitted in the Final Draft, restored Rule 27, took, in place of Rule 28, the Final Draft based on a Nebraska statute, while accepting the recommendation of the Tentative Draft of inclusion of the Uniform Foreign Deposition Act as subdivision (e), accepted Rule 29 (as did all drafts), restored subdivisions (e) and (f) of Rule 30, restored Rule 31, which had been omitted in the Final Draft, took Rule 32 with a new subdivision (e) of the Final Draft (providing for a hearing and objections to a deposition before the trial), took Rules 33, 34, and 36(a) and (b) (as did all drafts), and the first subdivision of Rule 35, and restored Rule 37(a)-(d) only, as recommended in the Tentative Draft, except that it left out the order for arrest as a penalty, (b) (2) (iv). The addition of the broadened rule as to impeachment, Rule 26(g), is referred to hereinafter.

ability of a Judge) and 71 (Process in Behalf of and Against Persons Not Parties), which had been omitted altogether in the Final Draft. In some instances the Court has cleared ambiguities appearing even in the Tentative Draft by restoring the federal rule or otherwise.¹⁰ And the Court should receive credit for so thoroughly accepting and following the recommendations before it in all the main features of the new system.

On the other hand, the Court has the responsibility for what seem to me two major defects: the substantial restoration of the demurrer with only a change of name and the omission of all revision of appellate practice. As to the first, the Court accepted the recommended Federal Rules 7(c) and 12(b), the first of which provides that demurrers, etc., "shall not be used," and the second that all defenses of law or fact shall be made *either* in the answer *or* by motion. But the Court now adds to Rule 7(c) the statement, "All objections to pleadings heretofore raised by demurrer may be raised by motion," and follows this by a long sentence requiring the motion to point out the specific defects just as—in effect and, I fear, in purpose—in the old special demurrer.

Before stating my objections to the substance of this addition, I should first point out a possible conflict between the two rules, for this new rule suggests only that the objections may be raised by motion, without also stating that some, at least those important ones where the pleading is insufficient in law, may be made by answer under Rule 12. A conclusion that by reason of the change these objections can be made only by motion would be doubly unfortunate.

But, assuming that the Court did not intend thus to restrict Rule 12, I still deplore this re-emphasis upon the motion substituted for the special demurrer, as at variance with the fundamental basis of the Federal and the Nebraska rules. Here the emphasis is once more changed back to preliminary proceedings aimed only at perfecting and polishing up the paper pleadings without respect to the actual merits of the controversy. But the trend of the rules, with the freedom allowed as to the form and content of allegation, "the simplicity and brevity of statement which the rules contemplate" (Rule 84), the freedom as to

The requirement of preliminary hearing on objections, Rule 32(e), seems definitely unwise; this should be a matter within the discretion of the trial court, and the normal course would often, if not usually, be in connection with the offer of the testimony in its natural sequence in the trial.

¹⁰ The Court struck out a proposed last sentence of Rule 4(b) (dealing with the form of summons) which had stated: "If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs." The substance of this statement was sound, but it was out of place where it was, and, since it refers to amount, might well conflict with the more complete provisions of Rule 54(e), which state that, except as to a defaulted party, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled." This, it will be noted, is not limited to money judgments. Unfortunately the Court accepted also the recommendation of the Final Draft as to this rule by leaving out the important and clarifying clause of the federal rule: "even if the party has not demanded such relief in his pleadings." One may hope that this is intended only as a change of form, not of substance. In Rule 55(b) (1), the court took occasion to clear up what seems to be a definite mistake in the committee drafts where reference is made to a nonexistent subdivision (f).

amendments, and notably Rule 15(b), that a case is deemed amended to conform to the proof actually submitted at the trial, and the direct prohibition against any reversal except for error affecting the *substantial* rights of the *parties* (Rule 61) all are quite at variance with this emphasis. Indeed, the two trends cannot exist side by side. Either the pleadings are an end in themselves, requiring and deserving that they be perfected, or they are only a mere step in trying to get to the actual merits of the litigation.

It is true that Federal Rule 12 itself contains the seeds of this ambiguity, for it in turn is a compromise, made necessary by the exigencies of opposing views as to the proper functions of pleading, being a combination of modern English practice and older American code pleading. It has been the most unsatisfactory of all the federal rules, the one about which the most litigation has centered. As I have elsewhere argued at length, it should be amended by thoroughgoing adoption of the English practice.¹¹ To reiterate, cases are not settled on the paper pleadings except in those rare instances where both sides are willing that they should be.¹² Those latter cases are taken care of under the English practice by allowing the judge to hold a preliminary hearing upon objections in law (stated in the answer) where he believes he can thus dispose of the whole, or a substantial part of, the case. The compromise involved in Federal Rule 12, and carried over into the Nebraska equivalent, is that while a motion to dismiss (substantially a plea in abatement and a demurrer combined)¹³ is prominently featured as an alternative method, with the answer, of raising objections, yet the judge is given the right to postpone decision until the trial. This enables a forthright judge to find means of avoiding the use of successive motions to delay. Yet the emphasis is the wrong way, since it seems to accept the preliminary hearing as the usual course. It should be obvious that the addition made to Nebraska Rule 7(c) shifts the emphasis still further in the wrong direction. I think both the logic of the system basically adopted and its practical effectiveness require a change in Rule 12 in line with the English practice; in any event, this further addition to Rule 7(c) ought to be eliminated.

There are some other features of the Nebraska plan which are disquieting, as further emphasizing this minor retreat back to ancient strictness. One concerns the Appendix of Forms, which is still un-

¹¹ See particularly my monograph on Simplified Pleading, n. 1, *supra*, also other authorities there cited; Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure* (1937), 47 *YALE L. J.* 50.

¹² The few judicial statistics available on the matter indicate quite clearly that the demurrer serves little function in finally settling a case. See my monograph on Simplified Pleading, n. 1, *supra*, at p. 5, n. 3. I have yet to see any reported cases, or meet any in practice, where the demurrer finally caught a party in an admission of fact that he was not ready to make, i.e., where it has actually short-cut trial more than would the more direct English practice.

¹³ Because by Rule 12(b) there may be both a general motion to dismiss and a special preliminary motion to dismiss in five specified instances (six under the Nebraska rule, see p. 314, *infra*).

fortunately missing from the Court's draft; a note to Rule 84, dealing with forms, says only that it is adopted "provided an Appendix of Forms is promulgated." Now a set of illustrative (but not binding) forms is practically an essential for the purpose stated, i.e., of indicating "the simplicity and brevity of statement which the rules contemplate." All the abstract admonitory phrases in the world cannot bring home to the profession the real simplicity and generality of pleading intended as can a few concrete examples. That has been a general conclusion, as it was the conclusion of the Federal Advisory Committee in recommending the Federal Appendix of Forms, which I believe to be quite indispensable to the success of those rules.¹⁴

It is true that the Nebraska committee in both drafts has included such an appendix, based on the federal model, but with the most surprising omissions. Perhaps the most important federal form, the best illustration of the proposed system, is Form 9 for a complaint in a negligence action involving an automobile collision. This form has been attacked even before a committee of the United States Senate; but it is based directly on a Massachusetts statutory form, which, in turn, was simply the old and well-understood declaration in a common-law action of trespass on the case.¹⁵ A recent Rhode Island decision illustrates its value and usefulness;¹⁶ it is the simplified system of pleading par excellence. Again, Federal Form 10, applying to the same kind of action the broad provisions of the rules as to pleading in the alternative and extensive joinder of parties, is most important as a precedent for this system.¹⁷ It, too, was omitted by the committee. I regard it as vital that a set of illustrative forms be provided, but it would be almost calamitous to have the play of *Hamlet* produced with the prince himself left out.

Again, the Court (following the Final Draft) first accepts the federal limitation on the use of a reply to the two cases of an answer to a counterclaim "denominated as such" and when ordered by the trial court "shall permit a reply to any answer which presents defensive new

¹⁴ See Committee's Notes to Federal Rule 84; Cook, *Statements of Fact in Pleading under the Codes* (1921), 21 COL. L. REV. 416; Cook, "Facts" and "Statements of Fact" (1937), 4 UNIV. CHI. L. REV. 233; Rossman, *Approved Forms of Pleading* (1932), 12 ORE. L. REV. 3; Sparks v. England, 113 Fed. (2d) 579, 581 (C. C. A. 8th, 1940); and Clark (1935), 44 YALE L. J. 1483; (1935), 9 CONN. B. J. 282, 290; (1938), 23 WASH. U. L. Q. 297, 315, 316. The committee's doubts, as expressed by Chairman Delehant, 21 NEB. L. REV. at 73, are therefore regrettable.

¹⁵ MASS. GEN. LAWS (1932), chap. 231, § 147, p. 2892; Williams v. Holland, 10 Bing. 112, 131 Eng. Rep. 848 (C. P., 1833); 2 CHITTY, PLEADING (7th ed., 1844) 529; Clark, *Pleading Negligence* (1923), 32 YALE L. J. 483. For discussion of criticisms of Form 9 before Congress, see Proceedings at A. B. A. Institutes, n. 1, *supra*.

¹⁶ Reichwein v. United Electric Ry. (R. I., 1942), 27 Atl. (2d) 845, citing cases and other authorities. Federal Form 9 has been approved and followed in Sierocinski v. E. I. Du Pont de Nemours & Co., 103 Fed. (2d) 843 (C. C. A. 3d, 1939); Swift & Co. v. Young, 107 Fed. (2d) 170 (C. C. A. 4th, 1939); and many district court opinions, e.g., Hardin v. Interstate Motor Freight System, 26 Fed. Supp. 97 (D. C. S. D. Ohio, 1939); Martz v. Abbott, 2 F. R. D. 17 (D. C. M. D. Pa., 1941), citing cases. See, generally, Note, *The Complaint under the Federal Rules of Procedure* (1941), 10 FORDHAM L. REV. 252.

¹⁷ Followed in Keiser v. Walsh, 118 Fed. (2d) 13 (App. D. C., 1941); and Fowler v. Baker, 32 Fed. Supp. 783 (D. C. M. D. Pa., 1940); and see also, Rau v. Manko (1941), 341 Pa. 17, 17 Atl. (2d) 422.

matter." Other rules have not been changed accordingly; thus, Rule 12(a), as to the time of serving pleadings, was not changed and does not cover this new form of reply. Hence, it seemingly can be served at any time. Since there is no incentive for a party deliberately to spread his case on the record more than he must, one can confidently expect that no pleader will file a reply except for some ulterior purpose. And as is natural, such purpose is found in the fact that by Rule 38 a party waives jury trial unless he claims it in writing within ten days after service of the last pleading. The practical effect of the change, probably the only one outside of general delay, is thus to allow one party to avoid the natural consequence of his failure to claim trial by jury in season.

To my mind this is another step contrary to the basic principles of the adopted system. The federal rule was adopted as the most appropriate of the two usual rules as to reply in this country (the other being that of reply to all new matter). It therefore is supported by excellent precedents.¹⁸ It was chosen for two reasons: that successive rounds of paper pleadings are not worth their cost in delay, and that the hopeless morass under the code cases of what is "new matter" should not be further perpetuated.¹⁹ Those reasons should have like force in Nebraska. Even if they were to be rejected, an out-and-out adoption of the contrary rule would seem preferable to the Nebraska compromise. Until the plaintiff has spoken, how can the defendant and the court ever know when the pleadings are closed and the case is at issue? And if the courts have never been able to define new matter satisfactorily and definitively, what can they do with that strange new phrase "defensive new matter"? It is a solecism to begin with, for by usual premises, new matter is not defensive, but is confession and avoidance, rather than traverse.

Again, the Final Draft added, and the Court accepted, an addition to Rule 12(b) of another category of objections, that of another action pending, which may be made not only by ordinary motion to dismiss (demurrer), but also by preliminary motion (plea in abatement). To my way of thinking, this simply adds to the weapons available for delay, and is rarely of real importance in a case. It should have been left to the answer, as under the federal rules.²⁰

Not all these points have the same importance. Added together, however, they suggest a reluctance to accept the implications of the system actually adopted by the Court, which possibly may not be a good

¹⁸ See Committee's Note to Federal Rule 7(a); CLARK, CODE PLEADING (1928), 479.

¹⁹ I MOORE, FEDERAL PRACTICE (1938), 425, 426; Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties* (1935), 44 YALE L. J. 1291, 1307; CLARK, CODE PLEADING (1928), 406-408, 415-426, 482-484.

²⁰ The court has accepted Federal Rule 12(e), providing for a motion for a bill of particulars, which, in my judgment, should be omitted. See n. 11, *supra*. In any event, the misleading and trouble-breeding words "to prepare for trial" should have been eliminated. See also, Commentary, *Motion for Bill of Particulars "to Prepare for Trial"* (1940), 3 FED. RULES SERV. 681.

augury for the future of the rules.²¹ After all, general admonitions will not constitute the real procedure of a court; that is determined by what the judges actually do with the rules in practice. The federal rules are flexible enough, so that a considerable latitude in their application is permitted a trial court. Actually the satisfying feature of that system is how simply and effectively it has been put into effect by the trial judges, a fact which persists, notwithstanding all attempts to draw a contrary conclusion from the industry of law publishers in disseminating federal rules decisions.²² Such decisions, except for purely federal problems, such as jurisdiction, have not been at all restrictive; the testimony of federal judges and lawyers alike is warmly affirmative.²³ In large measure this is due to the fine tone given the system from the start. If I have seemed too critical of points thought to be small, too prone to expect the lawyers to use the machinery for delay where possible, I can only say that the general tone is perhaps more important than anything else; and given at least a receptive attitude on the part of the judiciary, that is likely to be set by the emphasis contained in the rules themselves. If devices for polishing up technical averments of the lawyers which are remote from the parties themselves are played up in the rules, they invite the lawyers and the judges to a like misplaced emphasis.

As to the other defect I noted above, that of omission of appellate rules, that may be somewhat mitigated from sources outside these rules themselves. The adoption by the legislature of a statute in 1941 allowing the taking of an appeal by a mere notice and new supreme court rules of that same year somewhat simplifying the record are helpful.²⁴ Even if these steps were adequate as reform, it would be rather unfortunate, as well as inconvenient, for the lawyers not to find the simple system of Federal Rules 73 to 76, inclusive, as a part of the general adoption of the federal rules.²⁵ I fear, however, that the reform is not complete, for it is to be noticed that under the statute and under the

²¹ Of course, this reluctance to accept the full implications of the system occurs not infrequently. Cf., e.g., the proposed Missouri Code and Wheaton, *Missouri Practice and the Federal Rules: A Comparative Study* (1940), 25 WASH. U. L. Q. 505, 509, 511, ably answered by Henry, *The Proposed Code of Civil Procedure for Missouri—Parties and Pleadings* (1942), 7 Mo. L. REV. 1, at 14-17, as well as by Atkinson, *Parties and Pleadings in the Missouri Proposed Code of Civil Procedure* (1942), 7 Mo. L. REV. 27, 33-41.

²² Cf. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee* (1942), 28 A. B. A. J. 521.

²³ This appears most completely from the decisions, of which a few are cited in this article, particularly in notes 16 and 17, *supra*. Articles to the same effect are too numerous to mention; see the A. B. A. J., the J. AM. JUD. SOC., and the F. R. D., *passim*. Examples are: Armstrong, *Adaptation of Program of Procedural Reform to Tennessee Practice* (1939), 15 TENN. L. REV. 614, reprinted as *Simplification of Procedure*, 1 F. R. D. 511; Hutcheson, *Federal v. State Rules* (1941), 4 TEX. B. J. 459, 2 F. R. D. 101; Parker, *Improving the Administration of Justice* (1941), 27 A. B. A. J. 71, 1 F. R. D. 697; the articles by Judges Ford, Yankwich, and others in 1 F. R. D. See Moore, *The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration* (1942), 28 VA. L. REV. 861, 903-907.

²⁴ NEB. COMP. STAT. (1929), 20-1912 to 1934, as amended in 1941; also pamphlet, "Revised Rules of the Supreme Court of the State of Nebraska, in Force August 25, 1941."

²⁵ See excellent and compelling argument for this course by Orfield, *The Supreme Court of Nebraska: Procedure, Organization, Selection and Tenure* (1940), 19 NEB. L. BULL. 241-275, 295-301.

supreme court rules there is still continued the old bill of exceptions as something distinct from the general record—a distinction which grows more unreal and illusory as time goes on and we happily forget its history. Perhaps, however, we ought to recall the classic indictment of this attempted distinction by that famous Nebraskan, Roscoe Pound, 36 years ago in a famous address, "The Etiquette of Justice," before the State Bar Association.²⁶ Even if now these are only formal labels, they may serve as traps for the unwary who have not understood all the intricacies of getting the bill of exceptions settled.

Another definite defect in appellate procedure is the rejection in the Final Draft, and by the court, of the Federal Rule 52(a)²⁷ that trial court findings of fact shall not be set aside "unless clearly erroneous." Rather curiously the provisions of Rule 53(e) (2) requiring a court to accept a *master's* findings of fact "unless clearly erroneous" are retained. The Nebraska statute requiring in form at least a trial *de novo* in equity cases is thus continued.²⁸ Of course, there cannot actually be a trial over again on the basis of the printed page alone. Every appellate judge recognizes that, since he did not hear and observe the witnesses, he is not in so good a position to reach a conclusion to determine which are telling the truth as is the trial judge. The grant of this seemingly extensive power of review is rather illusory at best. It promises the parties what they cannot actually have. In reality, I believe it is as unsound practically as it is theoretically. After all, it is the function of the appellate court, in the comparatively few of the total cases brought, which come before it, not to attempt a retrial, but to correct manifest errors; and its function may wisely be thus limited by the governing rule. Originally for the federal system I advocated a narrower rule than that finally adopted.²⁹ The exact words of the formula, however, are not important so long as not more is promised than is actually had, and not more is had than is consistent with affirmance of a trial court's acts which have met the needs of substantial justice. A further criticism of the rule is that it attempts to preserve a distinction between equity and law cases, which may be provocative of fruitless litigation over distinctions no longer important and decidedly out of place on appeal from a judge sitting without a jury.³⁰

Other provisions of the new rules which I must criticize must be

²⁶ Roscoe Pound, *The Etiquette of Justice* (1908), 3 NEB. ST. B. A. REP. 231; see also, Orfield, *supra*, n. 25.

²⁷ While the Tentative Draft followed the federal form, the Final Draft, accepted by the court, omitted the important quoted words and left only that part of the federal rule which says that the findings "shall be considered with due regard to the opportunity of the trial court to judge of the credibility of the witnesses."

²⁸ NEB. COMP. STAT. (1929), 20-1925. See also, Orfield, *supra*, n. 25, 19 NEB. L. BULL. at 272.

²⁹ Clark and Stone, *Review of Findings of Fact* (1937), 4 UNIV. CHI. L. REV. 190; Stone, *The Scope of Review and Record on Appeal*, A. B. A. JUD. ADM. MONOGRAPHS, SER. A, No. 16 (1941), 2 F. R. D. 317.

³⁰ See n. 29, *supra*; *Report of Committee on Simplification and Improvement of Appellate Practice*, Section of Judicial Administration (1938), 63 A. B. A. REP. 602, 614; Committee Notes to Federal Rule 52(a).

discussed more summarily. A serious defect is the virtual emasculation of the popular third-party practice of Rule 14(a). Apparently at the behest of a minority,³¹ the Final Draft struck out the provision for citing in a third party liable to the defendant for the claim sued upon and left in only the provision for citing in such a party when liable to the plaintiff. This completely reverses the original purpose of the rule for which it has been most supported by leading commentators.³² For the rule was designed to permit a defendant who was protected from ultimate incidence of the plaintiff's claim by contract of guaranty or otherwise to obtain an immediate judgment with little fuss and without further suit against his debtor. The plaintiff was not harmed, the defendant was benefited by the short-cut and the court was saved the trouble of another suit. In the federal rules for the first time was adopted the rather daring innovation, suggested by admiralty practice, of allowing a defendant to bring in another person also liable to the plaintiff. But except where there are rules of contribution among joint tort-feasors or of comparative negligence, as in admiralty—that is, except in those few cases for application of the rule where the plaintiff does not have the option as to whom he should sue—that part of the rule cannot be effective, as the federal experience has shown.³³ In other words, the least desirable part of the rule has alone been retained.³⁴ Curiously, however, the companion rule allowing a cross claim between defendants on the very ground here objected to, Rule 13(g), has been retained.

The desirable compulsory counterclaim provision, Rule 13(a), requiring all issues involving the same occurrence to be tried in one case, has now been reduced from the natural penalty of loss of the right to

³¹ See n. 8, *supra*.

³² The original conception of the practice in England (Eng. Ann. Practice, O. 16A, rr. 1-13), as taken over in New York in 1923, N. Y. C. P. A., § 193(2), limited the citing in of third persons to those who were liable over to the defendant; and that still seems to be the more usual conception, except in Pennsylvania and states definitely following the federal practice. See Holtzoff, *Some Problems under Federal Third-Party Practice* (1941), 3 LA. L. REV. 408, and citations in n. 33, *infra*. The literature on the history of this practice is extensive: see, e.g., Bennett, *Bringing in Third Parties by the Defendant* (1935), 19 MINN. L. REV. 163; Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties* (1933), 33 COL. L. REV. 1147; GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936), *passim*; Prefactory Note, "Uniform Contribution Among Tort-feasors Act" (1939), *Handbk. Nat'l. Conf. Com'rs. on Uniform State Laws* 242.

³³ There has been considerable confusion as to this part of the rule in the federal cases; the general view appears to be that, if the plaintiff will not amend to make claim against the third party, the latter should be dropped from the case. For discussion of the rather extensive cases, see Note, *Joinder of Third-Party Defendant Where Plaintiff Objects* (1940), 83 UNIV. P. L. REV. 751; Commentary, *Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant* (1942), 5 FED. RULES SERV. 811; Holtzoff, *supra*, n. 32; (1940), 7 UNIV. CHI. L. REV. 359; (1940), 28 GEO. L. J. 826. In Pennsylvania, it has been held that the rights of the two defendants may still be adjudicated. *Rau v. Manko* (1941), 341 Pa. 17, 17 Atl. (2d) 422.

³⁴ See the thoughtful suggestion before the Judicial Conference in the District of Columbia last year that in this case Rule 14 serves no useful purpose and should be amended to eliminate this feature. Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure* (1941), 4 FED. RULES SERV. 1010, 1012.

sue separately,³⁵ to a mere levy of costs which is comparatively ineffective.³⁶ This suggestion came from the committee's Final Draft of the rules. But even the Tentative Draft contained an undesirable addition to the pre-trial rule, Rule 16, to the effect that "pre-trial procedure shall not be had until after issues have been joined." This is a definite pronouncement that pre-trial can never be had to speed up a case when a defendant is delaying unduly. Of course, it may be more feasible for the court to establish pre-trial procedure generally only for cases already on the trial calendar; but that should be a matter of practical discretion, not of arbitrary fiat. Thus, where a defendant has delayed filing his answer unduly, it would seem proper for the court at a pre-trial conference to ask him immediately and directly what his answer is to be.³⁷

Turning to the provisions as to jury trial, subdivision (d) which was added to Rule 39 in the Tentative Draft, and which provides for an application for separate trial of equitable issues, seems to me, at best, unnecessary and potentially a source of confusion and difficulty. Under a procedure where matters historically equitable are to be tried to the court and matters historically legal are to be tried to a jury unless waived, such trials must be had concurrently or separately; and it adds little to say that the court should have discretion which course should be followed. Under the federal system this seemed so obvious as not to require statement, and hence, a provision to that effect in an earlier draft (Rule 46, Preliminary Draft of 1936) was dropped. The long and not altogether clear first paragraph of this Nebraska rule states no more than this, and possibly not as much. For it seems to be limited to instances of several distinct independent claims, some of which are at law and some of which are in equity, and hence, it does not cover the not unusual case of a definitely mixed claim, i.e., one depending on both legal and equitable grounds. Thus, the provision may serve to make the procedure more rigid, rather than otherwise. Not even so much can be said for the second paragraph, which is distinctly harmful. That provides that nothing stated shall be construed as giving a right to a jury trial upon a counterclaim of a legal nature "where same is pleaded as a counterclaim in an equitable action." This rule is based on a premise which is false under modern procedure, to wit, that the code civil action is necessarily either equitable or legal and that filing a legal claim in an equitable action is a waiver of jury trial. Once such a

³⁵ See Commentary, *The Compulsory Counterclaim* (1942), 5 FED. RULES SERV. 807, and cases cited; CLARK, CODE PLEADING (1928), 446; 2 MOORE, FEDERAL PRACTICE (1938), 681; Preliminary Draft, FEDERAL RULES, 1936, Rule 18; Committee's Notes, par. (7) to Federal Rule 13(a).

³⁶ The change is understandable, of course, as a return to former Nebraska practice. CLARK, CODE PLEADING (1928), 446, n. 48; compare the comment cited n. 2, *supra*, at p. 464n. of 37 COL. L. REV.

³⁷ Cf. *Report of Committee on Pre-Trial Procedure*, Section of Judicial Administration (1938), 63 A. B. A. REP. 534, 541; Laws and Stockman, *Pre-Trial Conferences*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 4 (1941).

premise is adopted, the old subdivisions between actions are resurrected once more, and one may expect the dismissal of actions as brought to the "wrong side" of the court—just as though the modern code court had sides which were foreign jurisdictions to each other.³⁸ The provision, therefore, rejects the simple test of jury trial as based upon the nature of the *issues* presented and goes back to some test of forms of action. In my judgment, it is a clear violation of the constitutional right of jury trial, particularly when the requirements of the *compulsory* counterclaim rule, 13(a), are had in mind; and it should be eliminated.³⁹

Here perhaps may be noted the claim of the dissent as to these rules, which with all deference I find surprising, that the main provisions violate the constitutional right and leave the direction of Rule 38(a) for its preservation as "pure baloney." This is to overlook the experience, as well as the decisions, of the code states generally. The requirement that a party must affirmatively claim his jury trial right within a reasonable time is not an attempt to limit that right, but merely to prevent a litigant from profiting by inaction and making claim of error as to the form of trial after it has gone against him. Such a provision is one of the two or three most important ones to make the code union of law and equity workable.⁴⁰ Under the old rule requiring affirmative steps of waiver, a litigant who had kept silent on a trial to the court would raise the cry, after judgment against him, that the action was really one "at law" and he had lost his constitutional right. The answer should be twofold: first that the action was unitary, neither at law nor equity, and would include all issues in the case; and second that, if there were any legal issues, jury trial as to them had been waived. The second point, however, remained in doubt, when the case presented several issues, until the codes came generally to require an affirmative jury claim, a method which has always been held constitutional.⁴¹ This general rule is one of the best and most necessary features of the new system.

Rule 51, with respect to instructions to the jury, both in the form suggested in the Final Draft, and in the slightly modified form adopted by the court, seems to me definitely harmful in the rigidity with which it binds the trial judge in his conduct of the case and in his instructions

³⁸ See discussion by Pike and Fischer, *Pleadings and Jury Rights in the New Federal Procedure* (1940), 88 UNIV. P. L. REV. 645; Morris, *Jury Trial under the Federal Fusion of Law and Equity* (1942), 20 TEX. L. REV. 427; James, *Trial by Jury and the New Federal Rules of Procedure* (1936), 45 YALE L. J. 1022; CLARK, *CODE PLEADING* (1928), 52-67; 3 MOORE, *FEDERAL PRACTICE* (1938), 3016.

³⁹ Of course, as the authorities cited in n. 38, *supra*, show, some courts have adopted this false premise. Cf. *Behrens v. Kruse*, 121 Minn. 28, 140 N. W. 118, Ann. Cas. 1914 C, 850 (1913), with *Di Menna v. Cooper & Evans Co.* (1917), 220 N. Y. 391, 115 N. E. 993.

⁴⁰ See Clark, *Trial of Actions under the Code* (1926), 11 CORN. L. Q. 482, also authorities in n. 38, *supra*; cf. *Beaunit Mills v. Eday Fabric Sales Corp.*, 124 Fed. (2d) 563 (C. C. A. 2d, 1942).

⁴¹ See cases cited by James, *supra*, n. 38, 45 YALE L. J. at 1024; *Craig v. City of New York*, (1930), 228 App. Div. 275, 239 N. Y. Supp. 328; *Mandeville, Brooks & Chaffee v. Fritz* (1930), 50 R. I. 513, 149 Atl. 859. For the codes generally, see Committee's Note to Federal Rule 38.

to the jury. I presume that this goes back to a difference in the conception of the functions of a court which is so usual in American jurisdictions generally; and very possibly it represents a public policy so different from the federal and English systems, to which I have been accustomed, where the discretion of the court is not so hampered, that I had better pass it with only this general objection.⁴² Rule 58 places the time of rendition of a judgment as that of its announcement by the judge in open court. Why such formal announcement is necessary is not clear; to make the important matter of time of judgment turn upon its having been had would seem questionable. The committee had recommended the federal rule choosing the definite time when the entry is made in the clerk's docket.⁴³ One wonders why Rule 62, providing definite rules for a stay of the judgment, was omitted, notwithstanding the committee's recommendations. Possibly the provisions of existing statutes were thought sufficient. In any event it would have been helpful to the lawyers to have found these provisions in the rules proper. Other departures from the federal rules seem of a minor character, usually obviously necessary or a retention of the state rule in rather unimportant details.⁴⁴

I realize that a listing of specific defects, with only a general reference to the advantages, of the new rules is likely to convey to the reader a false emphasis of extensive criticism beyond what I intend. Yet I can only be helpful, if at all, by being specific where I criticize; there is little reason for quoting in extenso the rules I approve. Let me say again most emphatically that the latter far outweigh the former, that in general it is a good system (even the defects I have noted could, for the most part, be easily surmounted by judges favorable to the rules), and that the state is to be congratulated upon the sound and worth-while procedural advance it represents.

Perhaps, too, I should say a little more about two or three important and novel provisions of the rules. Rule 26 provides for allowing the impeachment at trial of a deponent without laying a foundation therefor in the deposition itself. This is in line with a general provision as to impeachment of witnesses, which was recommended by the Federal Advisory Committee, but rejected by the Supreme Court of the United States.⁴⁵ Another is the extensive evidence sections of Rule 43. One of

⁴² *Report of Committee on Improvements in the Law of Evidence*, Section of Judicial Administration (1938), 63 A. B. A. REP. 570, 572, 573; A. L. I. CODE OF EVIDENCE (1942), Rule 8; *Capital Traction Co. v. Hof* (1898), 174 U. S. 1, 13, 14.

⁴³ This is a necessary time and one which may be absolutely fixed. In this connection it is unfortunate that the Court rejected the recommendation of the Tentative Draft as to the clerk's books, the importance of which is to cause the records to distinguish only between "jury" actions and "court" actions, thus doing away with the old, but now misleading, distinctions between law and equity actions. See Federal Rule 79(a) and (c).

⁴⁴ See Rules 17(b)-(d), 19(a), 25, 55, 80-83.

⁴⁵ See Committee's Draft of April, 1937, Rule 44(b), which was struck out by the Supreme Court, to restore the much criticized federal rule. 3 MOORE, FEDERAL PRACTICE (1938), 3073-3076; 3 WIGMORE, EVIDENCE (3d ed., 1940), § 896 et seq.; Ladd, *Impeachment of One's Own Witness—New Developments* (1936), 4 UNIV. CHI. L. REV. 69; Callahan and Ferguson, *Evidence and the*

the justifiable criticisms of the federal reform was that it left the rules of evidence vague and unsettled, calling only for the application of the widest rule of admissibility to be found under either local, state, or federal law.⁴⁶ This is largely rectified by the substantial code here set forth, including interesting provisions as to the use of expert testimony.⁴⁷ It is to be noted that here, also, the court showed its leadership by rejecting limited and, indeed, undesirable provisions recommended to it as to use of declarations of a deceased for broader and more inclusive provisions, supplemented by a separate provision for discretionary use of hearsay in line with the latest expert views.⁴⁸

Perhaps, also, I should make some further reference to the dissent from the rules. First, I may express real surprise that there was not more opposition to the change. Lawyers traditionally oppose reform as a body; and this is not surprising, for their training and experience tend to make them expert in the status quo. Naturally an expert needs to be thoroughly convinced before he will relinquish his own science.⁴⁹ Yet of formal dissents of which I can find note, there seem to have been only four, two of which were limited only to specific rules,⁵⁰ another somewhat more general, but still apparently directed to the rules as to trial,⁵¹ and only a single extensive one, that of Mr. Shackelford, substantially as repeated by him in this Review.⁵² So limited opposition speaks well for the future success of the rules. It shows that the spadework of the committee, building on the solid foundations of the successful federal system, has already proved its value.

New Federal Rules of Civil Procedure (1936), 46 YALE L. J. 622, 634-635. It is to be noted that the Nebraska court expanded the recommendation of the Tentative Draft for impeachment of "any adverse party" as a deponent to the more general "any adverse deponent."

⁴⁶ Green, *The Admissibility of Evidence under the Federal Rules* (1941), 55 HARV. L. REV. 197-225; 1 WIGMORE, EVIDENCE (3d ed., 1940), § 6c, 6d.

⁴⁷ Use is made of several uniform acts (modified)—the Uniform Business Records as Evidence Act, the Uniform Composite Records as Evidence Act, the Uniform Judicial Notice of Foreign Law Act, the Uniform Expert Testimony Act, as well as the A. L. I. CODE OF EVIDENCE (1942), and the recommendations of the A. B. A. Committee, n. 42, *supra*.

⁴⁸ See subdivisions (h) and (t) of the Court's draft, the latter providing for the admission of declarations of a person unavailable where the judge finds that he is not available and cannot be produced and the declaration was made and made in good faith before the commencement of the action and upon the personal knowledge of the declarant, thus following recommendations of the A. L. I. CODE OF EVIDENCE and of the recent English statute. See *Boerner v. United States* (1941), 117 Fed. (2d) 387, 389 (C. C. A. 2d, 1940), certiorari denied 313 U. S. 587; A. L. I. CODE OF EVIDENCE (1942), Rules 503, 504, 530; Ladd, *A Modern Code of Evidence*, A. B. A. JUD. ADM. MONOGRAPHS, Ser. A, No. 12 (1942), 19-22. The Tentative Draft contains subdivision (h) for use of declarations against representatives of deceased persons on a like finding by the judge if there is satisfactory corroboration. This is a provision accepted by the Court, although the committee's Final Draft recommended merely the existing Nebraska statute, which constitutes the usual dead man statute, the objections to which are stated in *Dellefield v. Blockdel Realty Corp.*, 128 Fed. (2d) 85, 93 (C. C. A. 2d, 1942), citing authorities.

⁴⁹ Hence, leadership in reform comes often, perhaps usually prior to the federal rules, from outside the profession. Sunderland, *The English Struggle for Procedural Reform* (1926), 39 HARV. L. REV. 725. But cf. Clark, *The Bar and the Recent Reform of Federal Procedure* (1939), 25 A. B. A. J. 22; Clark, *A Striking Feature of the Proposed New Rules* (1936), 22 A. B. A. J. 787.

⁵⁰ Objections to Rules 8(e)(2), hereinafter discussed, and 16, also 51(b), dealing with instructions to juries. See 21 NEB. L. REV. at 81.

⁵¹ That of Mr. Reed, chiefly objecting that the report of Subcommittee 4 with reference to trials was not accepted. See 21 NEB. L. REV. at 81.

⁵² Shackelford, *supra*, n. 7.

Since Mr. Shackelford states so forcefully the arguments for the older procedure, there will undoubtedly be others who will sympathize with his view. He restates the familiar claims that wide rules of joinder of parties and of actions will unduly complicate the case, that detailed pleadings will really simplify and assist adjudication, that cumbersome jury waiver, leaving the actual fact of waiver in doubt, is a party's due. I can only say again that I think the teachings of experience are quite clear and are against his arguments.⁵³ What, for example, is there complicated about settling all the claims arising out of one automobile accident at one time, rather than successively?⁵⁴ The latter is really the complicated course, as anyone who has struggled with the rules of *res judicata* well knows.⁵⁵ What is there inconvenient about settling all the claims at issue between two parties at once, rather than attempting to distribute them among those arising or not arising "out of the same transaction or transactions connected with the same subject of action," a set of words which has been found incapable of satisfactory definition?⁵⁶ Not only are these older restrictions inconvenient and impractical, they are also unintelligible. Consider, also, the provisions for joinder of plaintiffs, which likewise are indefinable: persons "having an interest in the subject of the action and in obtaining the relief demanded."⁵⁷ When the distinguished critic thinks of these vague ambiguities as old friends whose "adoption" is "tried" and who should, therefore, be *grappled* "to thy soul with hooks of steel,"⁵⁸ one wonders if he has not his tongue in his cheek.

⁵³ See n. 1 and 2, *supra*. Apparently in Nebraska there was originally a strong trend toward the rule which requires a pleader to have, and always stick to, a single theory of action. *Omaha Electric Light & Power Co. v. Butke* (1917), 101 Neb. 159, 162 N. W. 421. But this seems to have been substantially repudiated. *Rhoads v. Columbia Fire Underwriters Agency* (1935), 128 Neb. 710, 260 N. W. 174. Cf. Albertsworth, *The Theory of the Pleadings in Code States* (1922), 10 CALIF. L. REV. 201, 211.

⁵⁴ Cf. *Molnar v. Hildebrecht Ice Cream Co.* (1933), 110 N. J. L. 246, 164 Atl. 300, where six actions (one being for wrongful death) all arising out of one automobile accident were consolidated for efficient trial and ten verdicts for differing amounts were awarded; *Metropolitan Casualty Ins. Co. of New York v. Lehigh Valley Ry. Co.* (1920), 94 N. J. L. 236, 109 Atl. 743, where twelve negligence actions were consolidated. New Jersey seems to have been the first state to adopt the English joinder rules, which it did in 1912. This has been one of the favorite steps in procedural reform; ten or more American states have now adopted these rules. See n. 2, *supra*.

⁵⁵ Compare the authorities cited and discussed in *Kearns Coal Corp. v. U. S. Fidelity & Guaranty Co.*, 118 Fed. (2d) 33, 37 (C. C. A. 2d, 1941), certiorari denied 313 U. S. 579 (1941); CLARK, *CODE PLEADING* (1928), 446; and n. 35, *supra*.

⁵⁶ The cases and articles in which an attempt is made to find a rational meaning for this curious set of words are too numerous to cite; the authorities cited in n. 2, *supra*, will supply adequate leads to anyone interested. For the unfortunate New York experience, where the original reform in 1921 applied only to joinder of parties, and not to joinder of causes, a mistake which it required seventeen or eighteen years to correct, see Clark, *Dissatisfaction with Piecemeal Reform* (1940), 24 J. AM. JUD. SOC. 121.

⁵⁷ The difficulty here arose from a failure in statement of the intended equity rule by using "and" instead of "or," thus making the requirement double-barreled, instead of alternative, as in equity. CLARK, *CODE PLEADING* (1928), 252-254. Similar ambiguities confused joinder of defendants. *Ibid.*, 265-269. Cf. Bennett, *Alternative Parties and the Common Law Hangover* (1933), 32 MICH. L. REV. 36; and authorities in n. 2, *supra*. Nebraska still seems to refuse joinder of claims against a maker and a guarantor of a note. *Mowery v. P. P. Mast & Co.* (1880), 9 Neb. 445, 4 N. W. 69; *Barry v. Wachosky* (1899), 57 Neb. 534, 77 N. W. 1080. Nebraska examples of the necessity of bringing two actions to ascertain which is the proper one are given by Pound, *supra*, n. 26.

⁵⁸ Mr. Shackelford opens his comment in opposition to the rules, 21 NEB. L. REV. 94, by making the indicated quotation from *Hamlet*.

In making his argument for detailed pleadings, the writer singles out for particular criticism Rule 8(e) (2), expressly allowing, *inter alia*, a statement of claim or defense alternately or hypothetically without regard to consistency, and without separation into counts or defenses. This rule, it is said, will greatly complicate litigation, "for previously the pleader has been required to state facts not hypotheses," and "facts do not exist in the alternative," while "claims are inconsistent if one destroys the other." I fear that this is a failure to analyze the problem or to consider its history. Actually what the pleader states is what he *hopes to prove* at the trial. As to just how the proof may develop with respect to fine details of the case, he can honestly and properly be in doubt. If he is to be tied down to his advance guess, even as to matters of which the defendant naturally has more information than he, of course his client is deprived of valuable rights by technical rules of pleading.⁵⁹ Now only occasionally will courts stand for such a result; by and large they will find means to avoid it. The hallowed method of the common law in this regard was the use of any number of separate counts stating essentially the same matter with differing details or on differing theories. Actually this rule is simply in the direction of direct and simple statement of *what the pleader really and reasonably knows* at the time he pleads. It does away with the useless verbiage of the duplicating counts. It also really makes for detailed pleading, since it allows the pleader to say what is actually in his mind without risk of fatal loss to his client. Thus he may, if he wishes, instead of making the general allegation of negligent driving permitted in the common-law action of trespass on the case and its modern equivalents,⁶⁰ say that the accident was due to either defendant's original negligence or his failure to act on the "last clear chance," or that *if* plaintiff was guilty of any contributory negligence, yet defendant still had the last clear chance, etc.⁶¹ This is a rule in the interest of truth and straightforwardness in pleading; it avoids the subterfuges otherwise found necessary in order to do justice. And it affords a commentary on the fundamental illusion of detailed pleadings as a means of tying down the pleader's client to something which, however believed at the time written, turns out to have not been so in fact.⁶²

A final argument in dissent, that this is not the time for change, is in some ways the most doubtful of all. As indicated above, this is not a change of objective; it is a change of manner and means of achieving

⁵⁹ *Swift & Co. v. Young*, 107 Fed. (2d) 170 (C. C. A. 4th, 1939); *Mezzi v. Taylor* (1923), 99 Conn. 1, 120 Atl. 871 (unfortunately limited in *Kinderavich v. Palmer* (1940), 127 Conn. 85, 15 Atl. (2d) 83, 90). See Clark, *Simplified Pleading in Connecticut* (1942), 16 CONN. B. J. 83.

⁶⁰ See n. 16 and 17, *supra*.

⁶¹ Generally either course is permissible. See Clark, *Simplified Pleading in Connecticut* (1942), 16 CONN. B. J. 83; cases, n. 59, *supra*.

⁶² Cf. Hankin, *Alternative and Hypothetical Pleadings* (1924), 33 YALE L. J. 365, and the articles by Professor Cook cited in n. 14, *supra*; *Rau v. Manko* (1941), 341 Pa. 17, 17 Atl. (2d) 422, 426. I have not space to discuss other criticisms made by Mr. Shackelford; enough has probably been said to indicate what I think the answer to them is.