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A PROPOSAL FOR WYOMING PROCEDURAL REFORM

FRANK J. TRELEASE, JR.*

The legislature of the State of Wyoming has adopted, in its most recent session, a statute giving to the Supreme Court the rule-making power in matters relating to pleading, practice, and procedure in all courts of the State.¹ Wyoming thus stepped in line with one of the most significant developments in the procedure field in recent years, and became the twenty-second state to grant its courts this power.²

The advantages of judicial rule-making are obvious. The judges are certainly in a better position to understand the problems involved in procedural matters than is the legislature. On such matters a legislative group usually accepts the judgment of its lawyer members, or of a pressure group from the organized bar. The Wyoming court will have the recommendations of an Advisory Committee, which will hold hearings on the rules proposed, and will thus be insured a wide basis of opinion and judgment upon which the rules may be predicated. Another advantage which a rule-making court has is that once an agreement is reached on a desirable change it is unnecessary to await a future session of the legislature, and there is no risk of being unable to get affirmative action for reasons that have nothing to do with the merits of the controversy.³

The most conspicuous example of a judge-made system of procedure is that adopted by the Supreme Court of the United States for use in the federal District Courts. The Federal Rules of Civil Procedure have served, ever since their adoption in 1938, as a springboard for procedural reform in the state courts. They were called to the direct attention of every lawyer, who was forced to learn (or be prepared to learn the minute he was engaged on a federal case) a system of pleading embodying many of the most modern concepts of pre-trial formulation of issues. Under the Conformity Act⁴ the proceedings in law cases in the federal courts had conformed more or less to the current state practice. As the lawyers in many states looked upon the new Rules and found them good, a new ideal of conformity arose—that state codes should be conformed to the new federal practice.

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1. S. L. 1947, c. 53.

2. Gavit, *Procedure in State Courts* (1946) p. 75. Monograph published by the Practising Law Institute.

3. A fuller statement of the advantages of judicial rule-making is found in Gavit, *supra* N. 2.

4. Rev. Stat. §914, 28 U.S.C. §724.

Arizona, in 1940, and Colorado and New Mexico, in 1941, adopted rules substantially in the form of the Federal Rules, even preserving the identical numbering. Under this same impetus other states have revised their pleading systems substantially, although the Rules themselves, or even their spirit, were not followed.⁵ Still others have adopted individual reforms inspired by the Rules (Wyoming did this in regard to joinder of parties and claims)⁶ and in many other states the bar associations have made studies of the desirability of overhauling their procedural systems.⁷

This paper is based upon the premise that the Federal Rules are at least a desirable starting point for discussion of improvements to our state procedure. In outline, it will attempt to point up for the reader the differences between the Wyoming and federal practice on some major principles of pleading, to suggest some reforms going beyond the Federal Rules and to summarize some procedural devices available in the federal courts that are not now open to the Wyoming practitioner. The text of the Federal Rules, as quoted below, include amendments adopted by the Supreme Court of the United States on December 27, 1946, which will take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but if that day is prior to September 1, 1947, then on September 1, 1947.⁸ All references to "Sec. 3—" are, of course, to the Code of Civil Procedure as published in 1 Wyoming Compiled Statutes, 1945.

PLEADINGS ALLOWED

Rule 7 (a). There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; . . . No other pleading shall be allowed, except that the court may order a reply to an answer. . .

Sec. 3-1203. The only pleadings allowed are:

1. Petition;
2. Demurrer;
3. Answer; . . .
4. Reply.

The Rule cuts off the pleadings at the answer, in the usual case, one step short of the Wyoming procedure. At common law, when the emphasis was placed upon reaching a single issue, pleadings might go through the stages of declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. The code de-emphasized the necessity for reaching a single narrow issue and intended that the parties should place their views of the facts on the record as concisely and quickly as possible.⁹ Should new matter appear in the

5. See comments of Circuit Judge Charles E. Clark on the Alabama and Texas rules, *Texas and Federal Rules of Civil Procedure (1941)* 20 *Tex. L. Rev.* 4.
 6. 1 *Wyo. Comp. Stat.* 1945, §§3-613, 3-701.
 7. *The Index of Legal Periodicals (1937-1946)* indicates published discussion in law reviews and bar journals of 21 states.
 8. Rule 86(b) as amended, 6 *Fed. Rules Dec.* 249.
 9. Clark, *Code Pleading*, (1928) p. 479.

reply, it would be deemed controverted by denial or avoidance.¹⁰ In about ten American jurisdictions the codes have eliminated the reply except where it was in fact an answer to a counterclaim,¹¹ and the draftsmen of the Rule felt that in view of the broad allegations contemplated by other rules, opposing pleadings beyond the answer were not useful and were only a source of delay.¹² Fair notice of the opponent's case is usually given in his first pleading, and should a defendant be sincerely in doubt as to how his defense will be avoided, upon a proper showing the court will order that a reply be made.

Under Sections 3-1318 and 3-1402, a reply is necessary only where the answer contains "new matter". This places on the plaintiff the burden of correctly analyzing the answer to determine whether the defense is affirmative or negative in character. This decision is in many cases difficult to make, as will be discussed later in connection with the answer. Under Rule 7 (a) the plaintiff is protected from the peril of erroneously predicting whether or not the court will agree with him in a conclusion that the answer was negative in character and hence needed no reply.¹³

THE COMPLAINT OR PETITION

Rule 8 (a). A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

Rule 8 (e) (1). Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

The Wyoming statute contains the statement uniformly found in the codes. The Federal Rule contains two significant variations from the traditional language—there is no mention of "facts" and the word "claim" is substituted for "cause of action".

Why was the simple term "fact" so carefully avoided? Professor Pomeroy stated the code ideal of pleading in his famous dogma: ". . . the allegations must be of dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely to the courts."¹⁴ The difficulty is that

Sec. 3-1301. The first pleading on the part of the plaintiff shall be the petition, which must contain: . . .

2. A statement of the facts constituting the cause of action in ordinary and concise language; . . .

10. 1 Wyo. Comp. Stat. 1945, §3-1402.

11. Clark, Code Pleading (1928) p. 480.

12. Clark, Simplified Pleading, p. 15. (Judicial Administration Monograph, Series A, No. 18, published by the American Bar Association).

13. See *Iba v. Central Association of Wyoming* (1895) 5 Wyo. 355, 40 Pac. 527, rehearing den. 42 Pac. 20.

14. Pomeroy, Code Remedies (5th Ed. 1929) p. 640.

we all know that many allegations soaked throughout with rules of law and clothed with legal implications of rights and duties are acceptable to the courts as "facts":

"Note the technical legal terms: 'Possession'; 'belonging to the plaintiff'; 'authority'; 'sold'; 'converted'; 'lawfully possessed'; 'forcibly took'; 'carried away'. Obviously only a legally trained person can tell what is meant. It may be asked: "Are these statements . . . 'statements of fact' or are they merely 'conclusions of law'?" The answer obviously is that they are both. The statement that the plaintiff was 'lawfully possessed' of goods in question is very properly interpreted as an assertion that some one of a large number of shifting and varying groups of factual events had taken place, the net legal consequence of which was that the plaintiff was 'lawfully possessed' of goods. Any one of a large number of combinations of events will, of course, result in conferring 'possession'—as distinguished from mere physical custody—upon a person. Proof of any such combination of events will be proof of the 'possession'. The approved form of statement thus leaves out much of the 'concrete particularity' of the events 'as they occurred'. Any statement will necessarily do that. The only question is, has the statement left out so much that it is not sufficient fairly to apprise court and counsel on the other side of what the plaintiff expects to rely upon? At this point we come to the crux of the matter. How much is enough?"¹⁵

The lawyer knows from precedent that "possession", "reasonable" and "negligently" are statements of ultimate fact, although analysis shows that he knows these things only because he is a lawyer. As his client relates a series of events he thinks, more or less automatically, "The driver of the car failed to use what the courts have called due care when he drove blindly into the intersection, therefore he drove negligently", and his pleading states only his summary or conclusion: That defendant negligently managed his automobile. On the other hand, he knows from precedent that he must not summarize a transaction as "fraudulent" in his pleading even though his reasoning is much the same: "When the salesman falsely stated that the car had just been overhauled, thus deliberately inducing plaintiff to buy it, his conduct was what the courts have called fraudulent." The lawyer may learn these precedents, but they solve only the easy cases. When he seeks to restrain the collection of taxes, should he follow the negligence analogy and say that the Board of Equalization acted "arbitrarily", in adding property to the tax roll, or should he, as in cases of fraud, set out in minute detail the substratum of circumstances?¹⁶ Can he characterize a transaction as

15. Cook, "Facts" and "Statements of Fact" (1937) 4 U. Chi. L. Rev. 233, 242.

16. The latter. *Ricketts v. Crewdson* (1905) 13 Wyo. 284, 79 Pac. 1042, rehearing den. 81 Pac. 1.

“ultra vires” or “in bad faith”?¹⁷ Can he conclude that certain property is a “fixture” and “part of the realty”?¹⁸

The same problem, approached from the opposite direction, leads to criticism of the pleader not because he was too general, but because he was too particular and pleaded not facts but evidence.¹⁹ The channel of ultimate fact between the Scylla of conclusion of law and the Charibdis of evidence is a narrow one. Even though the expert attorney may successfully navigate it, it is a rare case in which he can plead so perfectly that his opponent will fail to interpose a demurrer or motion under fear of being accused of frivolity or sham. The problem is largely one of style, of the degree of particularity of statement that shall be required of the pleader. Under the Code, plaintiff may have a meritorious claim, defendant and his attorney may be fully informed of all details of the case, yet delay and expense may occur because plaintiff's attorney used the wrong rhetoric.

Would the adoption of the Rules ease the pleader's burden? Rule 9 (b) would give some specific relief: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.” It seems clear that the framers of the Rules thought that general relief was provided also.²⁰ “. . . The Federal Rules have avoided one of the sore spots of code pleading. The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law”.²¹ While this statement has been quoted and followed,²² several lower federal courts have criticized pleaders for too much generality of language²³ and have stricken some evidentiary matter from pleadings.²⁴ These cases do not necessarily indicate that the framers' intentions have been subverted by reactionary judges. Poor draftsmanship is still poor draftsmanship, and

17. No. *Edwards v. Cheyenne* (1911) 19 Wyo. 110, 114 Pac. 677, rehearing den. 122 Pac. 900.
18. Yes. *Anderson v. Englehart* (1910) 18 Wyo. 409, 108 Pac. 977.
19. *School District No. 14 v. School District No. 21* (1937). (On petition for rehearing) 51 Wyo. 370, 384, 71 P. (2d) 137.
20. *Gavit, The New Federal Rules and State Procedure* (1939) 25 A. B. A. J. 367, 370.
21. 1 *Moore's Federal Practice* (1938) p. 553.
22. *McCleod v. Cohen-Ehricks Corp.* (S.D.N.Y., 1939) 28 F. Supp. 103; *Dioguardi v. Durning* (C.A.A. 2d, 1944) 139 F. (2d) 774.
23. *Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co.* (C.C.A. 8th, 1942) 131 F. (2d) 419 (Pleader should do more than allege violation of anti-trust act in terms of statute); *American Broadcasting Co. v. Wahl Co.* (S.D.N.Y., 1940) 36 F. Supp. 167 (Claim that defendant infringed copyrighted radio program, held too general to apprise court of situation); *Keegan v. Ruppert* (S.D.N.Y., 1941) 5 Fed. Rules Serv. 8a25, Case 1 (action against two defendants for wages failed to state whether they employed plaintiff jointly or at different periods of time).
24. *Satink v. Holland* (D.N.J., 1939) 28 F. Supp. 67; *Vignovich v. Great Lakes S. S.Co.* (W.D.N.Y., 1942) 7 Fed. Rules Serv. 8a.25, Case 12, 3 Fed. Rules Dec. 69.

the judges have at least decided the cases not on metaphysical distinctions between evidence, fact and law, but have applied pragmatic tests of whether the complaint is so general that it fails to afford fair notice to the defendant²⁵, or whether it is so prolix that it cannot be called "a short and plain statement"²⁶ that is "simple, concise and direct".²⁷ While these tests cannot operate automatically to solve the pleader's problem in advance, their use involves practical considerations that should make it easier to foresee the action of a practical judge.

The Rule also differs from the code, as noted above, in abandoning the phrase "cause of action" and substituting the word "claim". Here again the draftsmen of the Rule sought to avoid conflicting and confusing definitions framed by the judges under the codes.²⁸ As said by Mr. Justice Cardozo:

"A 'cause of action' may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata. Cf. *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U. S. 611, 617; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 321. At times and in certain contests, it is identified with the infringement of a right or the violation of a duty. At other times and in other contests, it is a concept of a law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed."²⁹

These different meanings of this simple phrase have caused a great deal of confusion, especially when transferred out of their original contexts and used in one of the other situations. It was the hope of the framers that the elimination of the words might give the courts an opportunity for a fresh start and thus eliminate the confusion.

One of the least utilitarian outgrowths of the concept of a cause of action as being limited by the legal right sought to be enforced is the development of the doctrine of the theory of the pleadings:

25. *Kellogg Co. v. National Biscuit Co.* (D.N.J., 1941) 38 F. Supp. 643.

26. *Purcell v. Summers* (E.D.S.C., 1940) 34 F. Supp. 421 (Complaint of 39 paragraphs and answer of 40 paragraphs).

27. *Vignovich v. Great Lakes S.S. Co.*, supra N. 24; *Buckley v. Altheimer* (N.D. Ill., 1942) 6 Fed Rules Serv. 8a.25, Case 1, 2 Fed. Rules Dec. 285 (260-page complaint).

28. 1 Moore's Federal Practice (1938) p. 145.

29. *United States v. Memphis Cotton Oil Co.* (1933) 288 U. S. 62, 77 L. Ed. 619, 53 Sup. Ct. 276. (Footnotes omitted).

"It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed if he succeeds at all".³⁰ Of course every lawyer must have some theory of law upon which he intends to base his case. He cannot expect to throw a group of facts at a judge and expect the court to work out a theory when he cannot, but a real problem arises where it is necessary to shift theories at the trial, because some of the facts relied upon do not develop as hoped for, or where the law is unsettled and the judge seems disinclined to adopt a particular theory. Can a shift be made to an alternative theory, or will a new "cause of action" become involved in the case preventing amendment? A majority of the states would not allow the shift; the plaintiff must bring a new action.³¹ More liberal courts have said that "an applicant for justice is not to be turned out of the temple of justice, scourged with costs, because he happened to come in at one door instead of another".³²

The Wyoming Supreme Court has quoted language from *Corpus Juris* which would seemingly require the application of the stricter rule, in a case where plaintiff framed his petition so as to recover on a contract theory and attempted to switch to recover pursuant to a statutory right.³³ The shift in theory was attempted on appeal and another trial was a necessity. The court did not actually apply the strict doctrine, but sent the case back for a new trial after appropriate amendment of the pleadings, and based its decision primarily on the fact that defendant had no notice of the second theory. In a later case ³⁴ the court allowed the plaintiff to recover on either a tort or contract theory, where his pleadings contained facts that would support either rule of liability.

In *Finley v. Pew*³⁵ where the question involved was the propriety of an amendment under Sec. 3-1704, which permits an amendment conforming the pleadings to the facts proved when it "does not change substantially the claim or defense", the court stated that "the tests sometimes applied . . . are first, whether the same evidence will support both pleadings; second, whether the same measure of damages is applicable in both cases; and, third, whether a recovery on the amended pleading will operate to bar a recovery upon the other". The first requirement suggested by the court is much too strict since obviously there would be no necessity for an amendment if the proof conformed to the original pleading. This requirement was not actually followed by the court, which allowed a shift from

30. *Mescall v. Tully* (1883) 91 Ind. 96.

31. *Clark*, Code Pleading (1928) p. 177.

32. *Brown v. Baldwin* (1907) 46 Wash. 106, 89 Pac. 483.

33. *School District No. 14 v. School District No. 21* (1937) (on petition for rehearing) 51 Wyo. 370, 384, 71 P. (2d) 137.

34. *Diamond Cattle Co. v. Clark* (1937) 52 Wyo. 265, 74 P. (2d) 857.

35. (1922) 28 Wyo. 342, 205 Pac. 310, 206 Pac. 148.

an implied contract theory to an express contract theory, necessarily requiring some difference in the evidence. The second test is likewise too strict since very often a change in theory may result in a change in the measure of damages, but in a contested case this should be immaterial. The third test is valid, and should be the only one used, provided that the opposing party is given opportunity to meet the new cause in case of surprise. Like the Federal Rules, this section of the statute avoids "cause of action" and substitutes "claim". It is possible that this could have been a deliberate attempt to avoid the operation of the rule against amending from one cause of action (theory) to another.

The federal courts have on the whole treated the "claim" as not requiring theory pleading³⁶ and have been liberal in allowing shifts in plaintiff's theory³⁷ but have not condoned pleadings so confused and mixed that the court is not only uncertain as to the plaintiff's theory, but also as to whether he is entitled to any remedy.³⁸

While a change to the federal rule would have a major effect in a strict "theory of the pleadings" state, Wyoming's liberal treatment of the problem already approaches the federal result despite the unfortunate language from C. J. and the unnecessarily strict tests suggested in *Finley v. Pew*.

THE ANSWER

Form of Denials

Rule 8 (b). A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only

Section 3-1311. The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant.

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36. *Gins v. Mauser Plumbing Supply Co.* (C.C.A. 2d, 1945) 148 F. (2d) 974; *Cohen v. Randall* (C.C.A. 2d, 1943) 137 F. (2d) 441, cert. den. 320 U.S. 796. A few early cases required that plaintiff's theories be identified. *Atwater v. North American Coal Corp.* (S.D.N.Y., 1939) 2 Fed. Rules Serv. 8a.25, Case 2; *Baird v. Dassau* (S.D.N.Y., 1940) 3 Fed. Rules Serv. 8a.25, Case 1.
37. *International Ladies Garment Workers' Union v. Donnelly Garment Co.* (C.C.A. 8th, 1941) 121 F. (2d) 561; *Nester v. Western Union Telegraph Co.* (S.D.Cal., 1938) 25 F. Supp. 478.
38. *Catanzaritti v. Bianco* (M.D.Pa., 1938) 25 F. Supp. 457; *Johnson v. Occidental Life Insurance Co.* (D. Minn., 1941) 4 Fed. Rules Serv. 8a.25, Case 2.

the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

The code makes no mention of denials of information and belief, but apparently they are widely used in the Wyoming practice. This type of denial is of great utility to the conscientious pleader, who may hesitate to verify that a statement in the petition is untrue, but who is in doubt as to the facts and is unwilling to admit the statement. Such a denial will have the effect of putting the pleader on his proof.

In the one Wyoming case involving such a denial³⁹ the defendant, who was obviously in a position to know the facts, denied information or knowledge sufficient to form a belief. The court held this pleading to be improper, but on the basis that such an allegation was not open to one in his position. The inference is that the form could be used in a proper case.⁴⁰ Such denials may also be validated by the familiar rule of statutory construction, that where a statute has been borrowed from another jurisdiction the construction placed upon it by the courts will be presumed to have been adopted along with the statute. In 1860, long prior to the adoption by Wyoming of the Ohio code, it had been construed in *State ex rel. Treadwell v. Hancock County*.⁴¹ The Ohio court approved a denial of information and belief as being authorized by the equivalent section to Wyoming's Sec. 3-1604 which permits a verification to state that the affiant merely believes the facts in the pleading to be true.

The Federal Rule permits only the denial of knowledge or infor-

39. *Appel v. State* (1900) 9 Wyo. 187, 61 Pac. 1015.

40. To be distinguished is the situation in *Creamery Package Co. v. Cheyenne Ice Cream Co.* (1940) 55 Wyo. 277, 100 P. (2d) 116, where plaintiff in the reply stated that it neither affirmed or denied an allegation of the answer. Held, this was equivalent to an admission under §3-1402. Obviously the intent was to put the defendant on his proof, but the wrong formula of words was used and plaintiff put itself squarely within the rule that what is not "controverted" is taken as true. The denial of information and belief clearly controverts the allegation.

41. 11 Ohio St. 183.

mation sufficient to form a belief. Some states allow the companion denial *on* information or *according to* information.⁴² These denials may take care of the exceptionally fastidious pleader who, although lacking definite knowledge, has some information contrary to the allegation and has formed a belief. Apparently the framers of the Rule felt such a denial was of doubtful utility, since either a direct denial or a denial of information would fit the case and force the pleader to prove his allegation. There is no requirement that the denying opponent must bring out definite proof.

The adoption of the Rule would also legitimize another common practice of the Wyoming practitioner, the qualified general denial: "Defendant admits the allegations contained in paragraph one of the petition, and denies each and every other allegation in the petition". This form of denial has been criticized as unauthorized under codes which, like Wyoming's, mention only a "general" or a "specific" denial.⁴³ From the viewpoint of simplicity and brevity, the qualified general denial seems highly desirable, and its use is a sure escape from the negative pregnant trap which lurks wherever a specific denial is used to controvert an allegation that is in any way modified.

Rule 8(b) places a desirable limitation on the use of the general denial. It may be used only where the pleader in good faith intends to controvert all the averments of the preceeding pleading, and his attention is specifically called to Rule 11. The latter requires the attorney's signature on the pleading and makes it a certificate that there is good ground for the pleading and that it is not interposed for delay, and provides for the striking of improper pleadings and possible disciplinary action where the Rule has been willfully violated. The general denial, as commonly misused, is an evasive form of answer, which does not point out the matters in dispute, and wastes the time of the court.⁴⁴ It forces the pleader to go to unnecessary trouble, time and expense in marshalling and presenting evidence on every point in his case, whether or not it is sincerely disputed. A verified general denial is technically correct only where the defendant honestly believes that every allegation in the petition is a complete fabrication, surely an unusual situation. Justice would be swifter and cheaper if defendants, as well as plaintiffs, are required to give adequate notice of the matters upon which they intend to rely, by limiting their denials to the allegations that they seriously intend to controvert.

42. California, Idaho, Montana, Nevada. Clark, Code Pleading (1928) p. 404.

43. Clark, Code Pleading (1928) p. 397. Clark cites several decisions from the Ohio lower courts as criticizing the practice.

44. *Lapides v. Pecoraro* (1927) 130 Misc. 365, 224 N.Y. Supp. 101.

Affirmative Defenses

Rule 8 (c). In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . .

Sec. 3-1311. The answer shall contain: . . .

2. A statement of any new matter constituting a defense, counterclaim, or set-off in ordinary and concise language.

One of the most troublesome problems facing the attorney for the defense is whether he may prove a particular defense under a general denial, or whether he must set it out in his pleadings. Loosely stated rules to the effect that what a party pleads he must prove⁴⁵ make him hesitate to take up a burden that he might avoid, yet if he guesses wrong and relies on a denial he may find his evidence excluded.

The difference between affirmative and negative ought to be obvious, but it is not when it comes to pleading. The state courts have split widely on whether the statute of fraud is an affirmative defense, or whether it may be proved under a denial, whether or not the defendant must plead the bar of the statute of limitations, whether contributory negligence is a defense or its lack is a part of plaintiff's case. The adoption of the Federal Rule would settle the law clearly in nineteen of the most common situations, many of which have not yet been adjudicated in Wyoming, and would thus eliminate much uncertainty. It would change the Wyoming rule on the statute of frauds⁴⁶, but on the whole the notice function of pleading would be given added emphasis in that defendants would be required to give fair warning of their contentions.

The rule does no more than provide for the more common cases, and there is still room for controversy on what is "other matter constituting an avoidance or affirmative defense". The test most usually applied is that of consistency: If the defense is inconsistent with the facts alleged in the petition, it may be proved under a denial; if they are consistent, so that both may stand together, the defense is new matter that must be pleaded.⁴⁷ The Wyoming Supreme Court

45. "If he alleges a fact that is denied, he must prove it." *First National Bank v. Ford* (1923) 30 Wyo. 110, 118, 216 Pac. 691.

46. *Williams-Haywood Shoe Co. v. Brooks* (1901) 9 Wyo. 424, 64 Pac. 342, and *Davidson v. Nicholson* (1928) 37 Wyo. 412, 263 Pac. 605, allow the statute of frauds to be raised under a general denial.

47. *Clark, Code Pleading* (1928) p. 415.

has applied the test of consistency to several situations⁴⁸, yet has recognized that public policy and fair play may require that some defenses must be pleaded although inconsistent with the petition⁴⁹. Perhaps the best solution yet offered is found in the Illinois Civil Practice Act: “. . . Any ground of defense, whether affirmative or not, which if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.”⁵⁰

One other point with reference to the form of the answer deserves mention. Under Rule 8(e)(2) a party “may also state as many separate . . . defenses as he has regardless of consistency . . .” Under a dictum of the Wyoming court,⁵¹ defenses must be so far consistent that proof of one must not necessarily disprove the other. This requirement stems from the code ideal of fact pleading, but it also comes perilously close to the “theory of the pleadings” doctrine discussed above. The common law courts first allowed the defendant but a single defense, but under the “Statute of Anne”⁵² the defendant was allowed to plead “as many several matters thereto as he shall think necessary for his defense.” No requirement of consistency was enforced, but leave of court had to be first obtained, and costs might be charged to the defendant unless he had had probable cause to plead a defense upon which the jury rendered an adverse verdict. The familiar law school example of inconsistent defenses is the plea to a declaration of trover which alleged that defendant borrowed a pot and returned it broken: defendant did not borrow the pot, it was not broken when he returned it, it was broken when he borrowed it. Certainly these are inconsistent, if pure logic is to be applied, yet all of these defenses may be relied upon in good faith in the same suit. Perhaps the circumstances of the original transfer of possession might have given defendant the idea that the transaction was a gift, not a loan. Should his evidence fail on this point, he may contend that certain chips and cracks do not make the pot broken, and should he fail to convince the court of this, there may nevertheless be a genuine controversy over whether or not these chips and cracks were in the pot at the time he first received it from the plaintiff. If the rule of consistency is applied it forces the defendant to elect, early in the case, the one theory upon which he will stand, at a time when he is

48. *Mutual Life Insurance Co. v. Summers*, (1912) 19 Wyo. 441, 120 Pac. 185 (fraud in the execution allowed under denial of contract); *Iba. v. Central Association of Wyoming*, (1895) 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20 (Allegation of title in defendant held not new matter).

49. *First National Bank v. Ford* (1923) 30 Wyo. 110, 216 Pac. 691.

50. *Jones III. Stat. Ann.* 104.043(4).

51. *Wyoming Construction and Development Co. v. Buffalo Lumber Co.* (1917) 25 Wyo. 158, 166 Pac. 391.

52. 4 Ann, c. 16, §4 (1705).

53. *Clark, Code Pleading* (1928) p. 435.

not sure which theory is sound in fact or law, and he may be deprived of a valid and truthful defense.

The only requirement that should be enforced against a defendant is that he be as truthful as his knowledge of the circumstances will permit.⁵³ If his answer is obviously false and inconsistent to the point of obfuscating the issue, let it be stricken as are other sham pleadings, but pure logic should not be employed to deprive a defendant of his best chance of obtaining justice.

DEMURRERS AND MOTIONS

In his monograph on *Simplified Pleading* Judge Clark gives the history of pre-trial tactics and offers the complete abolition of the demurrer as a solution:

“The common-law objections, other than pleas in bar on the facts (traverse or confession and avoidance), could be raised by plea in abatement and by demurrer, general or special. The motion, too, was available, though not of significant use, due to the wide scope of the other devices. It is obvious, however, that each of these preliminary devices might easily constitute a battle in itself, so that in ordinary course two or three extensive hearings and decisions, involving all the paraphernalia of calendar assignment, briefs, arguments, rulings and formal orders, could be had in advance of trial, and could, indeed, be repeated as often as amendment of the pleadings was had. Of course, any attempt to enforce or require detail in the pleadings against the resistance of counsel would inevitably lead to such repleading, with new objections. Since we have seen, the pleadings really were not binding as final admissions on the parties at the trial, after literally years of these preliminary skirmishes the litigation might not have progressed towards real adjudication. In an attempt to shorten this process most of the codes provide that the plea in abatement for matters outside the complaint must be a part of the answer, thus eliminating one separate hearing state. But the motion assumed great prominence—either the motion to expunge or strike out or the motion to make more definite and certain—and consequently under the codes there was little, if any, substantial gain in reduction of preliminary sparring.

“One of the first planks of pleading reform, therefore, has usually been the abolition of the demurrer. Hence the federal equity rules and those of New York and other states did formally abolish the demurrer. The difficulty is that a substitution of the motion to dismiss, sharply distinguished from all other motions, amounts in essence to not much more than a change of name, without meeting the problem. Real reform must go further. It is to be found in the English system, Order 25, Rules 1-4, which is simple and direct and apparently quite satisfactory. Here all objections are stated in the ordinary pleading—in the answer when made by a defendant—and, upon request of the parties or order of the court, may be called up for preliminary hearing and disposition if in the opinion of the judge decision will substantially

dispose of the whole action or a distinct part thereof. There is further power to strike out a pleading summarily as disclosing no reasonable cause or answer or as being frivolous or vexatious. This latter power is availed of only in the clearest of cases. Obviously this system effectively eliminates all preliminary skirmishes except where the judge sees a real possibility of advancing the final adjudication by them. A party is still protected, however, as to points he really believes in by the opportunity to bring all of them up at the actual trial."⁵⁴

Demurrers

Rule 7(c). Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 12(b). Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to

Sec. 3-1303. The defendant may demur to the petition only when it appears on its face either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;

2. That the plaintiff has not legal capacity to sue;

3. That there is another action pending between the same parties for the same cause;

4. That there is a misjoinder of parties plaintiff;

5. That there is a defect of parties, plaintiff or defendant;

6. That several causes of action are improperly joined;

7. That separate causes of action against several defendants are improperly joined;

8. That the petition does not state facts sufficient to constitute a cause of action.

Sec. 3-2108. . . . the court may, at any time, hear a demurrer or a motion and may, by rule, prescribe the time of hearing the demurrers and motions.

54. Clark, *Simplified Pleading*, pp. 16-17 (Judicial Administration Monographs. Series A, No. 18. Published by American Bar Association.) Footnotes omitted.

and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(d). The defenses specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

It can be seen that under the Federal procedure the pleader has an initial option to take the same steps permitted by the Code or to follow the English system and set out in his answer his objection that no claim is stated. However, a strong-minded judge may, under Rule 12(d), order the hearing on the motion deferred until the trial, and thus impose the English system on the parties.

The desirability of abolishing the demurrer may depend upon one's view of the primary function of that pleading—whether as a device for delaying the plaintiff and discouraging him into accepting a smaller settlement, or as an efficacious means of adjudicating law suits. While statistics are not available, the usual result of even a successful demurrer would seem to be to make the plaintiff replead what the defendant already knew, and only rarely is a case finally disposed of by the court's ruling at the preliminary hearing. More often the demurrer goes to a point of form which leads merely to amendment. The result is delay and the most achieved is formal perfection in the pleadings. When a serious legal issue is presented the tendency of lawyers is to reserve their objection in law until the trial, then let plaintiff have both barrels at once on issues of fact and law.⁵⁵ The true abolition of the demurrer would make this practice the rule and would eliminate preliminary sparring on matters of form. In the case of the comparatively rare petition which states the plaintiff's version of the facts so fully and accurately that the objection of the demurrer goes truly to a crucial point of law rather than to a matter of form or omission, the trial may still be eliminated and the entire case disposed of on a preliminary hearing.

55. Clark, Code Pleading (1928) p. 371.

The demurrer is also used to test the sufficiency of pleadings subsequent to the petition.⁵⁶ The original Rules set out no preliminary procedure for testing the sufficiency of an answer other than a motion for judgment on the pleading which might not be applicable if one of several affirmative defenses were good or if the defense were coupled with a denial. This may have been due to an attempt to limit the number of pre-trial steps, with the feeling that such an objection could be made at the trial,⁵⁷ but it seems to have been regarded by the courts as an omission.⁵⁸ Rule 12(f) has now been amended to broaden the scope of the motion to strike so that it may be used against an insufficient defense. This amendment does add a step to the proceedings, but since in most cases the motion would be open to the plaintiff alone, who is presumably the man in a hurry, there seems to be only slight danger that the motion will be used for purposes of delay.

One other amendment to the Rules deserves mention. The last sentence of Rule 12(b) now legalizes, in a sense, the "speaking demurrer". At common law and under the codes the demurrer admitted the facts in the pleading attacked, but could not itself supply any new fact.⁵⁹ Since the pleader might carefully omit mention of a fact, which although not a part of *his* case, was decisive of the action, the demurrer's function of deciding cases on points of law is limited. The original rules allowed "motions" to be supported with affidavits⁶⁰ and evidence⁶¹. Did this apply to motions to dismiss which had for grounds the failure to *state* a claim? The point was raised in many lower Federal Courts. The Circuit Court of Appeals for the Second Circuit dealt with such motions to dismiss as motions for summary judgment under Rule 56,⁶² and the last sentence of Rule 12(b) now adopts that practice. In other words, the missing fact may be added only if there is no genuine issue as to its existence. Judgment as a matter of law may thus be rendered on the undisputed facts whether appearing in the complaint or pointed out in the motion.

Motion for More Definite Statement

Rule 12(e). If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a re-

Sec. 3-1410. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not a p p a r e n t, the

56. 1 Wyo. Comp. Stat. 1945, Secs. 3-1308, 3-1309.

57. Rule 12(h) has always provided that the objection of failure to state a legal defense to a claim could be made by a later pleading, a motion for judgment on the pleadings, or at the trial.

58. Modes of Attacking Insufficient Defenses in the Answer (1939) 1 Fed. Rules Serv. 669; (1940) 2 Fed. Rules Serv. 640.

59. Clark, Code Pleading (1928) p. 353.

60. Rule 6(d).

61. Rule 43(e).

62. *Samara v. United States* (C.C.A. 2nd, 1942) 129 F. (2d) 594, cert. den. (1942) 317 U.S. 686; *Boro Hall Corp. v. General Motors Corp.* (C.C.A. 2d, 1942) 124 F. (2d) 822, cert. den. (1943) 317 U.S. 695.

sponsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. . . .

court may require the pleading to be made definite and certain by amendment.

Prior to the 1947 amendments Rule 12(e) permitted a motion "for a more definite statement *or a bill of particulars* of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading *or to prepare for trial*".⁶³ This rule was much criticized by courts and writers as adding an unnecessary step in the proceedings, as neutralizing the "short and plain statement" envisaged by Rule 8(a), and as duplicating the discovery procedures available under other Rules.⁶⁴ The amendment abolishes the bill of particulars and no longer allows the motion for the purpose of enabling an attorney to prepare for trial.

One basic theory of the Federal Rules must be understood and accepted before the desirability of the amendment can be conceded. The Rules contemplate a rather general statement of the claim, but provide very extensive methods for the discovery of details by the use of dispositions,⁶⁵ interrogatories to parties,⁶⁶ production of documents,⁶⁷ and requests for admissions.⁶⁸ One aspect of the trial by battle heritage of a lawsuit has disappeared—no longer is the evidence in the case the secret property of the party in possession, to be sprung upon the opposition with the devastating effect at the trial. Therefore, when defense counsel in a federal suit is confronted with a rather general complaint, he does not move for a more definite statement and get a reply from plaintiff's lawyers, he goes about it in a more efficient way: He asks the person who knows, by taking depositions or serving interrogatories.

These procedures for compelling the opposing party to "disclose his case" were viewed with horror by some attorneys trained in the older procedure, and were criticized as being too expensive for run of the mill litigation.⁶⁹ The latter objection may be true of depositions on oral examination, but can be met by the use of interrogatories to parties and depositions on written interrogatories. The answer to the former objection depends upon one's concept of a lawsuit—as a contest between attorneys, with each in exclusive possession of whatever ammunition he might have, usually different, or as an earnest attempt to do justice where each party has equal opportunity to

63. Italics supplied.

64. 1 Moore's Federal Practice, 1947 Supplement, pp. 286 et seq.

65. Rules 26 to 32.

66. Rule 33.

67. Rule 34.

68. Rule 36.

69. (1939) 6 Jour. D.C. Bar Ass'n 113-116.

get all facts in advance and prepare and present his views of those facts and the applicable law.

Wyoming has very liberal provisions relating to interrogatories to parties,⁷⁰ admissions,^{70A} inspection and copying,⁷¹ and depositions⁷². They do not seem to be as liberal in regard to the scope of the examination as do the Federal Rules, nor do they provide for the cheap deposition on written interrogatories. The dearth of annotations would not indicate that they are widely used, but they are and have been available to the Wyoming attorney who desires discovery before trial. Without analyzing the differences between the Wyoming code and the Rules the question is posed as to whether the motion for a more definite statement should not be restricted, and discovery substituted as the proper and only method of getting the details of the charge.

Motion to Strike

Rule 12 (f). Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Sec. 3-1409. If redundant, irrelevant or scurrilous matter be inserted in a pleading, it may be stricken out on the motion of the party prejudiced thereby; and obscene words may be stricken from a pleading on the motion of a party, or by the court of its own motion.

Little can be said with regard to the motion to strike. Insofar as the motion is used merely to refine the form of the pleadings it adds little, if anything, to the quick and efficient administration of justice.⁷³ Insofar as it may occasionally narrow the issues, by resulting in a ruling that some line of attack is immaterial and as a matter of law cannot affect the outcome of the case, there is doubt whether it saves either the court or the parties any time or trouble. The immateriality could be attacked at the trial, probably less time would be consumed than required by two hearings, one on the motion and

70. 1 Wyo. Comp. Stat. 1945, Secs. 3-1503, 3-1504, 3-1505.

70a. 1 Wyo. Comp. Stat. 1945, Sec. 3-3116.

71. 1 Wyo. Comp. Stat. 1945, Secs. 3-3118 and 3-3120.

72. 1 Wyo. Comp. Stat. 1945, Secs. 3-2905 et seq.

73. "Perfection in pleading is rare. There may be allegations in the complaint which might properly have been left out, but this kind of criticism could be urged in all cases. Prolixity is a besetting sin of most pleaders. Courts should deal with the substance, and not the form of the language of the pleadings. Where no harm will result from immaterial matter not affecting the substance, courts should hesitate to disturb a pleading. Another consideration, in such circumstances, is that to grant the motion would delay bringing the case to a speedy trial." St. Sure, J., in *Securities and Exchange Commission v. Time Trust, Inc.* (N.D.Cal., 1939) 28 F. Supp. 34, 44.

one on the trial, and the pre-trial delay in getting to issue would be eliminated.

What about scandalous or scurrilous matter? It should not be allowed in pleadings, but should not some other method of dealing with it be devised? The motion to strike may lead to a preliminary decision that the matter questioned is scandalous, but in fact the undesirable matter stays on the record for all who care to see, and is usually repeated in the motion. Adding a stage to the proceedings hardly seems justified in view of the limited nature of this relief. Perhaps the most efficient solution would be for the matter to be brought up as a matter of discipline or reprimand at the trial, or at least the pleadings should not be delayed by a motion for such action, and the time to answer should not be tolled while the motion is pending.

ADDITIONAL PROCEDURAL DEVICES

Third-Party Practice.

Rule 14 (a). Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . .

This practice, often called by the name of "impleader", will in many ways enable a single law suit to do the work of two or three. In many situations where A sues B, who is responsible and can be made to pay the judgment, ultimate liability will fall upon C. Thus where a retailer warrants an article on the strength of a warranty made to him by the wholesaler, where a land owner is held responsible for the torts of an independent contractor, where an endorser signs as an accommodation, or where an insurer has taken out reinsurance, a suit against the retailer, landowner, endorser or insurer will establish his liability, but the disposition of the suit will not dispose of the entire controversy and a second suit may be required. In some of these situations the party sued may be allowed to "vouch in" his indemnitor by means of a notice to come in and defend the claim. This notice will not operate as process nor make the recipient a party to the action, but it will at least serve to make the decision in the first case *res judicata* in the subsequent case against the indemnitor so that the facts may not be relitigated.⁷⁴

This partial relief is apparently available in all jurisdictions⁷⁵, but the federal third-party practice goes a step farther and permits the indemnitor to be made a party to the first suit, permitting all claims arising out of the same transaction to be settled in a single suit. Impleader has been used in England and the United States Ad-

74. Cohen, *Impleader* (1933) 33 Col. L.Rev. 1147.

75. *Ibid.*

mirality Courts for many years⁷⁶ and would be a valuable addition to the Wyoming practice.

Summary Judgment

Rule 56 (a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The nuisance value of defense under traditional procedure is high. A person who has bought goods from another on credit and has resold or consumed the same and who is sued for their value may file, in addition to the usual motions and demurrers, an answer consisting of a general denial and perhaps a claim for breach of warranty of quality. He may then sit back, wait until the case is placed on the jury docket and is reached for trial, force the plaintiff to prove his case in open court under the application of all the technical rules of evidence, and possibly defeat the claim if some mischance occurs in the form of a lack of technical proof or loss of evidence. In the end he need do nothing and is liable only for the original bill, interest and an insignificant amount of costs.⁷⁷ The plaintiff business man, out of pocket his attorney fees, put to other expense including his labor and loss of time, mutters something about shysters and the law's delays, and next time bitterly allows a debtor to settle his bill at 50 cents on the dollar. The attorney for the plaintiff feels badly but can do nothing. The attorney for the defense shrugs and says he is a hired advocate who insisted on no more than his client's legal rights to have the case against him proved up to the hilt. Similarly, every attorney for an insurance company or large corporation has many times calculated the nuisance value of an unfounded law suit

76. *Ibid.*

77. Finch, Summary Judgment Procedure, (1933) 19 A.B.A.J. 504.

and paid to a claimant who is but a step above a blackmailer some lesser sum than the cost to his client of a full-dress trial.

The usual rules against sham pleading cannot effectively deal with this problem. An answer can be stricken as sham only if the defense on its face is not even arguable as a bar to the action.⁷⁸

The summary judgment procedure operates on the theory that no person has a "right" to use the machinery of the courts for purposes of delay and injustice. Even though an issue of fact may be raised by the formal pleadings, this procedural device gives the judge a preview of the evidence and if the issue is not genuine the judge is given the power to render judgment summarily. The court does not try the issue on the affidavits, depositions and admissions, but only determines if a real issue exists; if a bona fide dispute appears the motion will be denied and the case tried in the ordinary manner. The summary judgment should be granted only on evidence which a jury would not be at liberty to disbelieve and which would be require a directed verdict for the moving party.⁷⁹ It does not deprive the party of a jury trial, he is not entitled to any trial where his pleadings are mere sham and no genuine issue of fact exists.⁸⁰

The summary judgment is an old and well tried device. It was first used in the Colony of South Carolina in 1769, and today some form of it exists in England, the English Colonies and at least eighteen states, as well as in the federal courts.⁸¹ At first it was applied only in certain classes of cases where the claim was liquidated, but its scope has been enlarged to cover so many cases that the Rule takes the final step and removes all restrictions so that the remedy may be applied wherever it may successfully dispose of a case. The necessity of a liquidated claim is eliminated by the provision for a trial on the sole issue of the amount of damages.

Another sub-section, Rule 56(d), provides that if on the application for a summary judgment the case is not fully disposed of the court may conduct a pre-trial hearing at the hearing on the motion to determine what material facts are really controverted, and shall then make a pre-trial order specifying the real issues of fact and directing such further proceedings in the action as are just. Thus the case may be partially adjudicated on the motion, the genuine issues

78. *Ibid*, p. 506.

79. *Sartor v. Arkansas Natural Gas Corp.* (1944) 321 U.S. 620, 88 L.Ed. 967, 64 Sup Ct. 724.

80. *General Inv. Co. v. Interborough Rapid Transit Co.* (1923) 235 N.Y. 133, 139 N.E. 216; *Fidelity and Deposit Co. of Maryland v. United States* (1902) 187 U.S. 315, 23 Sup. Ct. 120, 47 L.Ed. 194.

81. In *Clark and Samenow, The Summary Judgment* (1928) 38 Yale L.J. 423, the states of Connecticut, New Jersey, New York, Michigan, Illinois, Delaware, Pennsylvania, Indiana, Virginia, Alabama, Kentucky, Arkansas, Tennessee, West Virginia, and Missouri are listed. Arizona, Colorado, and New Mexico have been added to the list by their adoption of the federal practice.

separated from the sham, and a great deal of time may be saved at the trial.

CONCLUSION

The comparison attempted here between a few selected Federal Rules and the related sections of the Wyoming code does not demonstrate beyond controversy that the code is all bad and out-moded and that the Rules are all good and the last word. No modern Dickens could write too tragic a tale based on a Wyoming *Jarndyce v. Jarndyce*. But the basic theories of code pleading go back to 1848 (the date of the first New York code) and the essential elements of Wyoming procedure were first made law in 1853 (the date of the Ohio Code.) A century later our practice is to be reexamined to see whether it conforms to "the purpose of promoting the speedy and efficient determination of litigation upon its merits".⁸²

The means of accomplishing this objective would seem to be a system of short, simple, flexible pleadings that will serve to give fair notice to the opposing party of the pleader's case, that will leave problems of style and form largely to the attorney, and that will not allow the decision to be delayed by shadow-boxing techniques that accomplish no substantive benefits. To be more specific and to summarize, it is believed that the basic theory of the Wyoming rule-making statute could be best subserved by the adoption of the following features of the Federal Rules: the abolition of the reply, the substitution of the claim for relief in the place of the cause of action, the clarification of the rules pertaining to denials and affirmative defenses, the restriction of the motion to make more specific, and the use of the impleader and summary judgment devices. Going beyond the Federal Rules, the demurrer by any name should be abolished, as should the motion to strike.

The Wyoming litigant—for whose benefit the pleading rules should be formulated—ought to be guaranteed a decision on the merits of his case with as little delay and expense as possible. Under our code it is possible that he may be deprived of any hearing on the substance of his claim or defense because of a mistake in judgment on the part of his attorney, which may consist of nothing more than the inability to predict the action of a judge. No matter how skillful his attorney, he can be assured that he will be delayed while technicalities of form are being ironed out, and he may be put to unnecessary expense in proving much that is not genuinely controverted.

This discussion has, of course, been fragmentary. Only a few basic rules of pleading have been investigated, while many more remain. Left untouched are practice problems such as commencement of actions and service of process, venue and trials, judgments and appellate review. Many subjects that are usually major planks

82. S. L. 1947, c. 53, §1.

in a platform of reform are already on the credit side of Wyoming's books: free joinder of parties and actions,⁸³ waiver of jury trial,⁸⁴ liberal amendments.⁸⁵ But the entire system should be gone over thoroughly. Half-way measures of procedural reform are not likely to accomplish very desirable results, and are too likely to be adopted as a compromise between the desire for reform and the conservative feeling that, after all, a pretty fair brand of justice has been administered for years under the old system. The danger of tinkering with the old system is that it requires the attorney to learn new rules without obtaining the full benefit of modern procedural thinking, and it may prejudice the bar against true reform for many years.⁸⁶ Furthermore the interrelation of different sections of the code frequently leads to difficulties when one section is changed and in a case not foreseen a conflict or inconsistency with another section crops up.

Many of the proposals here advocated will be resisted as going too far. Many are on controversial points upon which differences of opinion may exist without either side being guilty of radicalism or ultraconservatism. Without doubt other solutions to some of these problems are possible and feasible. The point is that a set of really excellent rules of Wyoming procedure will require much study and discussion. While the Federal Rules have been here used as our most modern example, their complete adoption has not been advocated. Many of the rules not discussed relate to purely federal procedure—these should be discarded. Undoubtedly many sections of the Wyoming Code have a peculiar value in the Wyoming practice—these should be retained. But more is needed than a few piecemeal amendments to our code, a major overhaul is required. The Supreme Court of the State of Wyoming and its Advisory Committee must develop and adopt a philosophy of pleading that will run throughout all its rules, and must promulgate rules that will translate that philosophy into a practical and efficient mechanism for the administration of justice.

83. 1 Wyo. Comp. Stat. 1945, §§3-613, 3-701.

84. 1 Wyo. Comp. Stat. 1945, §3-2422.

85. 1 Wyo. Comp. Stat. 1945, §§3-1704, 3-3202.

86. Clark, *Texas & Federal Rules of Civil Procedure* (1941) 20 *Tex. L.Rev.* 4.