

“Clarifying” Amendments to the Federal Rules?

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A request to contribute to a memorial review in honor of Robert M. Hunter is for me a must. Bob Hunter was a rare person, one of the most completely free spirits I have ever known. Gay, witty, high-spirited, his gentleness belied the force which was in him, for no man stood firmer for principles of personal liberty; none showed more courage and independence. In an age when sterile conformity, if not abject fear, must be the rule, it is good to recall someone who stood out against the trend. We shall miss him grievously. The loss of his high capabilities, his moral strength, and his capacity for leadership, in times when those qualities have become priceless, is hard to bear. Even though my daily preoccupations have made it impossible for me to frame a composition worthy of a place in his honor, I feel that I must give what I can. So I have turned to a portion of my daily task, thinking that such an ordinary course would appeal to his modest approach to things scholastic. And immediately I am confronted, in work for the Advisory Committee on the Federal Rules of Civil Procedure, with a problem in his own field of procedural law which I think would have intrigued him greatly. Accordingly I present this small offering in tribute to the memory of a fine scholar and a gallant gentleman.

The question has arisen in connection with current activities of the Advisory Committee in surveying the rules to see if amendments are desirable at this time.¹ It stems rather paradoxically from the great success of the rules. Does the spread of the federal system, particularly among the states, demand the conclusion that it should not be disturbed, that hereafter changes should be made only for the most compelling of reasons? It is obvious that, just as in the similar case of changes later adopted in the uniform commercial acts, there will be a substantial, if not permanent, lag before such changes make their way into jurisdictions which have already adopted existing rules. Does the ideal of uniformity suggest a minimum of further change? And will the fact of change suggest unsubstantiality, militating perhaps against further rapid adoptions of the system? A difference of opinion as to the frequency of resort to the amending process appears to be developing among rule makers; the problem presented is one deserving of careful examination.

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¹ The pending activities of the Committee are stated in an announcement, *The United States Supreme Court Advisory Committee*, 39 A.B.A.J. 754 (1953).

Let us first place the matter in proper perspective. The process of rulemaking, as experience has conditioned it, is one requiring careful preliminary study and precise execution over a number of years. The now customary, but wholly desirable, course of submitting the rules for substantial preliminary public discussion, a course which has achieved the confidence of the profession for the rulemaking process,² is itself time consuming. The civil rules have now been in effect for fifteen years. Only on four occasions have amendments been adopted; of these, two were purely formal, one added another procedural process—condemnation of property—and only one revision, that effective March 19, 1948, affected any substantial number of existing rules.³ As to that revision, more than six years elapsed from the start of work by the Advisory Committee early in 1942 to its effective date.⁴ Obviously under the circumstances the amending process will operate with comparative infrequency. In actual experience, the problem, while recurring, will not recur too often.

How many states or territories may be affected by such changes? The number, it must be conceded at once, is already substantial and is likely to increase. With the addition of Nevada, January 1, and Kentucky, July 1, 1953, to the list, there are now just short of a dozen jurisdictions fully subject to the federal scheme. They are Alaska, Arizona, Colorado, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico, and Utah, and, for

² Clark, *A Striking Feature of the Proposed New Rules*, 22 A.B.A.J. 787 (1936); *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A.J. 97, 98 (1938). The history of the various drafts submitted for consideration of the bench and bar is recounted in CLARK, CODE PLEADING 36-39, 45 (2d ed. 1947); MOORE'S COMMENTARY ON THE U. S. JUDICIAL CODE 4, 5, 13, 18, 21-24 (1949); MOORE'S FEDERAL RULES AND OFFICIAL FORMS 5, 6, 13, 17, 19-22 (1951). See also PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE viii, xix (May 1936); REPORT OF THE ADVISORY COMMITTEE vi (April 1937); REPORT OF PROPOSED AMENDMENTS iii (June 1946); SUPPLEMENTARY REPORT OF PROPOSED RULE TO GOVERN CONDEMNATION CASES 1-8 (March 1951); and REPORT iii, iv (May 1948).

³ An amendment of December 28, 1939, effective April 3, 1941, made the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act and incidentally established the power to amend; an amendment of December 31, 1948, effective October 20, 1949, made changes of name and citation required by the revision by Congress of Title 28, UNITED STATES CODE, the former Judicial Code; and an amendment of April 30, 1951, effective August 1, 1951, added RULE 71A, "Condemnation of Property"—discussed by the writer in *The Proposed Condemnation Rule*, 10 OHIO ST. L. J. 1 (1949). The other and more extensive revision of December 27, 1946, effective March 19, 1948, is referred to in the text. For the history of these amendments see the texts by the writer and by Professor Moore cited in note 2 *supra*.

⁴ See Foreword, REPORT OF PROPOSED AMENDMENTS iii, iv (June 1946) *supra* note 2.

courts of law, Delaware. Substantial portions of the practice, notably the discovery section, and to a lesser extent that of party-joinder, have been taken over in several states; these include Florida, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas, and Washington. Individual rules have been adopted in other states, such as California, Connecticut, and North Dakota. Still more widely adopted is Fed. Rule 16, the rule for pre-trial conferences.⁵ Of the states considering the adoption of the rules as the basic provision for local practice, perhaps Louisiana is farthest along, although there is a strong movement in California, and at least some consideration to the cause in West Virginia and Wyoming and perhaps Connecticut.⁶

It may be well to note what has happened so far to the federal amendments in state practice. To date there is no definite practice, which may suggest opposite conclusions: since the pattern is already diverse, (a) it should not be made more so or (b) it is foolish to try now to change it. In Colorado alone does there seem a definite meeting of the issue; there the rules were amended in 1951 to include the federal amendments.⁷ In Puerto Rico a commission is at work to present suggestions along similar lines.⁸ In other juris-

⁵ Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. OF PA. L. REV. 909, 910 (1953); Clark, *The Federal Rules in State Practice*, 23 ROCKY MT. L. REV. 520 (1951); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1948); Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 67-70 (1949); and see *passim*, VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949). Many of these state rules are separately printed; thus the recent Delaware, Kentucky, New Jersey, and Utah rules are locally published, while those of Minnesota and Nevada are published by the West Publishing Company.

⁶ McMahon, *The Case Against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953); Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs*, 13 *id.* 395 (1953); Goodman, *Should California Adopt Federal Civil Procedure?* 40 CALIF. L. REV. 192 (1952); Lugar, *Common Law Pleading Modified versus Federal Rules*, 52 W. VA. L. REV. 137, 53 *id.* 27, 142 (1950, 1951); Trelease, *A Proposal for Wyoming Procedural Reform*, 1 WYO. L. J. 45 (1947); *Proposed Rules of Civil Procedure for the Courts of Record of the State of Wyoming*, 2 WYO. L. J. 124-241 (1948). In Connecticut, where proposals of court reform have been pending since 1949, see Clark & Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 YALE L. J. 1395 (1950), and current numbers of the CONNECTICUT BAR JOURNAL from 1950, the legislature has at long length passed a bill conferring rulemaking authority on the courts. CONN. PUBLIC ACT No. 214, Session, 1953.

⁷ 23 ROCKY MT. L. REV. 500-519 (1951).

⁸ Clark & Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 YALE L. J. 1147, 1167, 1168 (1952); Snyder, *New Puerto Rico Judicial System Is Modern and Efficient*, 36 J. AM. JUD. SOC. 134 (1953). Rather curiously a legislative restriction on rulemaking prevented court adoption of amendments to the rules of 1943 from 1948 to 1952, Clark

dictions, it would appear that the rules adopted are the latest form of the federal rules; thus Delaware, Kentucky, Minnesota, Nevada, New Jersey, and Utah all have the latest form because that was the case at the time of state adoption. In fact several of these jurisdictions have in effect federal amendments recommended by the Advisory Committee, but not adopted by the Supreme Court of the United States. This is notably the case with respect to the rule as to the "lawyer's work product"; the rule thus in effect in these states is somewhat broader in scope, and thus more restrictive of discovery, than the rule announced by the Supreme Court in the celebrated *Hickman* case.⁹

What is the nature of amendments we thus consider? It seems to the writer that a sharp distinction should be drawn between those which are intended only to make more clear what was originally intended. The former mark a change in direction and approach; it might properly be that those other jurisdictions which have accepted the implied invitation to take part in the movement should desirably have some share in any substantial change in policy. No such change has actually been contemplated by the Advisory Committee. The success of the rules and the spirit in which they have been accepted by the profession would make such a shift in any event of doubtful worth.¹⁰ But the process of judicial interpretation is sure to bring interpretations of the rules which in process of time mark a departure, usually by slow degrees, from the original intent of the rules. It is the nature of all procedure to harden and solidify, to become increasingly "red tape."¹¹ That is at once the ad-

& Rogers, *supra*, 61 YALE L. J. at 1161 n. 53 (1952); Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 495, 504, reprinted in FEDERAL RULES OF CIVIL PROCEDURE AND NEW TITLE 28, U. S. CODE JUDICIARY AND JUDICIAL PROCEDURE 1, 10 (Rev. ed 1953).

⁹ *Hickman v. Taylor*, 329 U.S. 495 (1947), was pending when the Advisory Committee made its report recommending an amendment of RULE 30 (b) which would have extended the protection of work products to the adverse party, his surety, indemnitor, agent, or expert, as well as his attorney. See REPORT OF PROPOSED AMENDMENTS 39-47 (June 1946) *supra* note 2. The Committee's unadopted note has been taken as a model in Ky. R.C.P. 37.02; LA. REV. STAT. 13:3762 (1950); MINN. R.C.P. 26.02; NEV. R.C.P. 30(b); N.J. R.C.P. 3:26-2; PA. R.C.P. 4011(e); UTAH R.C.P. 30(b); WASH. RULE OF PLEADING, PRACTICE AND PROCEDURE 26 (a).

¹⁰ The success of the rules is now so thoroughly recognized as to be an old story. In addition to the flattery of imitation, certain noteworthy encomia are cited in Clark, *The Federal Rules in State Practice*, *supra* note 5, 23 ROCKY MT. L. REV. at 525 (1951); Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and A Protest*, 1 SYRACUSE L. REV. 346, 349 (1950).

¹¹ See section headings, pages 31 and 37, of HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING (1897): "The inveterate nature of the incongruity between procedure and substantive law — (1) The former petrifies while the

vantage and the vice of routine. It becomes known, usable, and convenient it also becomes unchangeable, artificial, and square-cornered. The process is the more striking in legal procedure because of the inveterate way in which all legal trends are shaped or misshaped by precedent. By what I have ventured to call a Gresham's Law of Procedural Precedents,¹² the technical and the strict in due course drives out the liberal and flexible. The latter is not striking; indeed, it may never be written into a formal opinion. For what the trial judge lets the litigant or his counsel do, and the appellate court permits, is not something to stimulate a legal opinion in any of the famous Cardozo styles—ranging from "magisterial or imperative" to "tonorial or agglutinative."¹³ But a restrictive opinion finding some grievous fault in the methods of justice is different. In an attitude ranging from defiant virtue to sad reproof, it will exude limiting mandates and technical precepts which expand as they ripple down through later cases and trial court rulings.¹⁴ It is these glosses which may properly stimulate clarifying amendments returning the practice to the rules.

Certain examples will show the contrast I am suggesting. Some distinguished lawyers of the Ninth Circuit Conference, being concerned by what they consider a trend toward, or acceptance of, "notice pleading," are supporting a movement to add "the facts constituting the cause of action" to the requirements of statement in a federal complaint.¹⁵ From the proponents' standpoint this could be only a clarifying amendment. But actually they have misunderstood the background and purpose of the federal provision—"a short and plain statement of the claim showing that the pleader is entitled to relief"—and, it is believed, the real accomplishment of the rules. There never was any purpose or program to adopt or advance notice pleading, in spite of a later occasional loose judicial epigram; this is demonstrated not merely by the history of the drafting and the rules themselves, but, beyond question, by the

latter is in its budding growth. (2) The conservatism of the lawyer preserves the incongruity."

¹² Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950). See also CLARK, *CODE PLEADING* 71 (2d ed. 1947), discussing "procedural particularism."

¹³ CARDOZO, *LAW AND LITERATURE* 10 (1931).

¹⁴ A prime example is the present tendency of district judges to deny summarily motions for summary judgment presenting more than issues of law. See references note 32 *infra* and accompanying text. Of course the insidious appeal of a quick way of apparently clearing congested calendars cannot be overlooked as a cause of expanding influence of restrictive precedents; see reference to procedural particularism, note 12 *supra*.

¹⁵ See *Claim or Cause of Action*, 13 F.R.D. 253-279, also McCaskill, *The Modern Philosophy of Pleading*, 38 A.B.A.J. 123 (1952), and Tucker, *supra* note 6, with reply by McMahan to the Tucker argument, *supra* note 6.

forms attached to the rules. The purpose was rather to get away from the welter of details required in some jurisdictions and to follow the more generalized statements of some states and, also, of the general (as distinguished from the special) pleading of the common law.¹⁶ The various rules all intermesh to this end; the complaint rule is not necessarily the most important, but others carry forward the idea. These include the rules supporting general pleading, limiting the nature of objections to pleadings, providing for amendments requiring plain error for reversal, for discovery, pre-trial, and summary judgment (aimed at quick reaching of the merits, whatever the formal pleadings), and, especially important, the Appendix of Forms.¹⁷ The precedents show a noticeable carrying out of this intent, with quite a minimum of operation of the Gresham's Law, perhaps because the rule here is broadly permissive, rather than restrictive.¹⁸ And so a proposed change which might seem only clarifying turns out, when understood, to involve a major reversal in purpose and intent, affecting a large part of the total structure of the rules. In fact, if the correlative rules just

¹⁶ Thus the famous Federal Form 9, "Complaint for Negligence," taken from MASS. GEN. LAWS c. 231, § 147, p. 2892 (1932), is the common declaration in trespass on the case. *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (C.P. 1833); *Reichwein v. United Electric Rys.*, 68 R.I. 365, 27 A.2d 845 (1942), quoting the declaration in 2 CHITTY, PLEADING 574 (16th Am. ed.). See also Federal Forms 4-8 and the "common counts"; Cook, "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 233, 245 (1937); Notes, 30 CALIF. L. REV. 585 (1942) and 4 *id.* 352 (1916); CLARK, CODE PLEADING 287-296 (2d ed. 1947).

¹⁷ Involved, in addition to RULE 8(a), are at least RULES 8(b) to (f), 9, 10, 12(b) to (h), 15(b), 16, 26-37, 56, 61, and the Appendix of Forms.

¹⁸ They are too many to cite; collections may be found in the texts on the FEDERAL RULES. Some representative examples appear in CLARK, CODE PLEADING 241-245 (2d ed. 1947). Among most recent cases, note *Des Isles v. Evans*, 200 F.2d 614 (5th Cir. 1952); *Selby Mfg. Co. v. Grandahl*, 200 F.2d 932 (2d Cir. 1952); *Phillips & Benjamin Co. v. Ratner*, 2d Cir., Aug. 7, 1953; *Bloombury Woolen Co. v. Moosehead Woolen Mills*, 109 F.Supp. 804 (D.Me. 1953); and in state decisions, *Reese v. De Mund*, 74 Ariz. 140, 245 P.2d 284, 287 (1952); *Bridges v. Ingram*, 122 Colo. 501, 223 P.2d 1051 (1950); *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. Sup. Ct. 1952). It is difficult to find cases squarely opposed; *Bush v. Skidis*, 8 F.R.D. 561 (E.D.Mo. 1948), appears to stand substantially alone in federal practice. Compare *Grobart v. Society for Establishing Useful Manufactures*, 2 N.J. 136, 65 A.2d 833 (1949), and *Zabady v. Frame*, 22 N.J. Super. 68, 91 A.2d 643 (1952), commented on by the writer in Book Review, 62 YALE L. J. 292, 297 (1953). The motion calendars of the trial courts indicate a like smooth operation of the rule. Thus the long motion calendars in the Southern District of New York are practically devoid of motions to perfect the pleadings; and the same is true, oddly enough, of the calendars in the Southern District of California at Los Angeles, where, although the judges are divided in view, some are among the strongest supporters of the proposed amendment to RULE 8(a), *supra* note 15.

cited are not also reconstructed, the recommended limited change can produce only question and confusion.¹⁹

Other rules illustrate the development of an interpretative gloss which conceals and even falsifies the original. A notable case is that of the now famous rule on the effect of findings of fact, perhaps the most cited rule of all. The provision was developed as a statement of the equity rule of review, viz., "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."²⁰ While the second clause is a broad hint to the exercise of discretion, yet there is no question of the purpose to make the "clearly erroneous" principle basic in all review as a uniform and unifying principle, applicable whether "at law" or "in equity," whether by deposition or by oral testimony.²¹ But there soon developed an appellate gloss that, where the testimony was by deposition, the appellate court was in as good a position as the trier to pass on the testimony and hence could then more easily find the trier in error.²² Next came the step of forgetting the rule and substituting the gloss to make review in such cases substantially de novo.²³ Finally one court set up a veritable hierarchy of seven classes, involving different stages of review, thus destroying all uniformity to the basic principle, and inviting appeals beyond previous practice.²⁴ Other courts, an apparent minority, followed the origi-

¹⁹ No complete documentation of this problem is attempted here; it is touched upon in the Book Review cited in note 18 *supra*, as well as in Book Review, 47 N. W. U. L. REV. 739 (1952). The Advisory Committee, to whom the proposal has been referred, see REP. JUD. CONF. OF THE U. S. 23 (Sept. 22-24, 1952), is expected to report upon the matter shortly.

²⁰ RULE 52(a). For the background of this rule, see Advisory Committee's Note to RULE 52 and Clark & Stone, *Review of Findings of Fact*, 4 U. OF CHI. L. REV. 190 (1937).

²¹ See the Committee Note cited in note 20 *supra*, also 2 COLLIER ON BANKRUPTCY 965-966 (14th ed. by Moore & Oglebay 1940), quoting the note from 3 MOORE'S FEDERAL PRACTICE 3116 (1st ed. 1938); Clark, *supra* note 12, 3 VAND. L. REV. at 505-506 (1950).

²² Among cases see *Fleming v. Palmer*, 123 F.2d 749 (1st Cir. 1941), *cert. denied* *Carribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942); *Banister v. Solomon*, 126 F.2d 740 (2d Cir. 1942); *Ball v. Paramount Pictures, Inc.*, 169 F.2d 317 (3d Cir. 1948); *Himmel Bros. Co. v. Serrick Corp.*, 122 F.2d 740 (7th Cir. 1941); *Smyth v. Barneson*, 181 F.2d 143, 144 (9th Cir. 1950).

²³ See, e.g., *Dollar v. Land*, 184 F.2d 245 (D.C.Cir. 1950), *cert. denied* *Land v. Dollar*, 340 U.S. 884 (1950); *Panama Transport Co. v. The Maravi*, 165 F.2d 719, 720 (2d Cir. 1948); *Stokes v. United States*, 144 F.2d 82, 85 (2d Cir. 1944); *Bertel v. Panama Transport Co.*, 202 F.2d 247, 249 (2d Cir. 1953); *Carter Oil Co. v. McQuigg*, 112 F.2d 275, 279 (7th Cir. 1940).

²⁴ *Orvis v. Higgins*, 180 F.2d 537, 538 (2d Cir. 1950), a 2-1 decision, *cert. denied* 340 U.S. 810 (1950). See criticism in Comment, *Scope of Appellate Fact Review Widened*, 2 STAN. L. REV. 784, 787-788 (1950); approval in 5 MOORE'S FEDERAL PRACTICE § 52.04 (2d ed. 1951).

nal mandate.²⁵ If this view could now be re-enforced by a clarifying amendment, this would not constitute a change, only more properly a restoration of meaning, and the rules would be benefited by a return to the original purpose.²⁶

Another example occurs in connection with the rules of waiver of jury trial—rules basic to the fundamental code reform of the union of law and equity. The principle is that jury trial is waived by failure to make affirmative claim not later than 10 days after the service of the last issue which a party desires so tried.²⁷ Since the rules, while eschewing throughout the mysticism of the old "cause of action," yet always stress the factual nature of the claim and find no different claim when, whatever the legal theory, there is still involved "the conduct, transaction, or occurrence set forth or attempted to be set forth" originally,²⁸ an amendment after waiver setting forth only a change of legal claim on the same occurrence would seem not adequate to overcome the waiver. Such was the original view and that followed in many precedents.²⁹ But

²⁵ See, e.g., *Pendergrass v. New York Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950); *Holt v. Werbe*, 198 F.2d 910 (8th Cir. 1952); *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F.2d 632, 637-638 (9th Cir. 1951); *Quon v. Niagara Fire Ins. Co. of New York*, 190 F.2d 257 (9th Cir. 1951); *Yankwich, Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 271, 289.

²⁶ A clarifying amendment might conceivably take the course of separating the provision into two sentences, thus leaving the basic direction without qualification, and making the latter provision more directory and less mandatory in language.

²⁷ RULE 38(b) and (d). For the importance of this rule to the merger of law and equity, see Advisory Committee's Note to RULE 38; James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L. J. 1022 (1936); CLARK, CODE PLEADING 78, 90, 113-122 (2d ed. 1947).

²⁸ The quoted language comes from RULE 15(c), "Relation Back of Amendments." The stress of the rules upon the factual basis of the claim for relief, with complete elimination of the confusing phrase "cause of action," is well recognized. See, e.g., *Reeves v. Beardall*, 316 U.S. 283, 285 (1942); *Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187 (2d Cir. 1943).

²⁹ See PROCEEDINGS OF NEW YORK SYMPOSIUM (1938) 309, 310; *Gulbenkian v. Gulbenkian*, 147 F.2d 173, 158 A.L.R. 990 (2d Cir. 1945); *Fidelity & Deposit Co. of Maryland v. Krout*, 157 F.2d 912, 913 (2d Cir. 1946); *Parissi v. Foley*, 203 F.2d 454 (2d Cir. 1953); *Goldblatt v. Inch*, 203 F.2d 79 (2d Cir. 1953); *American Fidelity & Cas. Co. v. All American Bus Lines*, 190 F.2d 234, 237 (10th Cir. 1951); *Moore v. United States*, 196 F.2d 906 (5th Cir. 1952). See also cases sustaining waiver, even though a case begun in admiralty is transferred to the "law" or civil side. *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.*, 250 F. 939 (2d Cir. 1918), *cert. denied* *Jones v. United States ex rel. Pressprich & Son Co.*, 248 U.S. 564 (1918); *James Richardson & Sons v. Conners Marine Co.*, 141 F.2d 226, 230 (2d Cir. 1944); *United States v. The John R. Williams*, 144 F.2d 451, 454 (2d Cir. 1944), *cert. denied* *Great Lakes Dredge & Dock Co. v. United States*, 323 U.S. 782 (1944).

others now find a waiver in the new "cause of action" (sic) and allow for example the dropping of a claim for injunction on a patent infringement to revive the privilege of claiming jury trial.³⁰ Restoration of meaning by amendment to prevent the undercutting of this basic rule by shrewd procedural manipulation would seem desirable.³¹ As a last example I shall refer to the well known difference in approach to the summary judgment, where some courts have cut it down in substance to the field of operation of the old demurrer by substituting for the actual rule the devastating gloss that if there is "the slightest doubt" as to the facts, the summary judgment must be denied.³² A clarifying addition to the rule may

³⁰ *Bereslavsky v. Kloeb*, 162 F.2d 862 (6th Cir. 1947), cert. denied *Kloeb v. Bereslavsky*, 332 U.S. 816 (1947); *Bereslavsky v. Caffey*, 161 F.2d 499 (2d Cir. 1947), cert. denied *Caffey v. Bereslavsky*, 332 U.S. 770 (1947); *Canister Co. v. Leahy*, 191 F.2d 255 (3d Cir. 1951), cert. denied *Leahy v. Canister Co.*, 342 U.S. 893 (1951); *Nolan v. Columbia Broadcasting System*, 11 F.R.D. 194 (S.D.N.Y. 1951). An amendment merely changing the nature of the relief claimed is clearly unnecessary, RULE 54(c), and by the better practice should not be allowed. See *Couto v. United Fruit Co.*, 203 F.2d 456, 457 (2d Cir. 1953), with which compare *Bereslavsky v. Socony-Vacuum Oil Co.*, 7 F.R.D. 444 (S.D.N.Y. 1946), which led through, *id.* 445 (1946) and 447 (1947), to *Bereslavsky v. Caffey*, *supra*.

³¹ This might take the form of providing as a part of RULE 38(d) on waiver that a waiver of jury trial would not be revoked or recalled by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

³² See, e.g., *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948). So mere pleading allegations or denials have been held sufficient to prevent summary judgment. *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580, 581 (3d Cir. 1948); *Reynolds Metals Co. v. Metals Disintegrating Co.*, 176 F.2d 90 (3d Cir. 1949); *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636 (9th Cir. 1953). See *Seaboard Surety Co. v. Racine Screw Co.*, 203 F.2d 532 (7th Cir. 1953), holding summary judgment unavailable in actions for specific performance; but see *contra*, *Dale v. Preg*, 204 F.2d 434 (9th Cir. 1953); the New York rule, N.Y.C.P.R. 113, and *Rubin v. Irving Trust Co.*, 305 N. Y. 288, 113 N.E.2d 424 (1953); and the settled rule as to actions for injunction, *Houghton Mifflin Co. v. Stackpole & Sons Inc.*, 113 F.2d 627 (2d Cir. 1940); *United States v. W. T. Grant Co.* 345 U.S. 629, 635 (1953). Learned criticism of this restricted approach is now too extensive to cite exhaustively; some of the articles are cited in the writer's *The Summary Judgment*, 36 MINN. L. REV. 567 (1952); and see *Yankwich*, *Summary Judgment Under Federal Practice*, 40 CALIF. L. REV. 204, 224 (1952); *McAllister*, *Pre-Trial Practice in the Southern District of New York*, 12 F.R.D. 373, 378; *Asbill & Snell*, *Summary Judgment Under the Federal Rules—When an Issue of Fact Is Presented*, 51 MICH. L. REV. 1143 (1953); 99 U. OF PA. L. REV. 212 (1950); 5 VAND. L. REV. 607 (1952); 25 WASH. L. REV. 71 (1950). For a different approach see *Zampos v. United States Smelting, Refining & Mining Co.*, 10th Cir., July 9, 1953; *Brensinger v. Margaret Ann Super Markets*, 192 F.2d 458 (5th Cir. 1951); *Engl v. Aetna*

not change fundamental judicial attitudes, but it may at least show the hoped-for direction.³³

It seems to me that these examples — and others which might also be chosen³⁴ — not only illustrate the problem, but point pretty definitely to the answer. If amendments to correct the arbitrary interpretations indicated are not to be favored, then the rules are at the mercy of the more inflexible interpreters and in any event are destined to lose their value in time, as even natural interpretation hardens. And the reason suggested, to prevent confusion in state adoptions of the Federal Rules, operates to accentuate the errors as leading to their perpetuation in state practice, either in rules already adopted or in accepting the new procedure initially. An illustration which comes to mind, perhaps as a converse side of the picture, is that of the former federal conformity to state procedure at law which for a century was "static" conformity as of periods of time long past.³⁵ Here we have a suggested state conformity to not the best, perhaps the worst, of federal procedure made rigid by unchangeable limiting rulings. So the hope of continuing supervision of the rules by a standing committee is lost so far as practical utility is concerned; indeed, the hope for flexibility in

Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); *Forde v. United States*, 189 F.2d 727 (1st Cir. 1951); *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952); *Griffin v. Griffin*, 327 U.S. 220, 235 (1946); *United States v. W. T. Grant Co.*, 345 U.S. 629, 635 (1953); and see the recommendation of the Judicial Conference of the United States, in its REPORT of Sept. 1948, pp. 36-37, for greater use of the summary judgment.

³³ Thus an amendment to RULE 56(c) — which states the criterion of "no genuine issue as to any material fact" — could make it clear that a response to a motion and affidavits for summary judgment must be by equally detailed answer under oath, and not by formal pleading denials or allegations.

³⁴ Thus the entire section on discovery — RULES 26 to 37 — seems particularly to invite a procedural gloss which will restrict trial court discretion. For general discussions, see Speck, *The Use of Discovery in United States District Courts*, 60 YALE L. J. 1132 (1951); Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L. J. 117 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 FED. B. J. 289 (1951); Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COL. L. REV. 1026 (1950).

A recent striking example of judicial propensity to rewrite procedural rules is *Butcher & Sherrerd v. Welsh*, 3d Cir., Aug. 5, 1953, importing into the broad terms of RULE 60(b) a requirement for its use of upper court permission in any case where an appeal has been had. See *In re Long Island Lighting Co.*, 197 F.2d 709, 710 (2d Cir. 1952); *S. C. Johnson & Son v. Johnson*, 175 F.2d 176, 177, 184 (2d Cir. 1949), *cert denied* 338 U.S. 860 (1949); *Perlman v. 322 West Seventy-Second Street Co.*, 127 F.2d 716, 719 (2d Cir. 1942).

³⁵ Clark & Moore, *A New Federal Civil Procedure — I. The Background*, 44 YALE L. J. 387 (1935); Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504 (1935); Tolman, *The Origin of the Conformity Idea*, etc., 23 A.B.A.J. 971 (1937); CLARK, CODE PLEADING 31-34 (2d ed. 1947).

procedure by court action as opposed to the rigidity of statutory enactment is substantially gone.³⁶ And the consequence defeats the purpose; for state procedure, too, cannot be made forward looking if it is to be bound by shackles of federal precedents. Much better to put up to the states the thinking about procedure which new federal amendments must suggest than the sterility of literal acceptance of divinely ordered codes or rules perpetually to be maintained so far as their language is concerned.³⁷ What we should hope for is a lively sense of procedural thinking among all lawyers and judges; there is, there should be, no federal monopoly. The thinking about procedure, the resolving of steps for its improvement, is a vital part of rulemaking not only for actual achievement, but for the stimulus it provides. Let us have live rules committees, both state and national! And may each stimulate the other to greater endeavors in a spirit of mutual co-operation.³⁸

That is why, in this writer's opinion, clarifying amendments must be recommended or the rulemaking process becomes sterile and dead. That is why we should welcome the efforts, from whatever source, but most of all from sources of official responsibility in rulemaking, to improve the workings of courts and the administration of justice.

³⁶ Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521 (1942); Clark, *supra* note 12, 3 VAND. L. REV. at 507, 508 (1950); 3 MOORE'S FEDERAL PRACTICE 3453 (1st ed. 1938); PRELIMINARY DRAFT, *supra* note 2 at 170, 171; REPORT (April 1937), *supra* note 2 at vii; *Resolution of the American Bar Association*, 28 A.B.A.J. 711 (1942); see CARDOZO, LAW AND LITERATURE, *A Ministry of Justice*, *supra* note 13 at 41; Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 404 (1924).

³⁷ Actually literal conformity is not only undesirable, but impossible in any realistic adaptation of federal principles to local conditions. Thus, in states well devoted to these principles, deviations in at least minor degrees must appear: some 21 modifications and 8 new rules in Arizona; some 27 variances in Minnesota; and slightly more in Utah. See, 1 FEDERAL RULES DIGEST vii (1949); *id.* xii, xv, Cum. Supp. (1953).

³⁸ The use of state adaptations in future federal rules amendments is thus to be expected; the Advisory Committee has under consideration such material in connection with, e.g., RULES 14(a), 23(d), 30(b), 35(a) and (b), 50(b) and (c), and 56(c). See, in general, Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. OF PA. L. REV. 909, 944-947 (1953).