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## PLEADING UNDER THE FEDERAL RULES

CHARLES E. CLARK\*

Professor Trelease, Chairman McClintock, Dean Hamilton, and  
Friends of the Wyoming Bar:

This is indeed a very gracious reception, but I knew I would have a warm response from you. I was assured just this week by my colleagues Judges Medina and Kaufman that they envied me, for they had had such a pleasant time out here. So I am the bringer of greetings from them to many of you individually and all of you collectively in recollection of their visit with you to recently. Of course, I feel I have other ties with Laramie. Bob Hamilton has spoken of the time when he was a student at Yale. One of life's enduring satisfactions for having been a teacher is to go around the country and see one's students in various places of responsibility. I would like to stop to brag about that—to refer, for instance, to my student the Mayor of New York, my student the Mayor of Philadelphia, my student who has just retired as Attorney General of the United States, my student who is Governor of Massachusetts, and my student who almost became Vice President. I will say, however, that I do feel almost at home in Laramie, because my dear friend and colleague of many years' standing, Thurman Arnold, was the Mayor of Laramie and always claimed that he was the only Elk on the Yale faculty. Another one of the Yale men we had from here was Dean Carl Arnold, a truly wonderful person.

So I feel quite at home in Laramie, but there is an even more compelling inducement for my coming. Other factors are pleasant and attractive to me in a personal way, but there is a professional reason that gives me a very solid sense of satisfaction. That is that when I look at your procedure, I feel right at home, not merely because I happen to work with the subject, but because it is now *the* standard procedure of the country. Indeed, it is getting more and more so; fifteen jurisdictions have now accepted the Federal Rules *in toto*, and another nine have adopted significant parts of them. Wyoming is, I think, the most recent. North Dakota is a very late addition to the list; and then of course there are various states that are considering them for adoption, such as Alabama, Idaho, Maine, West Virginia. And then there are all the federal courts. I really get a great thrill out of just being able to understand you and have you understand me when we talk procedure together. For we are at last beginning to talk a common tongue. I expect that laymen would be amazed at the fact that we haven't been able to do this in the past, that we have all been little separate centers or cells, without knowledge or ability to know what went on elsewhere. Now we can go around the country and refer to these various different sections of the Wyoming Rules

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and you'll find that lawyers understand them. And even in those few states that haven't been too much affected, the active Bar Associations, particularly the younger men of the Junior Bar, are working on this particular reform. So you will find that practically any of the standard parts of your practice are going to be universally understood. I think that is a wonderful and a very delightful and desirable thing. A lawyer from anywhere can come out here and appear in your courts and properly associate himself with you in a spirit of confidence that he will really know what goes on. That, I think is wholly desirable.

Now Professor Trelease quite practically and properly called attention to certain differences between your procedure and the federal procedure. Of course, you lawyers practicing locally will need to have these differences in mind. But let me say that in the broad sense they are not important. Naturally they must be understood for the day-to-day activities of litigation, but in the sense of fellowship and association among lawyers and of general knowledge they loom very small. I would say that Wyoming, along with such states as for example, New Jersey, Colorado, Utah, and North Dakota, is one of the states that I characterize, and I think quite properly, as a state which has adopted the Federal Rules completely. Of course we couldn't expect that all little local details would be worked out the same way everywhere. But what I am referring to are the very basic principles—the general idea of what we expect of pleading, the joinder-of-party sections, the important discovery sections, and so on. These are basic and general. These you have here, and that's why I like your rules very much. I think you will find them very useful.

I imagine from all I can hear that you do owe much to a few leaders and in particular you owe a great deal to Professor Trelease. I say that because I know that in all movements of this kind there always have to be some leaders. So one of the things that makes me more and more proud of my profession now—I'm not always proud of everything lawyers do—is the great new development of interest on the part of the Bar as a profession, particularly on the part of the organized Bar, to try to improve the administration of justice. I had occasion to say this in a symposium along with Arthur Vanderbilt and others a year or so ago,<sup>1</sup> and I'm glad to reiterate it, because I think there are some things about the Bar—the increase in specialization, for instance—which may give us some concern. So I'm glad to speak of something of which I wholly approve, namely, this professional interest in law improvement and reform. I happened to receive from Professor Trelease over ten years ago his notable article advocating this development, which I brought along and studied on the train.<sup>2</sup> I found it just as fresh, just as in point, as it was when it appeared—perhaps even more so, because now we have further proof of the desirability of the reform he advocated. I'm glad to see that the movement here has finally borne fruit as it has in so many other places.

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1. 5 *Journal of Public Law* 290 (1956).

2. Trelease, *A Proposal for Wyoming Procedural Reform*, 1 *Wyo. L.J.* 45 (1947).

It has been somewhat thrilling to see these developments around the country. I like to think, for example, of New Jersey, when I was a law student there was the most pristine, antiquated practice of any place in the United States, with separate courts of chancery and a hierarchy of vice chancellors, ordinaries, and what not. At first in that state there was an attempt to preserve this system, and early tries at improvement succeeded in providing that there shouldn't be much, if any, change. But that dynamic leader in law reform, Chief Justice Vanderbilt, took hold; and he and an able corps of assistants (largely lay citizens, as he loved to point out, since he always stressed the need of lay support) were able to push through a very complete reform.

Sometimes I think that often we get overanxious and want to push reform forward too rapidly for the community to accept. I have recently spoken of this with respect to New York in an article I have just completed.<sup>3</sup> New York is now trying in a somewhat half-hearted way to accept some of the Federal Rules, quite a little actually, while disguising what it is doing. I don't believe that this will work. It hasn't worked very well in any of the places where it has been tried. It's better to wait a little longer and do the complete job, rather than settle for piecemeal reform.

When I come to my real assignment here, which is partly instruction—for I'm still a teacher at heart—I have the feeling that like many a professor I will have shot my bolt in the first five minutes of talk, because there is not too much I can tell you. But at any rate I do want to bring you lawyers a message of encouragement. That is, that I don't believe you can go very far wrong in applying these rules. The bane of procedure over the centuries has been the fear that a bright man may trip up a weaker one and justice suffer. I think you are going to find it very difficult to have that result here.

There is really no new system set up in either the Wyoming or the Federal Rules. One could say in a sense that both are at bottom common law pleading, and one would be correct in so saying. For it is a fact that under common law pleading, just as now, while there was a great deal of strictness in spots, yet over-all a great deal of liberality was permitted. I guess lawyers weren't so different in the old days from what they are now. You had then a school which required fairly strict special pleading and a school which allowed very general liberality. An example of the latter were the actions in *assumpsit*, the common counts, and also the negligence action, trespass on the case—a matter I want to come back to in a few moments. But I want to say again that the rules in particular parts are not new. They were not intended to be new as such. There was no thought of suddenly developing a system which would be strange to everybody. The idea really was to take modern trends and developments and put them all together. Hence so far as the rules are new, it really is only

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3. Clark, *Two Decades of the Federal Civil Rules*, 58 Col. L. Rev. 435 (1958).

in a bringing together of matters which had been advocated and which had been generally tested somewhere.

So I think of the rules as the best epitome of general practice that we know, some of it English procedure, a lot of it the rather popular Federal Equity Rules of 1912, and some of it advanced procedure from the various states. As a matter of fact, when we were working on the Advisory Committee we had a saying that most everything that we passed was due to the "Minnesota bloc," as we called it. There was quite a little truth in that, though it was a bit of exaggeration. Thank God that Minnesota procedure was and is fine, since it had such a considerable effect in shaping our result. For the "Minnesota bloc" consisted of first our chairman, William D. Mitchell, a brilliant lawyer in Minnesota who went on to Washington as Solicitor General and Attorney General and then to New York, and who was ostensibly of the New York Bar, but actually owed his training and his active experience to Minnesota. The second member was Professor Edmund M. Morgan of Harvard, who likewise had had his basic training in Minnesota and had taught at the University of Minnesota, then at Yale, and then at Harvard. And the third man was really located in Minnesota, Professor Wilbur H. Cherry of the university there. So that made a nucleus right at once in favor of the best of state practice.

Therefore I want to say right now that I don't believe that any of you will feel lost or not at home in the new rules. In fact, I think that you will feel quite at home for the most part. A good share of the country subject to code pleading had developed rather reasonable and workable rules. Minnesota was one such state, Connecticut was another, and there was a block of states out in this part of the country, led by California. There were a few spots of difficulty. One of the worst and of course one of the most prominent was New York State, where they have everything—good, bad, and indifferent. Unfortunately the bad has a way of sticking, I find, in procedure. I sometimes refer to what I call a Gresham's law whereby the technical ruling will always drive out the liberal one.<sup>4</sup> At any rate, your state, so far as I know (and I did spend some time on your practice in working on my book on Code Pleading), had a good system. So this, I am sure, will be a system that leaves you quite at home and you don't need to feel strange at all.

Turning now to the matter of allegation, what is henceforth to be required? Well, I can say directly that if you have been able to practice law satisfactorily in Wyoming before, you will be doing it in much the same way hereafter. One of the tributes I've found to the Federal Rules and the state rules generally is when a good lawyer will say, "Why that is just what I've been doing. I'm used to that." That's what we have in mind.

Now to go a little more into the question of allegations, the basic

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4. *Id.* at 445.

principle of pleading under the rules is, as you undoubtedly know, a system of fairly general allegation. This objective has caused a certain amount of discussion and debate. I'm not at all sure how much I need to go into it here. I never am quite sure, because the principle is so generally and so widely accepted that I think often it seems like stirring up past matters, somewhat like the old separation of law and equity which has been a thing of the past in a state like this for many years. But on the other hand, every little while there seems a recurring hope or belief that we can somehow tie the parties up and avoid trials by requiring detailed pleading. So perhaps I ought to speak about this. Some people love to say that all the rules require is fair notice, that pleading under the rules is only notice pleading. No member of the Advisory Committee, so far as I know, has ever said that, and of course that isn't the real theory. Notice pleading is a beautiful nebulous thing. I ought not to say too much about it because there are two pretty good decisions of the Supreme Court that speak of notice pleading. One of the last was the *Conley* decision<sup>5</sup> just this fall, where Justice Black for the Court speaks of modern pleading as being designed only to give fair notice. I don't use that expression—not that I object to it as such. I think it is something like the Golden Rule, which is a nice hopeful thing; but I can't find that it means much of anything and it isn't anything that we can use with any precision. What we require is a general statement of the case, and our best precedents are those that have been honored over the years, which shows that we haven't done anything really violent. We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms. These are important because when you can't define you can at least draw pictures to show your meaning. Well, we've drawn pictures and you, too, have added the illustrations by way of your model forms.

First, let's take up what is perhaps the most discussed form of all, because I think it well illustrates our meaning. That, of course, is Form 9, an old friend, probably the most used one of all in the state courts and possibly, too, in the federal courts—the complaint for negligence, and particularly for injuries suffered in an automobile accident. When this form was first recommended in the rules it was attacked, I remember, by Senator King of Utah on the floor of the Senate.<sup>6</sup> He quoted some lawyer in the District of Columbia as saying that this form, this complaint, would not be good in any place in the country. Well, he hadn't spent much time on his lessons, obviously. The form we use was a direct copy of the Massachusetts form provided in the Massachusetts statute. Actually, of course it didn't originate in Massachusetts. It is straight from Chitty.<sup>7</sup> It's a common law action on the case directly. It was upheld in *Williams*

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5. *Conley v. Gibson*, 335 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

6. 83 Cong.Rec. 8480 (1938).

7. 2 Chitty, Pleading 529 (7th ed. 1844).

*v. Holland*.<sup>8</sup> Those of you who may have used my casebook on *Modren Pleading* will find at page 65 the *Reichwein* case<sup>9</sup> from Rhode Island—which I suppose is as close as we have now to a common law state—upholding this same complaint. Of course, it is what common law pleaders grew up with—there is nothing strange here; it's what we've always had.<sup>10</sup>

Another reason why Form 9 is good is that the rules say it is good. As Rule 84 was originally drafted, we did not have a statement that the forms were sufficient under the rules. We just said that they were illustrative. Then the usual result occurred. Most judges thought they were pretty good. A few judges, however, wrote opinions to say that they were inadequate, and those are the decisions that get publicized. So the amendment of 1948 was put in to say: These forms are good, and that's what we put them in for. In this we leaned upon our good friend Senator George Wharton Pepper, a member of the Advisory Committee, who, whenever we'd get stuck with an idea we couldn't express in quite the best way, was always a marvel at telling us how to do it. So now Rule 84—I am reading from your own rules—says: "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."

I want to go one step further on that, because the mere fact that it appeared in *Chitty*, or the mere fact that it was sustained back in the *Bingham Reports*, or even that it was applied in Massachusetts wouldn't be enough. It might be that we ought to get away from it. But I will now ask, as I have often done, of any you who think this is a skinny complaint, What more would you seek? That is a question that I have tried to bring up often when this problem of detail arises. Now let's have in mind that you have at hand the weapons of discovery with interrogatories, depositions, and so on. If there is something specific you want to know, ask for it, get at it that way. But why make a general attack on the pleadings? Could you demur for failure to state a cause of action? Of course not, for a cause of action is stated, as *Williams v. Holland* held. Or let's suppose you want to move for a more definite statement. What do you want to get? This complaint particularizes the accident from among all other accidents in the world and gives you the basic picture. If you can't fill it in, you're not living in this world. What happens in an automobile accident? The most usual complaints are, of course, speed and wrong position on the highway. You can bring in some others that are accessory, things like defective headlights, lack of brakes, etc. Suppose you were to make a motion to make this complaint more definite and certain, halfway hoping that you can catch the lawyer for the plaintiff knowing his case only incompletely before the trial. What the pleader is going to do is to state what comes to his mind. Suppose that he says that the defendant was driving on the wrong side of the street, and says

8. 10 Bing. 112 (C.P. 1833).

9. *Reichwein v. United Electric Ry.*, 68 R.I., 365, 27 A.2d 845 (1942).

10. Clark, *Code Pleading* 241-245 (2d ed. 1947).

nothing about speed. The matter comes to trial, and a witness, a bystander, says, "Why he was driving too fast. I'd estimate he was going 60 miles an hour." Do you think there is any tribunal today that would say, "We must shut our eyes to that evidence because speed wasn't specified in the complaint?" Well, if so, they will surely be reversed, as they ought to be, because that is one of the essential facts. And so I suggest that in reality you are not going to get anything more than this form says and that you shouldn't.

You may ask, Why go this far, then, and say as much as Form 9 says? Why not go to the other extreme and say, "I want you to answer in a tort action," or something like that? Well, I think the answer is quite simply that we want to get what we can easily get that will be helpful. We want the lawyers to "do what comes naturally." That is why these rules are grounded in history. That is why, for example, you have essentially the common counts in the forms dealing with debt and contract. Why not? That's a part of the lawyer's background. Had we a different background, had we not been brought up in the Anglo-Saxon tradition, these wouldn't be usable. But this comes back to an issue of communication, and what serves as a good form of communication among lawyers is desirable here. So the advantage of a form like Form 9 is just because of its history. That's what lawyers would naturally say. That's the way we were brought up. In general we can get that much of very definite statement, and it is helpful. It particularizes the matter from any other case. It is perfectly adequate for *res judicata* purposes, and yet it isn't something a lawyer is going to feel unduly pressed for, as he would as to such details as speed, defective headlights, and the like. He may not know all those details. He may not know what his witnesses are going to testify. And further the witnesses cannot and should not be limited at the trial if some fool lawyer has not put in everything he can think of.

I have often gone back to my short period of practice when I was a junior in an office where we were defending the trolley company, and whenever anything happened within a block of a car the trolley company was always sued. There was one distinguished lawyer who had a perfect form for that sort of thing. He had everything in it. Thus he had allegations concerning a person crossing a street, and a passenger in a car, and a collision between an automobile and a trolley car, and so on. He used to put all that in every complaint. I remember going to my chief and saying, "Look, here are allegations that can't possibly concern us at all. Don't we want to do something about it?" My chief looked at me down his nose and said, "What?" This was back in Connecticut in the old days and I said, "Can't we demur, or more to strike out, or something?" "Well," he said, "what good would it do? The judge will probably say, 'Don't be silly. Don't bother me. You know that isn't going to apply. What harm does it do?' The only reason for making a motion of that kind would be that we weren't prepared, and if we wanted some time we would make it.



But we don't need any time. So let's go ahead and I'll see if I can make some fun of those allegations before the jury." That's one way to settle the problem of pleading of detail. Pile on the detail and nobody can kick that you haven't said enough. But a much clearer way is the way that is done here.

Now, as I say, I often fear that I overdo this explanation. So far as I can see, almost everywhere in actual practice that is what happens. I don't see many requirements now of more detail, but every little while there seems what I think can properly be termed a "flash-back," and sometimes a series of judges will be found doing that sort of thing. They begin to think that this is an awfully broad complaint, and that they can save time by requiring details. Now I want to say that I have never seen any saving of time and I have a good example that I want to present to you because I think it is of some immediate interest. This happens to deal with pleading in what is called the "Big Case," the Sherman Antitrust cases around New York City. Many of you may not have many antitrust cases, and you may say that this isn't too much in point; but I think it is in point, because it is the same problem, only perhaps more pointed. Some of our judges in New York, being quite pressed by the defense bar on the ground that they could shorten those very long cases by requiring further particularization, started to take steps that way, in one or two cases actual dismissal, usually dismissal with permission to amend, and occasionally just a motion to make definite and certain. Judge Murrah came to New York to conduct a seminar on the best disposition of these long and involved cases, which are a heavy load for the district judges. I gave a paper there called *Special Pleading in the "Big Case"*?<sup>11</sup> and I went over the docket in New York on some of these recent cases where they tried to order more particularization. All I could see in result was about a doubling of the length of the complaints, with no advantage whatsoever. I say that quite deliberately. The amended complaints were full of chiché allegations that added nothing that I could see. Apply this to a case like the one I've been discussing in negligence. What can you hope to obtain? What can you hope to learn about the misconduct of driving an automobile? After all, that is a rather standard form of misconduct nowadays. A good deal the same thing comes up with these antitrust cases. What can you hope to obtain? So far as I can ever see, all that they are really asking for are particular instances of discriminatory sales. That, as it happened, was the particular kind of case we were considering, dealing with price cutting, price discrimination, violations of the Robinson-Patman Act. What results is that the order for further pleadings leads to a year's or so delay, to more rulings of one kind or another, and to a complaint which is more verbose than before. In my paper I said that of course a judge should have discretion, as he would have under these rules, to go about ordering a perfecting of the pleadings if he thinks it worth while. That discretion the trial judge has. I don't think it should go beyond

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11. 21 F.R.D. 45 (1957).

that, however. I don't think he should dismiss the case. But then I added this: "But is there time in the Southern District [of New York—the busiest district in the country] for such pruning and perfectionism when the easier course is just to treat such excesses with silent disdain?"<sup>12</sup>

Historically the great period of particularized pleading was in England under the Hilary Rules, which turned the practice toward particularization under the leadership of the famous Baron Parke. Parke was pilloried in the famous and wonderful piece by Serjeant Hayes entitled, "Crogate's Case: A Dialogue in the Shades on Special Pleading Reform," between "Baron Surrebutter," a thin disguise for Baron Parke, as the exponent of detailed pleading, and Mr. Crogate, who lost out in the famous case of that name,<sup>13</sup> because his lawyer made a mistake in the replication *de injuria*. I shall not go into it here; if any of you are interested you will find it discussed in my article.<sup>14</sup> In this little piece of mine I said that I fear that our trouble now is that none of us have either the zest or the guts of old Baron Parke to make our pleading rulings stick. And that's the trouble with any one who calmly looks at this from the standpoint of the defense and says, "Wouldn't it be wonderful if we could only get the fellow to state his case so particularly that we could kick him out!" You're not going to get any judges to stick with you. Maybe we should, but I don't think so, and we just aren't going to. Go back to my case of testimony in the automobile accident case where the plaintiff under pressure may have started to state some grounds of negligence and forgotten the essential ones. Judges nowadays, when the trial comes, are not going to penalize the plaintiff because his lawyer was careless or dim-witted. That's the rock that you're going to fall on. So I say again, Let's come back to "doing what comes naturally." That is what I think we have here, without trying a supernatural or an unnatural way. There are remedies for indefiniteness, as will be pointed out later, and other ways of developing a case along lines which will make a party's assertions stick. Thus if you take the depositions of a man, he swears under oath just what he did. So this isn't and can't be a case of allegations that his lawyer makes and that he can repudiate.

In this connection our court has recently had occasion to try to return the practice to what seems proper. So along with my little paper I want to give you the citation to the *Nagler* case, because it discusses these problems. The case is a reversal of a dismissal for improper pleading.<sup>15</sup>

The question may be asked, If the motion to make more definite is so seldom used or seldom granted, why is it left in the rules? My answer is that I did my very best as Reporter to have it left out. It so rarely serves a useful purpose that I think the opportunity it affords for delay outweighs any utility it might be thought to have. You will remember that the

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12. *Id.* at 51.

13. 8 Co.Rep. 66 (1640).

14. 21 F.R.D. 45 (1957).

15. *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957).

Advisory Committee in 1948 did take out the bill of particulars. That had been a favorite battleground for would-be special pleaders. There had been more cases on the provision for the bill of particulars than on any other rule. Most of the requests were denied. But every now and then one of them would be granted, and that one always received the publicity. So we took it out. Not wanting to go too far, we left in the motion for a more definite statement, but so restricted it that it can hardly ever be used with disastrous effects.

I have said that I didn't know how much of this would seem like old stuff to you or how much of it was fresh. I never am quite sure. I do make these explanations because I find there are always those who want to challenge the basic theory. Let me say that so far as I can see the rules are pretty generally accepted and liked. From time to time this question of detailed pleadings has been raised. The basic rule which brings this out of course is Rule 8(a) (2) on statement of the claim, supported by the forms that I have been speaking of. There has developed in the Ninth Circuit in particular, led by two or three rather strong-minded individuals, a desire to return to the old nebulous statement of the "facts constituting a cause of action."<sup>16</sup> But I know from much correspondence that a considerable majority of the bar out there didn't go along. For example, although one of the judges, Honorable Pierson Hall, was quite active in the movement for change, his Chief Judge, Leon Yankwich, and Judges Mathes, Carter, and Goodman, among others, didn't agree. At any rate this group was interested enough so that they supported the thesis of going back to the old form of statement of the cause of action, and even came on before the Advisory Committee in Washington to urge that change. The Advisory Committee considered it, and made a statement which so far as I can see has been pretty much accepted. One of the objections made by these gentlemen from Los Angeles was that they thought notice pleading was provided for; but we pointed out that, while that was the idea of some of the text writers, it was not an idea in the rule itself. In the 1955 Report to the Supreme Court the Advisory Committee made its statement as to what it thought was the proper meaning of this provision of the rules. I would very much like to refer you to that, for I think it is a final and a completely definitive statement. You will find it, of course, in the original report,<sup>17</sup> but I took occasion to reprint it again in this article of mine.<sup>18</sup> A part of its felicity of language is again due to our good friend Senator Pepper. The Advisory Committee says in its note to Rule 8(a) (2) that the rule is retained in its present form, as being adequate, but that this note was appended in response to various criticisms. I'll read only two sentences, because I think they are informative: "The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep

16. Claim or Cause of Action, 13 F.R.D. 253, 279 (1951).

17. Report of Proposed Amendments 18, 19 (October 1955).

18. 21 F.R.D. 45, 53 (1957).

away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." Then we come to the final conclusion: "It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets for the characteristics of good pleading; does away with the confusion resulting from the use of 'facts' and 'cause of action'; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." That was our final definite statement. It's not notice pleading. It's more than that. It's a general statement of the case, but it is not detailed pleading either.

So far I have covered only the basic provisions, Rule 8(a). Of course that is supported by other directions, Rule 8(e), for example, which requires that pleadings shall be simple, concise, and direct, and provides for alternative pleadings. And you will see that the old requirement of consistency is gone. You don't need to make sure that your claims or defenses are legally consistent. Of course you don't need to, because that's the way the case may appear to the lawyer. When he starts the suit he may not know which of two alternatives is the sound one and he can so state. Rule 9 gives us specified directions for pleading some matters. Another rule which has some bearing on the form of pleadings is Rule 10. Rule 10(a) tells you how to make the caption. Rule 10(b), I think, is important as having a bearing on this general principle I've spoken of. The suggestion is here made for numbered paragraphs, because that is handy, with the further suggestion that so far as practicable there be a statement of a single set of circumstances in a single paragraph. Then there is this last sentence: "Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense. . . ." So far that's old technical stuff, which was often used to get delay; but here is something added which makes this rule functional, i.e., draws its teeth in a technical sense and leaves its application where it should be, within the discretion of the trial judge. This is the addition: "whenever a separation facilitates the clear presentation of the matters set forth." I don't believe many of you are going to be able to go to the Supreme Court of Wyoming on a denial by a judge of a motion to state separately the causes of action. At least I should think not; for if the judge says it looks good enough to him, it should stand. Of course in general that is the attitude the federal judges have taken.

I want to say one thing more about this approach. The criticism that has caused me as much concern as any is that all this results in promoting sloppy pleading and general incompetence among lawyers, and leaves no premium for skill. Let me say that to certain extent there may be some truth in the criticism, but to that extent the consequence is justified and necessary. I don't think it is true in large measure. I think a good statement of the case in your pleading is just as effective as it ever was. It's an

ideal to be striven for. Putting your best foot forward of course is a part of good legal practice and preparing a pleading is a matter for careful thought among those of you who wish to do it properly. But after all, we can't say in a democracy such as ours that only a person who can "wield the surgeon's knife"—to give an analogy from another profession—that only such a one can bring a case. We don't so require. We regularly allow people to bring their own cases. I want to say that among the most troublesome cases that we have in my court are the appeals where the parties persist in representing themselves. But that is a well-settled privilege; and as experience has shown from the time of Baron Parke on, we cannot establish rules of unusual precision in a matter of this kind, in a matter of approaching the courts for justice. Our ideal is much broader than that. I think it's a sound philosophical approach to say that in this stage of coming to the courts we allow any person to come in and put his claim before the judge. We don't want to establish rules with which only the highest grade counsel can comply. As a matter of fact, for years Senator Walsh of Montana held up the passage of the Enabling Act for the Federal Rules, with the reiterated complaint that this was an attempt of high-priced counsel to force their own absolute requirements on country lawyers. I don't know whether Montana is as country as all that, but this was a specter which apparently had grown up in response to the idea that metropolitan or city lawyers were trying to push Montana lawyers out of a specialized and highly esoteric practice. I wonder if Senator Walsh could see the kind of general and useful practice that we now—practically all of us—are actually pursuing, whether he wouldn't feel that his objection was one that could be met and one which did not need to be true of our procedure.

You will see from such things as Judge Murrah's very fine and complete demonstration of pre-trial here and Mr. Winner's exposition of discovery that those devices are the real complements, the necessary corollaries, of the kind of system of pleading we visualize. The pleading starts the case off generally. When you get to the point of trial preparation, then you are really going into the merits. You need to have these other adjuncts! And with them available, it would have been foolish and very wasteful had you spent two or three years on preliminary motions attacking the pleadings. When you get into court and well under way, the thing to do is to go right to these other procedures, which are really parts of the trial. As Judge Murrah said in referring to a piece I have written on that,<sup>19</sup> they are a substantial part of the trial and of course have the same results and the same consequences, i.e., are as decisive, as trial. A lawyer may make allegations for a party in his complaint, but no one now can hold him to them. We can think we are going to; but as I mentioned, we really haven't the force of character, or whatever it may require, to refuse to allow him to shift his position. But when that party has testified,

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19. Clark, Objectives of Pre-Trial Procedure, 17 Ohio St. L.J. 163 (1956).

has answered under oath in a deposition, and told what happened, of course you have something which he cannot repudiate.

I want to speak just a little of some of the things that Mr. Winner spoke of as to discovery, because I was so glad to hear a real voice of experience. His enthusiasm is the general response we get. The Administrative Office had a study conducted on the effects of pre-trial a few years ago.<sup>20</sup> This showed that the lawyers in general where the practice had been worked have the attitude that discovery is successful and helpful. I was glad indeed that Mr. Winner suggested among other things that he thought the interrogatories could be used perhaps more than they had been so far. That seems to have been the experience in Philadelphia, where the discovery machinery has been pretty well used. Much has been made there of the interrogatories; it seems to me, and I make this suggestion, that the interrogatories are a very useful and practical thing for the lawyers to have at hand.

As a matter of fact, you don't need to have any fuss or furbelows of any kind in making use of them. I don't see why the simplest way when you want to learn something is not to call your adversary counsel on the telephone and simply ask him. Now it is true that the interrogatories are not to be used to develop the case to which the opposing party is going to testify. They are not that complete. You just want them to get certain pieces of information that you need to go ahead. So I don't see any reason in the world why you can't phone your adversary (I say phone him, since why do you need to go through the serving of formal interrogatories when he knows that's just what you can do if he doesn't answer?) and say to him, "Say, Bill, whom do you expect to have as witnesses?" Now, of course, it would be quite surprising under the old ideas to have anything like that occur. And I will stay that there are some courts now that still raise objection to that sort of thing; and among matters which the Advisory committee had hoped to straighten out was that problem. But it doesn't seem to me that there can be any doubt that that is quite a proper thing. The hue and cry is raised, "How does the counsel know whom he is going to ask?" Well, he may not know completely; but all we want is a little good faith and a few steps toward putting the other man in the same situation as to knowledge of the case that you have.

That leads us to another thing that Mr. Winner demolished, that old shibboleth the "fishing expedition." About the best all-round thing we have done is to have run that down to earth and gotten rid of it. It doesn't seem to me that it was ever a fair or an appropriate saying. How is it a fishing expedition when you ask the other fellow about a case that involves both you and him? It seems to me that that is a matter in which you and he both should be vitally interested in getting at the facts, and it isn't being personal or anything like that to inquire about it. It is something that one is entitled to know.

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20. Speck, *The Use of Discovery in United States District Courts*, 60 *Yale L.J.* 1132 (1951).

Now, one of the really great developments in discovery, one of the things that really separates discovery under the modern rules from the old days, is a very simple little change in the theory, one connected with this idea of the fishing expedition and carrying out the same thought as that behind its elimination. It is that fundamentally "Ye shall know the truth and the truth shall make you free." The most important weapon is truth, not concealment or surprise. We are doing much better in the law now that we go on this theory that what we want to know is what happened.

The real change in the attitude toward discovery came when we got away from the idea found in all of the old discovery provisions, that you can only discover matter material to your own case, material to your own complaint or to your own defense. How silly, really! Under the old rule you can ask only for what you already know. You can't ask about the other fellow's case. And so I say, What curious deductions we did draw—the thought that anybody would much want to discover his own case. Once in a while you might like to protect yourself and call a witness to get him on record, but by and large of course you know the case you are working on. What you want to know is what the other fellow knows. The modern idea is that that is just what you are entitled to know.

So I say I was very glad indeed to have Mr. Winner bring out those points so well. I think one of the major accomplishments that we have is to put truth ahead of cleverness and tactics, to say that we are all searching for the truth. One way of searching for it is that we even exchange information; we say that my opponent is entitled to know what I know and I'm entitled to know what he knows. Of course that is one of the bases for modern settlements of actions, because you are in so much better situation to settle your case when everybody, including the judge (who may be helping you out when he concludes his pre-trial conference), has some real knowledge of the strength and weakness of your position.

I would like to stop, too, to discuss with you that new provision as to inspecting documents, proposed Rule 34 (b), that has raised some question. It is, I fear, a rule that is being unfairly criticized by those objecting to its passage by the Supreme Court of the United States.<sup>21</sup> Actually you have adopted it before it has been accepted by the Supreme Court. I think that there is no question but that it is an important and a desirable amendment. It is possible that it isn't stated clearly enough to be understood by the ordinary person. If so, perhaps something should be added. But as you will see from the Advisory Committee's notes to the Supreme Court, it is intended to combine and to make clear the interrelation of Rules 33 and 34, and also to do away with an unfortunate formality of always showing good cause whenever you ask for a written document.

On this there has been some division of opinion. Some courts, having

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21. Tolman, *Discovery under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 Col. L. Rev. 498, 509-515 (1958).

seen the old Rule 34 requiring good cause, have said that you could not do such a simple thing as say at the end of your interrogatory, when you've asked if the contract was in writing, that "if in writing attach a copy to your answer," which is the simple way to do. Of course you do that in a sense when you serve a subpoena duces tecum. The idea of this formality is unfortunate, and I think it is desirable to get away from it. More and more in the rules the attempt was made to avoid little motions which were usually granted as of course, to avoid running to the courts for all sorts of little things. That is why one of the important parts of federal deposition and discovery is that you start out not by going to the court and getting your court order, as in many states, but by serving notice. It is perhaps a little thing in itself, but it saves a lot of time and trouble for the court. Whenever the parties are going ahead quite naturally with these fundamental remedies they can do it without any court interference at all. So in general the thesis is that you go to the court on these preliminary matters only when you need help or protection, but you don't need to go merely to get started.

Now that ties right in with this new Rule 34 (b). As it stands, whenever you seek a photograph or paper, under Rule 34 you are supposed to go to court and show good cause. Your motion is likely to be granted practically as of course when you get reached on the motion calendar, because the court is then not going to know the details of the case and is pretty sure to take the lawyer's assurance that the matter is relevant and important to his case. The proposed Rule 34 (b) has a definite, important intent to get away from that bit of formality.

Let me now turn back to matters of pleading. I trust you will understand, as I think must be clear, that in these somewhat informal remarks I can't by any means give you the whole system of practice. I may not even succeed in giving you the things that interest you, because I have to pick out the things that I think may be important, and they may not be of importance to you at all. I hope, therefore, that this is just a beginning of study for you, and that I have made some suggestions of interest to you and have stimulated you to think and study and do further research. I know I haven't covered the subject more than that. Let me say one thing more about the general thesis of pleading that was raised by a question I was asked: What do you do with a complaint when you can't work out the theory of the pleader, because, for example, he hasn't distinguished between malicious prosecution and false imprisonment? But why should you do anything? My answer is that the pleader ought not be required to discriminate between the two; nor should he be particularly held to having chosen one theory. The general theory, as we stated in the case of *Gins v. Mauser Plumbing Supply Co.*<sup>22</sup> (a statement that has been quite often quoted), is that the best way to plead is to set forth a simple statement in sequence of the events which have transpired.

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22. 148 F.2d 974, 976 (2d Cir. 1945).



I'd like to emphasize that. You don't plead malicious prosecution, you don't plead false imprisonment, you just say what plaintiff and defendant did, what happened. Then it is for the court to put on any legal labels that are needed. If the parties do give such labels, that's just a way of being helpful. So if the pleader wants to tell us a little theory, that's all right, but it's not binding. It's not for him to say. It's the court's duty, and that not only is emphasized in the general background of statement and in the precedents themselves, but is made very clear by one provision of the rules that you ought always to have in mind, Rule 54 (c), entitled, "Demand for Judgment." This rule first states the ordinary and usual limitation on default: a default judgment where the defendant does not appear cannot be different in kind or amount from that prayed for. But the rule goes on to say that in all other cases every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. Now that's important and very significant for the theory it means. It means just what I've indicated. When the parties are at issue, it is for the court to award the judgment. The parties may suggest and the parties may help out, but the court should fashion the result. And the court is not limited to what is stated in the pleadings. You will find in the cases that this rule is often cited and generally applied when the parties are at issue, whether or not they have asked for a particular relief.

Another provision which carries out this same thesis and is also very important is Rule 15 (b), "Amendments to Conform to the Evidence." In effect this says that when you've tried the case, when you've tried an issue, your pleadings shall be deemed to have taken care of it, whether stated or not. This is not particularly new; it is an adaptation of ideas that we have long had. It is amplified and I think stated more clearly. But again it's just the old idea we've had that when you've had a trial and the matter has been thoroughly gone into, then you should have a complete settlement and the court should award the relief which the facts require. The rule states that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. It goes on to say that the court may order an amendment, but may go ahead even without the amendment, and that, too, is often applied. I can think of many cases in our court where we have relied on it. Of course this is a matter which primarily comes up in the trial court, but we get the proposition often, because counsel going over the record below with a fine-toothed comb will say, "Why there's no pleading here. This isn't what was pleaded." Then we simply cite this rule and say, "Well, it was tried, and that's all there is to it." For my part I think that is a very sensible way to handle it.

With this as with many rules you can, if go over them carefully, think of all sorts of little questions that may still arise. There is one here that I think is a bit amusing. You'll notice that this applies to a case where the

issues have been tried, with the parties consenting, expressly or impliedly, which of course means if the parties don't object. I'll ask you what can be done if the parties object, but the judge goes ahead and admits the evidence, but doesn't require the pleadings to be amended, as could be done under the next sentence. You know a judge sometimes will not protect his own record, and lawyers who should be protecting it will forget to do so. Suppose there is an objection to evidence as not relevant to the pleadings. If there were no objections and it came in and was tried, this provision would cover it. But assume that there has been an objection and the judge says, "Ah don't bother me. You're highly technical, Mr. Lawyer. Admitted." And you go ahead and try it and the matter is pretty thoroughly gone into. Then you get in the upper court and the claim is made that this provision cannot apply because it applies only to a trial by consent. Well, that problem might give you quite a little pause. We have always found ways around it. Theoretically in that situation we ought to reverse because the objection is made, but I can't ever remember a case where we have. As I say, the question doesn't arise very often. It is just one of those little things that shows that very shrewd lawyers can find holes in even the best of rules. Of course we usually find that the best way to handle it is to say, just as the trial judge did, "Why of course this is within the issues raised." Then we don't need to worry about this little hole in the rules. Nevertheless I think it is a bit amusing how some of these questions can be raised.

Now I want to turn to Rule 12 because that is one of the more important parts of this section of the rules we are considering and one which at first seems rather difficult, rather hard and rather confusing. This is what we do in modern law with the old demurrer and with other technical weapons, such as the old special demurrer, the motion to strike, and so forth. How are these things now to be handled? We had to make two tries at this, because we had originally a motion to dismiss pretty well separated from the summary judgment. The question was raised, Suppose that you moved to dismiss, were you limited to defects on the face of the pleading? Was the motion to dismiss essentially the demurrer? I have always thought that one of the things we needed to get farthest away was the demurrer. A demurrer might be useful when the parties were convinced that the only question was one of law; but when the parties are so convinced, they can always raise the question. The very real problem of the demurrer came up when the parties were fighting over the formal pleadings, and a demurrer was filed for failure to state the case completely. Even in the old days, when courts were supposed to be harsh, I can find essentially no case where final judgment was rendered on demurrer as such without leave to try again. Usually it was just the beginning of a series of motions directed to the complaint, and led to a situation here where the lawyers were wasting their time and substance in just trying to polish the pleadings. We didn't want that in any event.

Later on, in Rule 56, we provided for the motion for summary judgment, which is the real way to settle a case on a point of law. Under that you'll bring out matters of real defense (if you are the defendant) or of real claim (if you are the plaintiff) by way of affidavits and discovery and present them for the judge's decision; and you are not limited by the face of the pleadings. But to come back to the motion to dismiss, the great question that developed—before the amendments of 1948 changed and clarified all this—was whether the parties or the court could bring in matter outside the formal pleadings or could make what judges love to call a "speaking motion." That was familiar legal jargon from the old days of the "speaking demurrer." And there wasn't any greater crime than to plead a speaking demurrer, that is, put allegations of fact into the demurrer, instead of saying that the demurrer accepted the case as alleged in the pleading under attack. And so there was a long discussion in the cases as to whether a motion to dismiss could be made into a speaking motion. I am happy to say that some of us said—and I recall decisions by Judge Goodrich and by myself—"Why nobody is any longer afraid of speaking motions; of course you can have them." But for many courts there was still the problem. So what we did in the amendments of 1948 was to legalize it; we made an honest lady of the speaking motion, so to speak. And here it is in Rule 12 (b).

Actually what I think you now have is only a simple motion for summary judgment. In your answer you can raise all sorts of defenses, including not only those on the facts, but also those on the law, such as matters of the court's jurisdiction, or lack of real claim. But you also have the option to raise them preliminarily by a motion. That motion is technically the motion to dismiss; but if the face of the pleading doesn't show all the facts, you are fully entitled to bring them up by an affidavit. Hence a motion to dismiss that can be made with or without affidavit is essentially a summary judgment. When the Advisory Committee worked on this I brought in a draft in which it was provided directly that all objections were to be made either by the answer or by a motion for summary judgment; but my colleagues, then as often, restrained my enthusiasm and said, "Let's do it more subtly. People will think it strange if we shoot that at them. Let's get at it by degrees." So that's what we've done. I don't know whether I'm proud of the little circumlocution we have here or not. All I can say is that it works and that it works beautifully.

The whole serious problem that we had up until this amendment took effect in 1948 seems to be entirely gone. What we have here is a provision apparently separating the two ideas of the motion to dismiss and the summary judgment, but providing that the motion to dismiss slides very easily into the motion for summary judgment. The last sentence provides: "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 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." Actually, whenever a preliminary motion to dismiss is made, the parties better well make it into a summary judgment or they are likely to lose valuable rights; and so they do.

Theoretically a judge can stop that; he might say, "I don't want you to make this motion to dismiss a motion for a summary judgment. I love the old demurrer and I want the nearest thing to it, and I'm not going to let you bring in this outside material." Actually that isn't realistic. When on motion day the judge is handed up the papers, he will have the affidavit already there before him. It is hard to conceive of a judge saying, "Why you have a lot of facts here and I'm not going to look at them; I'll cover my eyes." But he doesn't do that; he really wants to get the job done. So actually over and over again we have this simple little solution of using the summary judgment, instead of the motion to dismiss, to settle cases on the law. Would it now be wise to go back and provide that the only way to attack pleadings is either by answer or by motion for summary judgment? I don't know. That was once thought to be too abrupt, and we will probably never do it now, because this works well enough. We are doing it in effect without having taken anything away from anybody. The old motion to dismiss is still there, and anybody can use it; only practically nobody does use it as such. Of course there may be cases where you don't need an affidavit because the matter is apparent on the face of the pleading, but if that's not the case then you can use the affidavit.

I've always been a little interested in that experience from the standpoint of legal draftsmanship or reform draftsmanship. As we know, a great deal of legal reform came through the use of legal fictions. Often we can slide to the base, whereas if we ran in headlong we might be tagged out. Here is a good example. I think that our discovery rules are the better because we go quite extensively into spelling out all the different procedures. These discovery rules are much longer than theoretically they might need be. We might have put in a single section a provision that you could have discovery in any one of the several forms, depositions, interrogatories to the parties, or inspection without including the detailed specifications. But I have no doubt whatsoever that that very specification of each of the separate things possible was a means whereby the discovery practice was made meaningful and hence useful. I can point to a contrast, and one that has worried me somewhat, the contrast with Rule 56, the motion for summary judgment. The fact of the matter is that while the summary judgment is quite useful, yet in many ways I don't think we get the best use of it, because judges are very timid about it, and you'll find quite a lot of division in the courts as to its application. My own circuit has been one of the most divided, with some very great names, Judges Learned Hand and Jerome Frank in particular, who have said that you

can't deprive a man of a jury trial by affidavits. Well, I sometimes wonder if a mistake was not made in making the summary judgment rule too broad and too inclusive.

Thus in discovery we have all these particularized methods, so that you look at each one separately and come to understand it. In summary judgment we perhaps have a rule so broad that it is not properly understood. That form of procedure had been borrowed from England and used a great deal in this country in certain places, New York for example, Connecticut, New Jersey, etc. In each of those states it was limited to certain kinds of action, mainly contract and debt. It was decided, however, that it could be made broader and more inclusive in the federal system. Theoretically I see no reason why it shouldn't have been, but practically I'm wondering a little. Possibly if we had kept it more restricted, Judges Hand and Frank might not have become so concerned as to its use. I don't know. If you want to see some of the discussion that has developed about this and the last attempt of the Advisory Committee to make the summary judgment somewhat more workable, I refer you to an article by my brilliant young associate in working on the rules, Professor Charles Alan Wright of Texas.<sup>23</sup>

Now let's turn back to see if we can cover some other matters relating to pleading. I would like to speak about cutting off the pleadings, because that's another part of this question. In the old days, and still in my own state of Connecticut, one may have pleadings continuing through the replication, rejoinder, surrejoinder, rebutter, and surrebutter until eventually one reaches a point where one side affirms and the other denies an ultimate fact. Code pleading tended to terminate the pleadings somewhere, usually with the reply. One could always have a reply to new matter. But if there is any more dreadful question upon which to waste one's substance, thrashing about in a preliminary way in what I love to call shadowboxing, before one really gets down to the trial of the merits, it is in deciding what is new matter and what is only defense. And so we felt one of the important things was to get rid of the pleading stage fairly promptly and go on to these matters that are important and that are going to fix the actual outcome of the case. So under the rules the pleadings soon terminate, as is provided in Rule 7(a), usually with the answer. You can have a reply to a counterclaim in the answer, but the only other case of a reply is where the court orders it. I have discovered almost no cases where the court requires a reply. I think that bears out the idea that we have. After the opening salvo, you are not going to get much more by keeping these replications and surrebutters going on. And so the pleadings are cut short at a fairly prompt time.

Let me refer to another little detail of Rule 7(a) that I think is helpful. You'll notice that it says that there shall be a reply to a counter-

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23. Wright, Rule 56(e): A Case Study on the Need for Amending the Federal Rules, 69 Harv. L. Rev. 839 (1956).

claim *denominated as such*, because in the old pleading days there was the greatest trouble to decide whether a pleading was a counterclaim or was just new matter. Some way of making it clear was needed, and the solution was to let the parties do it. So now you are not going to lose your case for failure to make a reply if there is in the answer something that seems very much like a counterclaim, but isn't called one. You are only put on the obligation to reply when the pleader in the answer has said, "This is a counterclaim" or has labeled it "counterclaim."

The next thing I want to talk about somewhat is the matter of counterclaims. Here again you have in your procedure and also in the federal procedure the widest opening ever for counterclaims. Under Rule 13 (b) you can plead a counterclaim of any kind whatsoever. Under the codes the counterclaim was restricted to something that attacked the complaint, but that restriction is done away with. Now you can have a suit on a promissory note, wherein the defendant counterclaims for slander and libel. There are other provisions that make clear that old restrictions are taken away. Notice Rule 13 (c), which says that a counterclaim may or may not diminish or defeat the recovery sought by the opposing party. That's to do away with an old restriction which said that one could never have a counterclaim unless it potentially reduced the judgment.

One other thing in connection with counterclaims is the division into so-called compulsory counterclaims and permissive ones. The compulsory counterclaim is provided for in Rule 13 (a); and we tried to make it that, when a defendant had a claim arising out of the same transaction or occurrence (to me "occurrence" is the more meaningful) as the plaintiff's claim, he *must* make his claim in the same suit or else lose it. Now that idea occurs in several of the code states, and was a part of the old federal equity rules. I think the idea is a very desirable one; and it's a very simple one, that when the court is compelled by one of the participants in an affair to start adjudicating the matter, it must do the whole job, and no one can come back and make it go over the same ground again. There is another reason for the compulsory counterclaim, and that is to avoid the pitfalls of *res judicata*. In many, many places where this rule does not apply you may easily find that a defendant can't sue on such a claim where he did not plead it in the first action because the matter has become *res judicata*. Suppose in an automobile accident case that defendant did not put in a counterclaim and wanted to reserve it under a procedure which theoretically allows him to do so. If, however, he had been guilty of negligence in response to the person first suing him, you can see he would have no chance of a later suit against the person, because his negligence, which in the second case becomes contributory negligence, was already finally adjudged. The compulsory counterclaims helps to avoid getting into the morass or dilemma of *res judicata*. Some have asked me, How good is this provision? I think it has worked out pretty well, although it isn't perhaps as clear-cut as it might be. Those words, transac-

tion and occurrence, are a little subject to ambiguity; but I fear that not even new rules can avoid all questions of definition. I think the idea is a rather sound one and that socially it is quite desirable to settle all litigation at one time and avoid repetition.

How far does this operate? Does this operate, for example, to prevent defendant from starting another suit in another state? Or, to take the federal example, suppose you have not pleaded what in federal law would be called a compulsory counterclaim. Can you start another suit in the state courts? Of course there is nothing to prevent you; and I fear there is nothing to prevent the state court from going ahead to hear it. The state court might easily say, "Federal Rule 13(a) is a matter of procedure, and doesn't bind us." While there hasn't been too much litigation on it, there has been a little; and in general it is said that the first suit is a final holding and the second suit is not allowed, even though had everything occurred in the latter jurisdiction, separate suits would have been allowed. This seems to me to be the more reasonable and rational result. Under the governing procedure, by operation of this rule, the party has lost his right to press his opposing claim further.

To finish off defendant's claims, I want to turn for a moment to Rule 14, "Third Party Practice," sometimes referred to as impleader. This useful idea, that came from admiralty, was used in England and had developed somewhat in New York and a few other states. I won't say it covers over much ground, because it is somewhat of a particular case. It's the case where the defendant wants to make a claim over for reimbursement or for indemnity of whatever he has to pay the plaintiff. But it is used a great deal in the situation where it is applicable. I want to speak of it particularly because it has a bearing upon what I was referring to earlier in my remarks, the matter of having to run to the courts to start proceedings. As the rule was drawn, we in the Advisory Committee didn't think too much about this point, but just took the practice from New York. You will notice that Rule 14 starts out by requiring the defendant to move *ex parte*, or after notice to the plaintiff, for permission to bring in a third person liable over to him. Now that is machinery that is nothing but machinery. I have never seen a case in which the court denied this *ex parte* motion. The court isn't going to know the answer at that time. When counsel comes in and says, "I have a bona fide claim over against X and I want to bring him in," of course the judge is going to say, "I'll sign the order." So this is just a time-wasting formality. In that set of amendments of 1955 recommended by the Advisory Committee, which the Supreme Court has neither accepted nor rejected, this was changed and made similar to the provisions for discovery. Under the recommendation the moving party would go ahead without going to court; for we took out this "moving the court" and simply provided that the defendant would serve the third-party defendant. Since you in Wyoming have adopted so many of these 1955 amendments even before their federal acceptance, I'm wondering why you didn't adopt this one also.

I would like to close by turning to some of the provisions on parties. These sections are important in themselves, and they are important as rounding out the picture. You adopted modern joinder years ago, in 1939 when you adopted what are essentially the Federal Rules of joinder of parties and joinder of claims. I have the feeling that once you start on the toboggan slide of reform of procedure you can never get out of the groove. Take the first provision that comes up, Rule 18 on joinder of claims and remedies. When you adopted Rule 18(a), just as when you permitted the free pleading of counterclaims, how can you then make ancient restrictions on what you'll plead? Just as the defense can bring in any counterclaim in opposition, so here the plaintiff can join any kind of claim when bringing suit. I think you have been converted to procedural reform already, when as long as twenty years ago you provided that, say, slander and an action on a note and a suit on an automobile accident could all be joined in one suit. In fact you haven't got much further to go, for you are already there in procedural reform. And isn't that sensible?

Why in the world were we so long in coming to this idea? Well, it may be due in large measure to our history, to the separate forms of action which tended to make arbitrary divisions between trespass and case, covenant and debt, and so on. We started with a compartmentalized approach to procedure, but it seems to me that we ought to get away from our history when the history is not helpful to us. That history accomplished things in its time. The action of assumpsit was a great advance over covenant. Obviously, however, the action of assumpsit is no longer an advance. Times have moved on, history has served its purpose, and we ought to be moving on to something else. What reason is there now to say that when parties are in court they shouldn't bring up all their points of irritation? Sometimes it is said that it would be too confusing. Who would be confused? If they're thinking of the court, I think His Honor can take care of that. Certainly with all the kinds of complex cases that naturally come up nowadays, antitrust cases for example, the little matter of keeping separate a slander claim and a note claim would be a trifle. If it's a matter for the jury there probably has been some selection and separation by the lawyers. Even at most, I think we usually overdo the matter of confusion.

As I look at it, part of the function of an American jury is to be somewhat confused but nevertheless to see the right by more or less looking at the parties. It isn't supposed to figure out all these ultimate details; it is supposed to say, "Why that fellow is kind of a scalawag anyway. Let's give the judgment to the other side." If anybody is really definitely worried about confusing the jury, the judge can apply the provisions for separate trials, and send part of the case to a different jury. But socially it is much better, when parties are at swords' points, when their wives aren't speaking, instead of having continuing battles so long as they can think up points of difference, to say, "Bring in everything now. Fight it out. When you get through, let's consider that you are done."



So much for joinder of causes of action; now I want to turn to joinder of parties. Probably, among the newer procedural reforms, the joinder-of-parties rules have been more popular than almost any other. You adopted them in this state almost twenty years before your other steps; and they have been adopted in a good many jurisdictions which have not yet accepted the Federal Rules in full, for example in California, New York, and Connecticut. I recently went to a meeting in Ohio, and I noticed from the discussion that they still find difficulty in joining master and servant, or several parties in a single automobile accident case. Of course that's not sensible; and the lawyers there usually get away from it by joining the cases by agreement. All these case ought to be brought together, or if brought separately they ought to be consolidated by the court. Where there has been one automobile accident there ought be one trial. Any point of irritation affecting several people ought to be all tried at once.

The test of joinder under Federal Rule 20 (a) is whether the parties assert a right to relief arising out of the same transaction or occurrence and whether any common question of law or fact will arise. Your Rule 20 (a) is even simpler, and I like it better—if any substantial question will arise common to all of them. We have striking examples of that sort of thing. There was a famous case in New York, soon after the adoption of the Civil Practice Act in 1921, when 193 plaintiffs sued an investment house for putting out a false stock prospectus and the court of appeals held the joinder correct.<sup>24</sup> Of course there was a common question: Was the stock prospectus, which had led all these people to invest, false and fraudulent? It was the same question in all 193 cases; so why try it more than once?

The problem, however, does seem to recur. My court struggled through it again in that case, involving the antitrust and price discrimination matter in the radio and television industry in New York.<sup>25</sup> There the trial judge in dismissing the case held not only that the pleading was inadequate, but that the joinder of parties was improper. I remember that 13 small retailers of radio and television sets were suing for themselves and others similarly situated, some 24 of the big manufacturers and distributors, and 2 retailers, claiming price discrimination and resulting damages. The objection was made that all these claims could not be tried together properly. The whole contest centered about the assertion made that two retail houses in New York City, Devega and Vim, were getting special prices as a favorable discrimination which entitled all other retailers of the area to damages under the Robinson-Patman and Sherman Acts. Well, you can see there is very distinctly a single, important question of fact: Is it so that these two concerns were getting special price concessions from "The Big Fellows," and if so, did they come within any of the exceptions under the Robinson-Patman Act? Now if you denied joinder you would have—I cant' figure the mathematics of it—but you would have each one of these 13 or more plaintiffs suing each of the 24

24. *Akely v. Kinnicutt*, 238 N.Y. 466, 144 N.E. 682 (1924).

25. *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957).

distributors separately. Just imagine that clutter of suits. In a crowded jurisdiction such as the Southern District of New York, literally how horrible it would be to have a situation of recurring cases of that kind! Joinder here is such a simple and effective step, and yet I don't think there is any real possibility of confusion. The judge decides the main issue. If the judge decides it for the defendants the case is there ended. If the judge decides it for the plaintiffs, having settled that main issue, he may then have to conduct a series of separate hearings on separate damages and so on. This, it seems to me, is the simpler and more direct approach.

I have just a couple of suggestions on one other party matter: class actions. Many scholars think that, though the class action has important possibilities of development, Rule 23 is too complicated and that a much simpler rule, one that would allow representation whenever it seemed to the court fair, would be more workable. I don't want to try to pass upon that here. I just wish to say first that this is a provision that has a considerable utility. It does allow a proper expansion of litigation where many issues affecting different people can be disposed of. The really serious problem, however, has been the question of *res judicata* and how to apply that doctrine to the case of a person who is in the suit only by representation, who is there only because somebody else says he is suing in the other fellow's right. This is an area where I think we are likely to have some developments, where the rule could perhaps be made more useful by expansion. But there is a great deal of difficulty in knowing just how to expand and still keep it fair to those who are in the suit only by representation. Some scholars, Professor Hays of Columbia for example, have written extensively on the subject; and they think the point is much easier than we have thought it. I won't say it isn't.

I like to mention this problem even if I'm not going to help you very much, simply to show that in the judgment of most of us there are still possibilities for expansion in the rules, still places that we want to study, and still matters that we ought to consider and develop. And so I think that Professor Trelease, who has done so much already, ought to have a term of office as procedural reformer that will continue indefinitely because there is still so much to do. In the federal service now the proposition is to create a division in the office of the Administrative Director which will be devoted to continuous procedural studies, and be headed by somebody who is referred to as a "dedicated chief."<sup>26</sup> I didn't coin that expression, but I really like to think of it. I think the federal service will be improved by having someone who feels that way about these problems—who is dedicated to the study of law administration and particularly to this important aspect of that broader subject. Since Professor Trelease is already such a dedicated person, I suggest that you will want to have a continuing office of that kind in this State, with him as its "dedicated chief."

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26. Clark, *Two Decades of the Federal Civil Rules*, 58 Col. L. Rev. 435, 444 (1958).