

## THE FEDERAL RULES OF CIVIL PROCEDURE: 1938-1958

### TWO DECADES OF THE FEDERAL CIVIL RULES

CHARLES E. CLARK\*

Two decades of lively experience under the federal civil rules provide adequate perspective for both survey and prognosis. The rules have been thoroughly tried and not found wanting;<sup>1</sup> and the trend of state adoption is proceeding apace. Now a quarter of the states are followers; half have adopted substantial portions of the federal system; and hardly a local jurisdiction remains unaffected. North Dakota, Wyoming, and Idaho are the most recent converts, with Alabama nearing decision and New York more doubtful, and with promising developments in Maine, Montana, New Hampshire, and Vermont, California, Connecticut, Rhode Island, and West Virginia, among others.<sup>2</sup> Finally, events of the moment virtually

---

\* Chief Judge, United States Court of Appeals, Second Circuit. Former dean, Yale Law School. Reporter to the Supreme Court's Advisory Committee on Rules for Civil Procedure, 1935-1956.

At the request of the author, citations in this article conform to his own style and not necessarily to *A Uniform System of Citations* (9th ed. 1955).

1. This is Judge Chesnut's statement: "I have yet to note an instance in which they have been found lacking." Chesnut, *Improvements in Judicial Procedure*, 17 CONN. B.J. 238, 243 (1943). Among many similar encomia the following may be noted: VANDERBILT, *IMPROVING THE ADMINISTRATION OF JUSTICE—TWO DECADES OF DEVELOPMENT* 90-91 (1957); VANDERBILT, *THE CHALLENGE OF LAW REFORM* 57-58 (1955); Burton, "*Judging Is also Administration*": *An Appreciation of Constructive Leadership*, 33 A.B.A.J. 1099, 1166, 1167 (1947); Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 346; Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155, 174; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U.L. REV. 1057, 1058 (1955); Rives, *A Court of Appeals Judge on the Federal Rules*, 17 ALA. LAW. 324 (1956).

2. The following jurisdictions have adopted the federal civil rules fully: Alaska, Arizona, Colorado, Delaware (separately for the unmerged courts of law and courts of chancery), Hawaii, Idaho, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Utah, and Wyoming. Substantial portions, such as the discovery provisions, the joinder provisions, and so on, have been adopted in Alabama, California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas, and Washington. Individual rules, notably Rule 16, have been adopted in other states. The Alabama Rules of Civil Procedure (1957), proposed by the Commission for Judicial Reform, closely follow the federal rules, but have not yet been adopted by the state legislature. In Nebraska the rules as adopted were rejected and the rule-making act repealed by the legislature in 1943, as stated in note 59 *infra*. Among interesting accounts of local adoptions of the federal rules the following may be cited: Allen, *The New Rules in Arizona*, 16 F.R.D. 183; Keely, *How Colorado Conformed State to Federal Civil Procedure*, 16 F.R.D. 291; Herrmann, *supra* note 1; Sims, *Recent Civil Procedural Reform in Kentucky*, 16 F.R.D. 397; Robertson, *New Mexico Rules of Civil*

compel re-examination of the basic premises of rule-making and rule-amendment. The discharge by the Supreme Court of its Advisory Committee<sup>3</sup> and current plans for re-establishment of rule-making authority in some more permanent form are bringing the issues to a head.<sup>4</sup> So I welcome this symposium on the federal rules in a twenty-year perspective and congratulate the editors of the *Columbia Law Review* on their initiative in planning it.

It has been my fortunate privilege to have been closely associated with the federal movement from an early date. That has involved initial support for the ABA campaign for statutory authority,<sup>5</sup> followed by some activity, upon enactment of the Act of June 19, 1934,<sup>6</sup> for full reform centered upon the basic union of law and equity.<sup>7</sup> Then, when the Court assumed full responsibility and appointed its Advisory Committee in 1935, I became Reporter or draftsman responsible for the initial drafts both of the original rules and of the later proposed amendments throughout the life of the Committee.<sup>8</sup> No more stimulating or rewarding work has ever fallen to my lot. Sometime I hope a history may be written of what was done and how; of the gay Committee meetings and the dull; of the successes, which were many, and the failures, which were few. And I trust that this will point up the accomplishments of many now overlooked, of, among others, the trial judges, the bar association committees, and the law professors—all of whom

---

*Procedure for the District Courts*, 16 F.R.D. 489; Hawkins, *Mechanics of Adopting the Federal Rules for State Practice*, 38 J. AM. JUD. Soc'y 57 (1954). See also Skinner, *Alabama's Approach to a Modern System of Pleading and Practice*, 20 F.R.D. 119. Several good local practice books are now available, e.g., CLAY, *KENTUCKY CIVIL RULES—PRACTICE AND PROCEDURE* (1954); WRIGHT, *MINNESOTA RULES* (1954). Late developments are noted in current numbers of the *Journal of the American Judicature Society* and the *Federal Rules Service*.

3. Order of October 1, 1956, 352 U.S. 803. The Advisory Committee had been originally named in an order of June 3, 1935, 295 U.S. 774, and made a continuing body by an order of January 5, 1942, 314 U.S. 720.

4. See proposal sponsored by the Judicial Conference of the United States, Rep. Jud. Conf., Sept. 18-20, 1957, pp. 7-8, discussed below in text at notes 43-46.

5. The article, Clark, *Procedural Reform and the Supreme Court*, 8 THE AMERICAN MERCURY 445 (1926), was the occasion of some interesting correspondence with the editor, H. L. Mencken.

6. C. 651, 48 STAT. 1064, formerly 28 U.S.C. §§ 723b and c (1934), now appearing in amended form in 28 U.S.C. § 2072 (1952).

7. As authorized by the second section of the 1934 Act, 28 U.S.C. § 723c (1934), 48 STAT. 1064, as added to the bill in 1922 under the vigorous prompting of Chief Justice Taft. See the account at note 24 *infra* and text.

8. Following the initial adoption of the rules on December 20, 1937 (effective on September 16, 1938), see 308 U.S. 645, there were amendments of a minor nature, but establishing the amending procedure, on December 28, 1939, 308 U.S. 642, effective April 3, 1941. More extensive amendments, but of a clarifying nature, were adopted on December 27, 1946, 329 U.S. 843, effective March 19, 1948. Certain amendments to conform to the newly adopted Title 28 of the U.S. Code were adopted on December 29, 1948, 335 U.S. 923, effective October 20, 1949. And Rule 71A for the condemnation of property was adopted on April 30, 1951, 341 U.S. 959, 962, effective August 1, 1951. The amendments proposed by the Committee in 1955, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Oct. 1955, have not been acted upon by the Court.

contributed careful study and suggestion. Certainly to be included in such a history would be the devoted and loyal efforts over the years of Committee members, living and dead; and particularly to be explored is the part played by that unique leader, William D. Mitchell, whose absolutely invaluable contribution has been too little understood.<sup>9</sup> And in this story the part played by the Supreme Court itself must be given its proper notice.

For my part I have been too close to all this to view it objectively; and I have written overmuch about it already—so much so that, in responding to the editors' courteous invitation, I fear lest I merely repeat myself.<sup>10</sup> But certain aspects of that history have immediate bearing on the future of rule-making, and my connection with the movement gives me a basis for some testimony I believe of value to present discussions. That concerns particularly the role of the Court itself in past happenings<sup>11</sup>—a role I find considerably misunderstood and minimized perhaps even by members of the present Court. So to that phase of federal rule-making I shall address myself particularly.

### I. THE LEADERSHIP OF THE SUPREME COURT

For my present purpose I need not recount the pre-1934 history further than to emphasize that, save for an early suggestion of David Dudley Field for reform naturally by a "code,"<sup>12</sup> the revision urged was always for rule-making by the Supreme Court. The invariable dichotomy was

9. I take the liberty of quoting from my message to the Chief Justice on August 25, 1955, notifying him of Mr. Mitchell's death on the previous day: "Mr. Mitchell had a distinguished career of public service. But I think there is no finer monument to his memory than the Federal Rules of Civil Procedure. It has been my privilege to have worked long and intimately with him in this activity; and I know what the strength and force of his personality, his devotion to principle and his drive, have meant for the success of the Rules and the standing they have obtained throughout the profession and the country. I am thoroughly convinced that without his directing genius the Rules, if they had come to exist at all, would have been a much lesser thing than they now are." See also Clark, *Alabama's Procedural Reform and the National Movement*, 9 ALA. L. REV. 167, 168 (1957); Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163 (1956); Clark, *Foreword*, 10 RUTGERS L. REV. 479, 481 (1956); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 148 n.16 (1948).

10. Much of the background appears in the writer's text, CLARK, CODE PLEADING 25-45 (2d ed. 1947), and in the law review articles cited in the footnotes to this article, particularly in notes 11, 12, 19-26 *infra*.

11. See Holtzoff, *Judicial Procedure Reform: The Leadership of the Supreme Court*, 43 A.B.A.J. 215 (1957), and the editorial, *Brilliant Leadership*, 43 A.B.A.J. 240 (1957). But see Moore, Address, A.B.A. Section of Judicial Administration, 21 F.R.D. 127, 128, 44 A.B.A.J. 44, 45, 92 (1958); cf. Statement of Chief Justice Warren, 21 F.R.D. 118, 44 A.B.A.J. 42, 43 (1958); Address by Justice Reed, 21 F.R.D. 139, 140, 44 A.B.A.J. 92-94 (1958). That this history has not been detailed in the literature (see note 10 *supra*) is doubtless because, as noted in the text below, the Court's pre-eminent role has hitherto been taken for granted.

12. 9 A.B.A. REP. 551 (1886); 9 A.B.A. REP. 503 (1886); see 11 A.B.A. REP. 63, 79 (1888); 10 A.B.A. REP. 317 (1887). For the history see CLARK, CODE PLEADING 25-45 (2d ed. 1947); Editorial, *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A.J. 97 (1938); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).

between Court and Congress; no intermediate judicial or semijudicial body was contemplated.<sup>13</sup> In the light of later discussions this is a truly outstanding fact. Thus from the beginning it appears to have been felt quite universally that the Court's prestige was necessary to support this important branch of law-making. The Court had always had and exercised quite extensive rule-making powers. Some of these, particularly those dealing with control of appellate procedure, were resorted to later by the Advisory Committee, with at least silent approval by the Court,<sup>14</sup> to supply certain gaps in authority left by the 1934 Act. The Equity Rules were an established part of the Court's authority; and the success of the Uniform Equity Rules of 1912 sparked the movement for a like success at law.<sup>15</sup> In response to the express advocacy of Chief Justice Taft, the plans were expanded in 1922 to include the union of law and equity, always under the aegis of the Court.<sup>16</sup> So it was the Court's leadership which was the loadstone for all efforts for a modern federal procedure. And in due course after the passage of the Act the Court responded—quite magnificently, as events have shown.

Those who now tend to understate the Court's participation either have not known or have forgotten the dramatic steps whereby the Court accepted the responsibility which Congress had tendered it. For nearly a year the Court took no action and seemed oblivious to the charge committed to it. Meanwhile Attorney General Cummings, who had ultimately rescued the bill and piloted it through with masterly skill when it seemed headed for defeat, not unnaturally concluded that if the movement was to advance he must provide the push. So he set up a drafting organization in the Depart-

---

13. See 19 A.B.A. REP. 411, 424 (1896) (committee report urging federal uniformity and rule-making). See also the views of Chief Justice Taft, cited note 24 *infra*, and the annual reports of the ABA's Committee on Uniform Judicial Procedure, beginning with 37 A.B.A. REP. 35, 434-35 (1912). The literature on court rule-making is extraordinarily voluminous; adequate leads for present purposes may be found in the ABA Handbook, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 10-21 (3d ed. 1952); CLARK, CODE PLEADING 59-62 (2d ed. 1947); INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS 1-67 (1955); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-145 (1949); Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1950); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623 (1957). The classic description of the English system is ROSENBAUM, THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT (1917).

14. This background is explained in detail in *Lopinsky v. Hertz Drive-Ur-Self Systems*, 194 F.2d 422, 424-26 (2d Cir. 1951). See also Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303 (1936); Foreword to ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, May 1936, at xi, xii, reprinted in the *Lopinsky* case.

15. See, e.g., Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638 (1933), and earlier articles there cited. The Equity Rules of 1912 appear in 226 U.S. App. I, 33 Sup. Ct. V, 57 L. Ed. 1633, and are reprinted after the Federal Rules of Civil Procedure in 28 U.S.C.A. The indebtedness of the present rules to these rules is shown throughout in the Committee's Notes to Rules of Civil Procedure and in Table 1 of the Appendix thereto.

16. See note 7 *supra* and text, and notes 20, 21, 23-27 *infra*.

ment of Justice, to be aided by a committee with duties more honorific than specific.<sup>17</sup> His plan was to provide only uniform rules at law to supplement the existing and popular Equity Rules.<sup>18</sup> This seemed a comparatively simple task and one designed to avoid conservative opposition. But to many of us this seemed a truncated reform, indeed. There is little doubt but that this movement was checked by William D. Mitchell, whose powerful letter of February 9, 1935, to Chief Justice Hughes, setting forth the need for the full reform, was clearly the deciding factor in the Supreme Court's decision, if not in its choice of him as Chairman of the Advisory Committee.<sup>19</sup> The present writer can claim to have contributed to this happy result. For, as Mr. Mitchell acknowledged when fourteen years later he was persuaded to give the letter publicity, it was the writer's campaign for united rules which aroused him to action.<sup>20</sup> At any rate, Chief Justice Hughes' announcement of the Court's assumption of full responsibility, made in his annual address to the American Law Institute on May 9, 1935, is a notable milestone in this history.<sup>21</sup> This was followed by the appointment of the Advisory Committee on June 3, 1935, and led to a complete reversal of the developing trend to a continuance of the divided procedure.

A re-examination of the Chief Justice's address is not without profit for our present problems. Two things seem of peculiar interest. One is of course the decision of the Court to accept its responsibility to the utmost. This was signaled by its determination to appoint its own committee to assist it in the task. This meant, as we soon found out, that all plans already initiated for work in the Department of Justice had to cease and the Committee's office had to be in the Court's own building, where it remained for

17. Colonel Edgar B. Tolman, Editor of the *American Bar Association Journal*, who had been appointed a Special Assistant to the Attorney General to take charge of the work of drafting, was chairman, and the writer was one of the Committee members. For the Committee personnel, see 18 J. AM. JUD. SOC'Y 163 (1935); and for the general plans, which included many local committees to be set up by the senior circuit judges, see 20 A.B.A.J. 713-16 (1934), and 20 Mass. L.Q., Feb. 1935, pp. 41, 44. As the Attorney General reported the next year, "more than one hundred federal judges, five hundred practicing lawyers and many law teachers and research scholars are participating in this great project." 21 A.B.A.J. 403, 404 (1935).

18. This was apparently the view of the Conference of Senior Circuit Judges, 20 A.B.A.J. 713, 715, 716 (1934), as well as of others, as pointed out in the articles cited in notes 19, 20 *infra*. See also *Supreme Court Needs Rule-Making Commission*, 18 J. AM. JUD. SOC'Y 131, 132 (1935), and *Policies Involved in Federal Rule Making*, 18 J. AM. JUD. SOC'Y 134-37 (1935), setting forth the proposal of Newton D. Baker for a uniform federal system in the common law states and local conformity in the code states.

19. Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73, 76-78 (1949).

20. Mitchell, *supra* note 19; see Clark & Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387 (1935); Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443 (1935); Clark, *The Challenge for a New Federal Civil Procedure*, 19 J. AM. JUD. SOC'Y 8 (1935).

21. Address of Chief Justice Hughes, 21 A.B.A.J. 340, 55 Sup. Ct. xxxv, 12 A.L.I. PROCEEDINGS 54 (1935); see *Dramatic Pronouncement by Chief Justice Hughes*, 19 J. AM. JUD. SOC'Y 3, 5 (1935); *Chief Justice Hughes on Rule-Making*, *id.* at 6-8.

twenty-one years. Even the symbolism of the Court's activity had to be exact.<sup>22</sup>

The second is the Chief Justice's succinct and convincing statement of the grounds which had led the Court to act at once on the mandate for the union of law and equity, rather than to content itself with only the partial reform.<sup>23</sup> In the course of this exposition he quoted from Chief Justice Taft's original advocacy of that course in 1922, which followed Taft's fine opinion in *Liberty Oil Co. v. Condon Nat. Bank*, as reported in 260 U.S. 235, in accordance, too, with the best principles of code pleading in such states as Taft's own Ohio.<sup>24</sup> Since this principle has now become well nigh universal, after its adoption in the federal rules, it is difficult to recapture the former doubts; but that they were real is shown by a settled view of the era that union of law and equity in the federal courts would be unconstitutional—so strong a view that the powerful voices of Roscoe Pound, William H. Taft, and others<sup>25</sup> had not been sufficient to allay doubts. Some question arose because of the ambiguous nature of the original Act of 1934, and a few voices from the past were still to be heard.<sup>26</sup> But actually

22. Colonel Tolman gave up his position in the Department of Justice and established the office of Secretary of the Committee in the Supreme Court Building, with appropriate letterheads, etc.

23. The Chief Justice in discussing the goal of a simplified practice said that "we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity"; that those who had practiced under a unified system would not "entertain for a moment the suggestion that they should go back to the old separate methods"; that while in certain jurisdictions, including that with which he was especially familiar (*i.e.*, New York), the simple form originally adopted "came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration," yet "[s]uch experiences have taught a lesson and in the improvement we contemplate in the federal system we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power." Then, after quoting from Chief Justice Taft's article, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 47 A.B.A. REP. 250 (1922), cited note 24 *infra*, that this was a "perfectly possible and important improvement in the practice in the federal courts [which] ought to have been made long ago" (thus rebutting the picture of Taft as a hopeless conservative), Mr. Hughes went on to demolish each argument for delay or partial reform, such as the attitude of the Bar and Bench toward the two-step form of the Enabling Act, note 7 *supra*, the supposed difficulties, and so on. Indeed, what he said could be taken as the complete answer to yet more modern suggestions for merely partial or halfhearted reform.

24. Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 604, 607, 47 A.B.A. REP. 250, 259-61, 268 (1922). See also Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34, 35 (1922). He had made the suggestion both of the unified procedure and of rule-making by the Supreme Court at least as early as 1914. Taft, *The Attacks on the Courts and Legal Procedure*, Ky. L.J., vol. 5, No. 1, Nov. 1916, pp. 3, 14-15 (Address at Cincinnati Law School Commencement, May 23, 1914); Taft, *Address as President of the A.B.A.*, 39 A.B.A. REP. 359, 381 (1914); see his testimony in *Hearings Before the Senate Committee on the Judiciary on S. 2432, 2433, and 2523*, 67th Cong., 1st Sess. 16-17 (1921). See also Burton, *Judging Is also Administration: An Appreciation of Constructive Leadership*, 33 A.B.A.J. 1099, 1101, 1166 (1947). Taft was a state court judge in Ohio, 1887-1890, before his federal executive and judicial service.

25. Pound, *Law and Equity in the Federal Courts*, 36 A.B.A. REP. 470, 73 CENT. L.J. 204 (1911); Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 47 A.B.A. REP. 250 (1922); HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING 162-64* (1897); McCormick, *The Fusion of Law and Equity in the United States Courts*, 6 N.C.L. REV. 283 (1928).

26. See discussion in Sunderland, *Character and Extent of the Rule-Making Power*

this in retrospect appears as one of the most easily accomplished, as well as quite outstanding, improvements effected by the rules.<sup>27</sup> What an emasculated reform we would have had if the Court had not stepped in so opportunely and so decisively! The effect on state practice has likewise been beneficial; thus a dying gasp in New Jersey for an asserted inevitable separation was overcome by forceful local leadership following the federal model.<sup>28</sup>

Since that initial forthright step the Supreme Court has made its procedural conclusions clear whenever it has been called upon to do so. The apparently prevalent idea that the Court should have more actively and continuously directed the Committee's activities was clearly not the concept of Justice Hughes and his colleagues. Instead they contemplated just what has happened,<sup>29</sup> namely, a supervision which would become active when necessary, but should leave details to what an often disagreeing Justice has termed "the informed judgment" of the Committee.<sup>30</sup> The Court's action in adopting the original rules in 1937 went far toward settling the manner of proceeding and the validity of various provisions, including not only the union of law and equity, but also rules of evidence and of appellate procedure so far as affected by trial court action, of service of process, of extensive examination, and the like. This has been followed by a now considerable line of notable decisions upholding the rules,<sup>31</sup> culminating in the relatively

*Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404 (1935); cf. McCaskill, *One Form of Action, but What Procedure, for the Federal Courts?* 30 ILL. L. REV. 415 (1935).

27. Here, too, the literature is extensive. See, e.g., James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022 (1936) (giving the background of research for Rule 38, the basic provision as to jury trial); Advisory Committee's Note to Rule 38; Holtzoff, *Equitable and Legal Rights and Remedies under the New Federal Procedure*, 31 CALIF. L. REV. 127 (1943); Joiner & Geddes, *The Union of Law and Equity; A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059 (1957); Morris, *Jury Trial under the Federal Fusion of Law and Equity*, 20 TEXAS L. REV. 427 (1942); Editorial, *One Form of Action*, 32 A.B.A.J. 408 (1946); Pike & Fischer, *Pleadings and Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645 (1940). For the contrasting New York difficulties, see Clark, *A Modern Procedure for New York*, 30 N.Y.U.L. REV. 1194, 1203-06 (1955). For illustrative federal cases see *Alcoa S.S. Co. v. Ryan*, 211 F.2d 576 (2d Cir. 1954); *Groome v. Steward*, 142 F.2d 756 (D.C. Cir. 1944); *Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943).

28. For discussion of the New Jersey reform of 1947 and 1948 overriding persistent nostalgia for the past, see Clapp, *Making the Federal Rules a Part of New Jersey's Practice*, 16 F.R.D. 39; Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 70-72 (1949); Clark, *Divided Law and Equity Jurisdiction*, 28 J. AM. JUD. SOC'Y 29 (1944); 67 N.J.L.J. 152 (1944); and the references in CLARK, CODE PLEADING 28 n.69 (2d ed. 1947).

29. See Chief Justice Hughes' outline of the process and its analogy to that of the American Law Institute in drafting the restatements in his annual address to the Institute in 1936: "The Advisory Committee on Rules has drawn its spirit and organization from your example." 22 A.B.A.J. 374, 375 (1936). See also note 21 *supra*.

30. Justice Frankfurter concurred in the order, 329 U.S. 843 (1946), see note 8 *supra*, "in approval of the proposed amendments essentially because of his confidence in the informed judgment of the Advisory Committee on Rules of Civil Procedure."

31. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), upholding the validity of Rule 35(a), authorizing orders for physical or mental examination of persons; *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), holding valid Rule 4 (f), authorizing

recent ones sustaining the validity of the amended Rule 54(b) concerning final judgments.<sup>32</sup> These decisions form a veritable bulwark of reform in themselves. And the Court was called upon to, and soon did, clear up various ambiguities in the process left by the original act, including even the power and manner of amending the rules.<sup>33</sup>

This same approach is exemplified by the nature of the proposed rules which the Court rejected. These have been few in number, but each has represented a problem which the Court could with propriety seek to avoid. On the first draft there were two: one involving problems of jurisdiction, the other concerning evidence.<sup>34</sup> In the 1948 revision there were three rules rejected, but each presented a problem then before the Court for adjudication in a particular case.<sup>35</sup> Finally the most extensive action of all was taken with respect to the trial provision of the more recent condemnation rule, Rule 71A. Here the Committee, after much deliberation and by a divided vote, had ultimately decided on a rule against the practice of various of the states allowing a jury trial in all cases of timely demand; but the Supreme Court, impressed by the need for uniformity in the condemnation of great territories as required in some of the mammoth federal developments, had directed reconsideration by the Committee.<sup>36</sup> The final form of the rule, still slanted toward jury trial but allowing the court some discretion in enforcing the uniformity indicated, is thus due to the direct control of the Court.<sup>37</sup>

---

service of summons without the district but within the state; *Hickman v. Taylor*, 329 U.S. 495 (1947), sustaining the validity of certain discovery provisions; cf. Rule 30(b).

32. *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). These cases, and those cited note 31 *supra*, expressly discuss the issue of validity; of course in numerous cases a variety of specific rules have been accepted without debate. After these latest cases it does not seem likely that other rules will be subject to a like attack.

33. By the amendment adopted Dec. 28, 1939, 308 U.S. 642.

34. Proposed Rule 77 of the Reports of April 1937 and November 1937 on Registration of Judgments in Other District Courts, as to which a Committee Note raised the question of power, and proposed Rules 26(c) and 44(b) in part dealing with the extent of cross-examination to contradict of a party and of a witness not a party called by the adversary. The first matter is now covered by 28 U.S.C. § 1963, enacted in 1948.

35. Proposed amendments to Rule 25(a), dealing with substitution of a party on his death; Rule 30(b), dealing with protective orders in deposition cases; and Rule 50, dealing with a motion for a directed verdict. See *Anderson v. Yungkau*, 329 U.S. 482 (1947); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), comprising the cases then pending before the Court.

36. This generally overlooked bit of history, including the Court's direction of December 23, 1948, returning the draft to the Committee, is fully set forth in the Supplementary Report of March 1951, at 1-18, proposing the draft which was adopted by the Court on April 30, 1951, 341 U.S. 959, 963. See note 8 *supra*; Clark, *The Proposed Condemnation Rule*, 10 OHIO ST. L.J. 1 (1949).

37. Incidentally, this is the rule which has achieved the steady, though not too well informed, opposition of the American Bar Association. The latest action of the ABA reiterating its opposition to the trial provision, Rule 71A(h), is found in 43 A.B.A.J. 1047, 1048 (1957). The latest action of the Judicial Conference of the United States reiterating its support is found in Rep. Jud. Conf., Sept. 18-20, 1957, p. 33. This followed the report of a Committee, with Judge John J. Parker as Chairman, made after extended study and



The measure of success which court rule-making has thus achieved is attested by the general satisfaction of judges, practitioners, and scholars with the federal system and its increasing adoption in the states.<sup>38</sup> But perhaps the truest indicia of all are in the attitude of Congress. Prior to the rules, the difficulties of the Conformity Act and the constant amendments of procedure by the legislature were all too well known; they were perhaps the most prominent argument for reform.<sup>39</sup> Since the advent of the rules the result has been quite phenomenal. Notwithstanding many proposals, Congress has withstood all attempts to obtain passage of procedural statutes of any consequence. A search has turned up in the rules area only a single statute, one of no far-reaching import.<sup>40</sup> Congress has seemed literally uninterested in all such proposals, and committee chairmen have quite regularly turned them over to the Court or the Advisory Committee for final attention. The fear of recurrence of legislative tinkering has been a profound stimulus for the presently contemplated reconstitution of the Advisory Committee.<sup>41</sup>

## II. A CONTINUING ROLE FOR AN ADVISORY COMMITTEE

While the rule-making process has been therefore quite generally effective, it has disclosed certain gaps where response to felt needs may not be immediately forthcoming. These concern particularly matters debated among and dividing the bar, such as the more extensive reaches of the discovery process. The Court is not equipped and should not be expected to conduct extensive research on its own; this is a task to be performed for it by others, leaving only broad decisions of policy to be ultimately settled by the Court. And for this task an Advisory Committee only occasionally stimulated into activity on an *ad hoc* basis is not wholly adequate. It cannot keep as consistent or wise an over-all watch on procedural developments as is needed; and it is not in a position to fend off attacks from interested groups or defend its work when completed.<sup>42</sup> What is needed is an

---

adopted at the meeting of the Conference in March 1952, Rep. Jud. Conf., March 20-21, 1952, pp. 203-05.

38. See notes 1, 2 *supra* and accompanying text.

39. See materials cited notes 13, 19, 20 *supra*.

40. 35 U.S.C. § 282 (1952) (a provision for the pleading of defenses to a patent suit, such as noninfringement and invalidity, appearing in the Patent Act of 1942).

41. This has been a recurring theme in the literature cited above; it has been deftly stated by Chief Justice Hughes, see note 23 *supra*, and by Mr. Mitchell, see note 19 *supra*.

42. On two occasions Chairman Mitchell submitted briefs amicus to the Court in his own name to guard against obvious mistakes pressed on the Court. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); see note 31 *supra*. But generally speaking even this limited form of support has not been feasible. Contrast the position of an Act of Congress where the Attorney General is commissioned by law to defend the validity of legislation before the federal courts. 28 U.S.C. § 2403 (1952). Thus such a one-sided brief as that filed with the Court on March 10, 1956, by the International Association of Insurance Counsel, attacking proposed discovery amendments—*cf.* J. H. Groce, 22 INS. COUNSEL J. 131 (1955) and 23 *id.* 7 (1956)—must needs remain unanswered.

expansion of present features shown by experience to be wise in order to have a firmer basis in the profession at large and in the administrative processes of the federal judicial establishment itself. Such a plan is to be found in the present proposal of the Judicial Conference of the United States, already widely supported in the profession and among the judges, including members of the Court itself.<sup>43</sup>

There are three main features of this proposal: (1) retention of the present authority of the Supreme Court and of the existing rule-making statutes without amendment; (2) bringing of the Judicial Conference into the rule-making process by an amendment to its statutory powers to include recommendations to the Court as to rule innovations or changes as proposed by an advisory committee of practitioners, judges, and scholars responsible to the Conference; and (3) establishment in the Administrative Office of the United States Courts of a new division devoted to the continuous study of procedural operations of the courts under a dedicated chief who would also serve as secretary or reporter for the newly constituted Advisory Committee.<sup>44</sup> This seems a scheme skillfully designed to exploit the best features of the present system and to fill the gaps now apparent in it. The Court as the ultimate source of power is still the keystone of the arch. But by relieving itself of unique responsibility for initiating steps in the process, the Court sheds a burden which has obviously troubled it of late. On the other hand, the process of continuous supervision of the court system by its administrative officers not only assures better co-ordination of the system as a whole, but will supply means for extension of Mr. Mitchell's invaluable original concept of active participation in the process by the bench and bar of the country.<sup>45</sup> For the division in charge will be able to bring the activities of the Advisory Committee, its studies, and deliberations to the active attention of bar associations, law schools, circuit conferences, and all like

---

43. For the proposal see note 44 *infra* and see the statement of Chief Justice Warren and the addresses of Justices Clark and Reed, Chief Judge Biggs, Professor Moore, and Mr. Scanlon before the ABA Section of Judicial Administration, Nov. 7, 1957, 21 F.R.D. 117-41, 44 A.B.A.J. 42-45, 92-94 (1958).

44. Rep. Jud. Conf., Sept. 18-20, 1957, pp. 7, 8. As a careful reading of these minutes shows, the proposal to amend the rule-making statutes themselves was rejected to leave the Court's authority intact.

45. See statement of Chief Justice Warren, 21 F.R.D. 118, 119, 44 A.B.A.J. 42, 43 (1958). For the plan followed with respect to the original rules, see references in notes 17, 19, 27, 29 *supra*; Clark, *A Striking Feature of the Proposed New Rules*, 22 A.B.A.J. 787 (1936). This solid foundation of support accounts in large measure for the success accorded the rules in their acceptance by the Court in all but exceptional instances, see notes 34, 35 *supra*, and also in their united approval in the Committee itself. Only twice has there been dissent: once in 1946, on a single feature of the discovery process, by a member whose illness had prevented his participation in Committee meetings and discussions; and again more extensively, if belatedly, in 1955 by a recently appointed member, see note 51 *infra*. Against this background of accomplishment, criticism of the Committee for failure to hold public hearings (see Moore, *supra* note 11) seems gratuitous. Rule-making is a matter for research, study, and judicious analysis and critiques, not one for the public platform. Actually the Committee throughout its history responded to all reasonable requests for hearings.

bodies. For one thing, with such material at hand the annual circuit conference required by statute in each circuit should be much more realistically activated to consider the procedural problems of its courts than is now the case.<sup>46</sup>

In a sense this is a return to earlier ideas advanced at the dawn of federal rule-making. In its first report in May 1936 the Advisory Committee recommended the establishment of a standing committee, meeting annually or oftener and submitting annual reports to the Court;<sup>47</sup> and this idea has been quite widely supported elsewhere, as in a resolution adopted by the American Bar Association in 1942.<sup>48</sup> Some provision for regular reports seems peculiarly necessary because of a condition developing largely from the very popularity of the rules. The wide interest in their operation has led to the most extensive writing and reporting of rules decisions and the publication of texts and rules services. This popularity has been far from an unmixed blessing; it has in fact led almost inevitably to glosses upon the original rules, obscuring, if not distorting, their meaning. Judges and writers have enjoyed writing about these new developments, particularly while they seem fresh and original. The very proliferation of precedents, each seemingly offering its own nuance of interpretation, would inevitably present problems. But this is increased by the natural tendency of the technical and limiting precedent to gain the flare of publicity which the liberal decision does not. There is little to say when applying a discretionary rule in its spirit; indeed, a formal opinion is likely to be eschewed. But the limiting decision must be explained, if not apologized for, and, through the processes of competitive publication, becomes the only known authority in the premises.<sup>49</sup> For this reason practically all the amendments hitherto suggested by the Committee have been in the nature of "clarifying" amendments stripping away the barnacles of interpretation.<sup>50</sup> This is a slow and

46. See Warren, *supra* note 45.

47. Rule A, "Standing Committee on Rules of Civil Procedure," ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, May 1936, at 170-71; see *id.* at xviii; Report of April 1937, at vii; 3 MOORE, FEDERAL PRACTICE § 86.04, at 3453, 3454 (1st ed. 1938).

48. 28 A.B.A.J. 711, 67 A.B.A. REP. 131 (1942); see *Report of the Standing Committee on Jurisprudence and Law Reform*, 67 A.B.A. REP. 200-02 (1942); Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521 (1942); Moore, *The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration*, 28 VA. L. REV. 861, 899-907 (1942).

49. For the statement of this Gresham's Law of procedural precedents, see Clark, "Clarifying" Amendments to the Federal Rules? 14 OHIO ST. L.J. 241, 245 (1953); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507, 508 (1950); Keffe, *Federal Rules—Proposed Amendment: Two Comments*, 41 A.B.A.J. 42 (1955); Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839, 849-50 (1956).

50. Clark, "Clarifying" Amendments to the Federal Rules? 14 OHIO ST. L.J. 241 (1953); Keffe, *Federal Rules—Proposed Amendment: Two Comments*, 41 A.B.A.J. 42 (1955); Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105; Tolman, *Advisory Committee's Proposals to Amend the*

delayed process; criticism at the time of the decision would be much more effective, as it would naturally be less extensive when made decision by decision. And in this area, dealing not with defining substantive rights so much as providing their speedy vindication, supervision and suggestion by a central body should be welcomed, as it would not be in substantive areas.<sup>51</sup>

Such a system might well provide a readily perceived answer to the most enduring, if ill conceived, criticism of the rules, namely, the number of decisions and books that they have inspired.<sup>52</sup> The number of course is undoubted, but the conclusion that all are necessary to a proper interpretation and understanding is really a superficial deduction which is a complete *non sequitur*. A little examination of the character of the decisions would disclose as much. The greater number still cite the rules as an easy and complete answer to problems in hand, as witness the most cited rule of all, the "clearly erroneous" requirement for upsetting findings of fact, Rule 52(a).<sup>53</sup> The tribute of extensive citation cannot be disparagement lest *Wigmore on Evidence* itself be tried and found wanting. Though the Bankruptcy Act has led to many, many rulings, that does not show that it is a poor Act or one not expressive of sound public policy. The plethora of cases telling us that a court will not reverse fact findings unless clearly erroneous does not demonstrate that the rules are either unwise or unintelligible. As I have indicated earlier, those rulings (after all, comparatively few against the total) which limit the rules should be soon pruned

---

*Federal Rules of Civil Procedure*, 40 A.B.A.J. 843 (1954); Wright, *Amendments to the Federal Rules: The Function of a Continuing Committee*, 7 VAND. L. REV. 521 (1954); Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839 (1956).

51. The concept of annual reports by an advisory committee, so strongly supported in the authorities cited notes 47, 48 *supra*, is thus coming back into favor, *cf.* Addresses before the ABA Section of Judicial Administration, *supra* note 43, in the wake of some publicized objections to alleged overamendment of the rules, attacking the Committee's proposed amendments of 1955 which have not been acted upon by the Court. Thus the amount of amendment was stated as affecting one-fourth of the rules when a closer analysis would show—if the point is important—that less than one-tenth of the separate provisions were involved. Moore, Separate Statement, in ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Oct. 1955, at 6-8. Reliance was also placed upon an unauthenticated statement against "tinkering" attributed to Chief Justice Stone, whose favorable views are cited in note 1 *supra*. The Advisory Committee's reasoned conclusions in support of its proposals are found in its Foreword and separate Notes, in the REPORT OF PROPOSED AMENDMENTS, *supra*. See also the articles cited note 50 *supra*. The Idaho, North Dakota, and Wyoming Rules (1957) adopt most or all of the proposed amendments, as does the draft of the Alabama Rules. See note 2 *supra*.

52. Greenberg, *Myth and Reality about Courts, Judges and Justice*, 12 THE RECORD 246, 250, 251 (1957); Report of Committee to Cooperate with the Judicial Council, 69 N.Y. STATE BAR ASS'N REP. 342, 351-67 (1946); Rothschild, *Reformulating the Jurisdiction of the Court of Appeals*, 13 BROOKLYN L. REV. 14, 16, 17 (1947).

53. Elimination in 1948 of the "bill of particulars" as an unnecessary weight toward detailed pleadings quite completely removed the most prolific source of rulings in the first decade of the rules. See, *e.g.*, Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497.

off by action of the rule-making authorities.<sup>54</sup> The others, being harmless, should be tolerated—perhaps encouraged because of the interest they stimulate in the writers. On the whole the divisions in view would appear to be declining, so that the advent of continuous supervision under the new plan could easily soon make them of negligible effect.<sup>55</sup>

### III. SOME CURRENT OPPOSITION AND LOCAL VARIATIONS: THE NEW YORK PROPOSAL

Despite its demonstrated inadequacy, constant reiteration of this superficial charge has had some apparent effect in fanning opposition in some states, an opposition sure to arise in our profession, as experience shows, whenever new ways of court action are proposed. Some of this may well be jealousy of federal success, but more probably it is but the usual fear of the older and settled members of the legal profession who see their skills being challenged and found even detrimental to progress. Happily reform is not now so long delayed as in the famous 100-year struggle, largely lay-led and sparked, in England.<sup>56</sup> The younger members of the bar, and the junior bar associations in particular, are showing an interest in the federal system which is aiding in its rapid spread.<sup>57</sup> For proof of the correctness of their course they can point not only to the success of the federal system, but to the problems raised by the confusing half-measures of reform and the general discontent they engender. While every reform movement must take note of the federal movement, even if to try to evade it, there is now no one settled system in opposition, but only confusing intermixtures of the federal practice denatured by local rules. No one of these systems seems satisfactory; Florida, Illinois, Iowa, Missouri, Pennsylvania, Texas—all suggest the need of more thorough reform.<sup>58</sup>

54. See Clark, "Clarifying" Amendments to the Federal Rules? 14 OHIO ST. L.J. 241 (1953).

55. Perhaps the most serious schism remaining concerns the scope of summary judgment. See Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839 (1956). The rule on Substitution of Parties—Rule 25(a)(d)—has become inadequate because of later legislative changes out of the Committee's control. See ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Oct. 1955, at 29-33; Perry v. Allen, 239 F.2d 107 (5th Cir. 1956).

56. CLARK, CODE PLEADING 17-21 (2d ed. 1947); Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

57. Thus in Connecticut, federal discovery, long supported by the junior bar, has now been accepted and is urged by the State Bar Association itself. See 31 CONN. B.J. 410-15 (1957).

58. Extensive criticisms with respect to these states were cited in CLARK, CODE PLEADING 24, 50-54 (and nn.59, 145-50), 82-83 nn.24, 25 (2d ed. 1947); see Amram, *A Reply to Professor Wright*, 101 U. PA. L. REV. 948 (1953); Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEXAS L. REV. 4 (1941); Graubart, *Rejoinder from Pennsylvania*, 101 U. PA. L. REV. 959 (1953); Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909 (1953). The report in Vestal, *New Iowa Discovery Rules*, 43 IOWA L. REV. 8 (1957), is most interesting, as is *Ten Years of Missouri Civil Procedure—a Symposium*, 3 ST. LOUIS U.L.J. 323 (1955).

Some of these illustrate particularly the evils of attempted reform by statute, rather than by rules of court; all show a resistance (in varying degrees) to wholehearted action.<sup>59</sup> No more convincing argument for the federal rules can be found than these local variations.

Against this background it is indeed a matter of keen regret that the steps so far taken for reform in New York seem to follow this outmoded pattern. It is true that reform in New York has always faced unusual obstacles.<sup>60</sup> The sheer bulk of cases and of courts tends toward paralysis and inertia. The lack of clearly developed procedural objectives promotes such a diversity of ruling that support for practically any position, sound or unsound, can be found somewhere in the precedents. The historic and continuing rivalry between upstate New York and metropolitan New York City makes any co-operative advance seem but a dream; and now sharp discord between state and federal authorities has presented an added source of discord. But even so, reformers must follow their dream and leave compromise to others; else they will soon find that they have nothing to compromise.<sup>61</sup>

The new system for New York, so far as it has been disclosed by the procedural Advisory Committee for the Temporary Commission on the New York Courts, seems a curious thing. Its underlying purpose or objective is rather difficult to fathom. One senses a conceived necessity to use much of the federal system while disguising this use so far as may be. Since the New York system already followed practically all the federal joinder rules (for both parties and causes) and since some at least of the discovery rules were being applied, it was necessary to make use of the federal system in large part in any event.<sup>62</sup> So far as actual discovery had gone, and arguments for further advance pointed, there seemed but one direction for the reformers and that into the area occupied by the federal rules. That is probably the actual direction of these new provisions. But the increased bulk of rules, one-third to one-half over the corresponding provisions, raises questions

---

59. Thus the Alabama attempt and the Missouri partial revision took the form of statutes, rather than rules, while the New York draft, discussed below, apparently contemplates an intermixture of statutes and rules. See OUTLINE OF WORKING DRAFT, 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, N.Y. LEGIS. DOC. NO. 6(b), at 11-14 (hereinafter cited as TEMPORARY COMMISSION). A promising venture in Nebraska, see Simmons, *Why New Rules of Civil Procedure Now?* 26 J. AM. JUD. SOC'Y 170 (1943); Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307 (1942), was "rejected" by the legislature. Neb. Sess. Laws 1943, c. 63; 27 J. AM. JUD. SOC'Y 19 (1943).

60. Clark, *A Modern Procedure for New York*, 30 N.Y.U.L. REV. 1194 (1955); Clark & Wright, *supra* note 13; Mitchell, *supra* note 19.

61. Clark, *Dissatisfaction with Piecemeal Reform*, 24 J. AM. JUD. SOC'Y 121 (1940); see authorities cited note 58 *supra*.

62. TEMPORARY COMMISSION 114-60; Supporting Studies, *id.* at 429-94, 553-624; see Weinstein & Bergman, *New York Procedures to Obtain Information in Civil Litigation*, 32 N.Y.U.L. REV. 1066 (1957); Weinstein, Gleit & Kay, *Procedures for Obtaining Information before Trial*, 35 TEXAS L. REV. 481 (1957).

that remain unanswered. There are such abstractions as a provision for complete "disclosure" of all evidence, which, being only a pious hope and not an actual mandate, has no place in the code, since its promise cannot be matched by fulfillment. It was even thought necessary to discard the well-known and apt title "Discovery" for the inadequate term "Disclosure" taken from the hopelessly restricted practice in Connecticut, for which the State Bar Association of Connecticut, ironically enough, is now hoping to substitute the federal rules.<sup>63</sup>

The contrast between the New York and federal systems is clearly illustrated by the divergent approaches to the basic question of the manner of stating the case in the complaint. The old code requirement of "stating the facts constituting the cause of action" did perhaps its greatest damage in promoting uncertainty, confusion, and wasted effort in the courts of New York;<sup>64</sup> and a part of the original opposition to federal uniform procedure was the fear lest New York practice be forced upon the rest of the country.<sup>65</sup> With the need for clarity without technicality in mind, the Advisory Committee by precept and illustration established a system of general pleading not at all a departure from the best common-law precedents, and not the "notice" pleading often advocated by many whose aims are high, but whose ideas are unclear.<sup>66</sup> In view of its importance, it is not unnatural that the plan as adopted by the Supreme Court was at first misunderstood in some quarters and opposed in others. Perhaps the wonder is that this assault on a sacred icon of past law was so generally accepted. At any rate one of the most concrete attacks for restoration of the old mystical formula centered in the Ninth Circuit<sup>67</sup> and led to proposals which

63. TEMPORARY COMMISSION 114.

64. CLARK, CODE PLEADING 225-38, 262, 263 (2d ed. 1947); articles cited note 60 *supra*; Recent New York Pleading Cases, Supporting Studies, TEMPORARY COMMISSION 403-28; Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518 (1957).

65. This was stressed by Senator Walsh of Montana, leader of the opposition for many years. Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 ORE. L. REV. 1 (1926), reprinted in 13 A.B.A.J. 87 (1927) [answered by Pound, 13 A.B.A.J. 84 (1927), and Hale & Sunderland, 6 ORE. L. REV. 73-81 (1926)]; Morton, 49 A.B.A. REP. 595 (1924). See committee reports by Senator Walsh, e.g., S. Doc. No. 105, 65th Cong., 1st Sess. 1 (1927); S. REP. No. 440, 70th Cong., 1st Sess. (1928) (to accompany S. 759); 55 A.B.A. REP. 527 (1930); Clark, *Procedural Reform and the Supreme Court*, 8 THE AMERICAN MERCURY 445 (1926); Mitchell, *supra* note 19.

66. See CLARK, CODE PLEADING 56, 57, 68, 69, 240, 241 (2d ed. 1947), following pages 29, 30, 36, 37, 163 of the first edition (1928); Clark, *Alabama's Procedural Reform and the National Movement*, 9 ALA. L. REV. 167, 172-74 (1957). See also Reports of the Advisory Committee cited note 68 *infra*. I do not object to the statement of aim, rather than definition, of a rule in such good cases as *Hickman v. Taylor*, 329 U.S. 495, 501 (1945), and *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

67. *Claim or Cause of Action*, 13 F.R.D. 253-79; McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A.J. 123 (1952); cf. MOORE, FEDERAL RULES AND OFFICIAL FORMS 88 (1956); Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading*, 13 LA. L. REV. 395 (1953). *But see* McMahon, *The Case Against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953).

the Advisory Committee considered on reference by the Court. So the Committee in its latest Reports in 1954 and 1955 made a restatement of principles and objectives which I think can be taken as a definitive expression of modern procedural objectives. As it says: "The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." Its conclusion was that Rule 8(a)(2) should not be changed, since it "adequately sets forth the characteristics of good pleading" and, while doing away "with the confusion resulting from the use of 'facts' and 'cause of action,' " yet requires a disclosure of adequate information by a pleader "as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it."<sup>68</sup> And this explanation appears to have given general satisfaction, so that the agitation for change or clarification has entirely subsided.<sup>69</sup>

In the light of this experience and against the New York background of hopeless confusion in "stating the facts," it is particularly discouraging to note the lack of firm approach to this basic issue shown by the New York reformers. In fact their suggestions seem so hesitant or blind that it is not possible to deduce just what is intended. Thus proposed Rule 26.5 makes the basic requirement that of "fair notice," that delusive term so attractive to text writers (perhaps since it can be made to mean all things to all men) but never yet a general rule of pleading for major courts.<sup>70</sup> It is of course a pure abstraction, without content except as injected by the immediate user, worthy to stand with the abstractions which were so un-

---

68. ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Oct. 1955, at 18, 19, following ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, May 1954, at 8, 9, accepted as definitive in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957). In the light of this result and the background cited in note 66 *supra*, the analysis of the *Nagler* case presented in 58 COLUM. L. REV. 408 (1958) must be considered misconceived, and its title "Adequacy of Notice Pleading Reasserted in Second Circuit Private Antitrust Suits" quite misleading.

69. More recently there has been some movement for a redefinition of Rule 8(a) to require detailed specifications in the so-called "Big Case" or protracted case. But there is no authority for such differentiation, and experience suggests the inutility of the course which has been rejected by the official authorities and precedents. See authorities cited in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957); Clark, *Special Pleading in the "Big Case"?* 21 F.R.D. 45. See also *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957).

70. See note 66 *supra*. Proposed Rule 26.5 reads as follows: "*Particularity of statements generally.* Statements shall be sufficiently particular to give the court and parties fair notice of the transactions or occurrences intended to be proved and the nature of each cause of action or defense. Pleading forms contained in the appendix of forms are sufficient under these rules and are illustrative of the degree of particularity required." TEMPORARY COMMISSION 62-63.



fortunate a feature of the original Field Code.<sup>71</sup> But at once we perceive an anomaly. The "notice" concept is normally employed to signify a rejection of both fact and issue pleading in favor of a system of unusual generality of expression.<sup>72</sup> Yet apparently the intent here is just the opposite, for statements shall be "sufficiently particular" to give the court and parties "fair notice of the transactions or occurrences intended to be proved and the nature of each cause of action or defense."<sup>73</sup> In terms this goes beyond even the old fact pleading in New York. This idea of greater particularity seems to be supported by other provisions, such as "26.6. *Particularity as to specific matters*," and "26.7. *Particularity in specific actions*."<sup>74</sup> Such conflict or vagueness makes the proposed illustrative forms of the utmost importance as a guide to a determination of rule intent; but as yet at least these forms have not appeared. Perhaps the draftsmen have not yet been able to settle upon their own meaning of these provisions.

Since it is my firm conviction that halfhearted reform is worse than none at all—having all the vices of novelty and none of the virtues of lasting improvement<sup>75</sup>—I must reluctantly conclude that New York is not yet ready for the substantial lift, as well as the good hard work, which the situation both demands and promises. Perhaps some delay in accomplishment may here pay returns, as it has in other instances, such as New Jersey, when delayed reform has been complete. Here is the kind of situation where revivification of federal rule-making should be vitally important. Indeed, an active and functioning department of the federal courts, again constantly at work in the field, may well provide opportunity for the kind of collaboration among rule-making authorities so pertinently suggested by Dean Maynard Pirsig a few years ago.<sup>76</sup> Thus, for possible halting and reluctant movements on ill-assorted fronts, there may be substituted once more a united approach to the real ideal of a uniform and natural procedure for courts, both federal and state.

---

71. For various examples of these abstractions—in addition to the classic "facts constituting the cause of action"—involving joinder of causes or of parties, see CLARK, CODE PLEADING 22, 23, 64, 358, 365 (2d ed. 1947); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950).

72. See note 66 *supra*.

73. See note 70 *supra*.

74. TEMPORARY COMMISSION 64-68.

75. I have often pointed this out; see notes 60, 61 *supra*.

76. This suggestion was made in an address before the Section of Judicial Administration of the ABA at Boston in August 1953. See Clark, *The Evershed Report and English Procedural Reform*, 29 N.Y.U.L. REV. 1046, 1060 (1954).