

WASHINGTON UNIVERSITY LAW QUARTERLY

Volume 23

APRIL, 1938

Number 3

THE HANDMAID OF JUSTICE*

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"Although I agree," said Collins, M. R., in a leading English case, "that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."¹ Sentiments such as these, when expressed as abstract propositions, will no doubt win the assent of all. Applied to concrete cases, however, there is danger that by a conservative bench and bar they may be more honored in the breach than in the observance. The learned judge's homely simile might be carried further. A handmaid, no matter how devoted, seems never averse to becoming mistress of a household should opportunity offer. Just so do rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers—unless, indeed, they are continually restricted to their proper and subordinate role. Now, at a time when at last there has been brought substantially to fruition in our national courts a significant reform, involving the due subordination of civil procedure to the ends of substantive justice, through the adoption of the new Federal Rules of Civil Procedure, it may be appropriate to examine this continuing conflict between substance and form and to consider how it has there been resolved.

* This article formed the basis of a lecture delivered by Dean Clark at the Washington University School of Law. This lecture by Dean Clark was the initial lecture of a series of addresses to be given annually at the School of Law by outstanding legal scholars and jurists.

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1. In re Coles [1907] 1 K. B. 1, 4.

The new Federal Rules were adopted by the Supreme Court of the United States on December 20, 1937, to apply to the procedure in the district courts of the United States in all suits of a civil nature.² The Court acted on report of its Advisory Committee of fourteen, which since 1935 had been engaged in the task of draftsmanship and which had submitted two formal drafts of rules for consideration by the bench and bar of the country. The Court found its authority to adopt the rules, which, among other things, unite the practice in law and equity and supersede federal statutes inconsistent with them, in an act of Congress passed finally in 1934 under the leadership of the present Attorney General after agitation for a quarter of a century by the American Bar Association and many of the most distinguished lawyers of America.³ The rules take effect on September 1, 1938, or three months after the adjournment of the present Congress, whichever may be the later date.⁴ Although the rules have been laid before Congress as the statute requires, no affirmative action by the legislative body is called for. It is indeed possible that the Congress may pass some new statute overturning, restricting, or otherwise varying the effect of the rules. In fact a bill to repeal the rules and to restore the present system of attempted conformity to state practice has already been given a hearing by the House Judiciary Committee.⁵ One is doubtless rash to venture a prophecy as to legislative action.

2. Rule 1, Federal Rules of Civil Procedure (hereinafter cited as FRCP). Certain special proceedings are excepted by Rule 81. For the rules as finally adopted, see Rules of Civil Procedure for the District Courts of the United States, available from the office of the Advisory Committee in Washington; also published as H. R. Doc. No. 460, 75th Cong., 3d Sess.; 58 S. Ct. No. 10, Supplement to issue of March 15, 1938; 94 F. (2d) No. 2, Supplement to issue of March 14, 1938; 82 L. ed. Advance Opinions No. 8, Supplement; (1938) 5 U. S. Law Week No. 18, sec. 2. The Committee also published Preliminary Draft of May, 1936, Report of April, 1937 (both containing notes to the rules), and Final Report of November, 1937, and will shortly publish a revised copy of the notes containing also a bibliography of all law review articles on the rules.

3. (1934) 48 Stat. 1064, (1935) 28 U. S. C. A. secs. 723b, 723c. For the history of the movement, see Clark and Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 Yale L. J. 387; Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 Harv. L. Rev. 1303, and articles therein cited.

4. Rule 86, FRCP.

5. H. R. 8892, introduced by Mr. Ramsay of West Virginia. The Committee hearing, March 1-4, 1938, is to be published as a House Document. See also speech by Congressman Ramsay in the House, March 11, 1938, 83 Cong. Rec. 4377-4381.

But it would seem that we are justified in hoping that the long labors involved in the agitation for and execution of this reform will not be thus summarily cast aside by the necessary votes of the two legislative houses and the approval of the President before the product has had the opportunity of undergoing any test of practical experience.

Since I had the honor to serve as Reporter for the Advisory Committee which presented the draft of rules accepted in substance and, except in a few instances, in complete detail by the Court, it is not appropriate for me to attempt to state the supposed effect of the various separate rules.⁶ Interpretation is now, of course, for the courts. Nor am I immediately interested in such a task, but prefer to discuss the general principles of pleading and procedure in the light of the continual clash between form and substance I have spoken of above and to use the new reform only to illustrate my thesis. I ask the question, What concrete steps may be taken to keep procedure in its modest position as handmaid? And in making my answer I make use of these rules as a concrete realization of what theory and experience tell us to attempt.

The necessity of procedure in the sense of regularized conduct of litigation is obvious. Court trials, like other matters of human conduct involving continually recurring processes, must be systematized. In no other way can a great volume of business be done at all. In no other way can it be fairly done. If there are no rules upon which suitors can depend or rely, they can be trapped or misled, while the favored friends of the tribunal are securing special treatment. Regular procedure is necessary to secure equal treatment for all; it is necessary, too, for the quite as important factor of the *appearance* of equal treatment for all. Regular habits are necessary in all daily tasks. A household becomes indeed disorganized if its head overturns even the settled round of daily meals. The process of adjudication requires such settled habits the more that litigants may not be prejudiced by deviation therefrom, and that impartiality in fact, and in ap-

6. The author has discussed the rules, at various stages of their development, in *The Proposed Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 447; *A Striking Feature of the Proposed New Rules* (1936) 22 A. B. A. J. 787; *The New Federal Rules of Civil Procedure: The Last Phase* (1937) 23 A. B. A. J. 976. Discussions by others will appear in the bibliography referred to in note 1, *supra*. See also (1938) 62 A. B. A. Rep. 705-707.

pearance to the parties and the public, shall be maintained.

This dilemma which justice faces of a choice between regularity of action and individualization of treatment of suitors has been often remarked upon. Holdsworth, the great English legal historian, aptly states it as follows

One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.⁷

As this quotation indicates, and as experience teaches us, habit has a tendency to become our master. We become so accustomed to doing things in a certain way that no other seems open, even though it may be easier and simpler. There are notable examples of the tendency of practice rules to crystallize and harden. The most famous is that afforded by the history of the Court of Chancery. Originally developed through the function of the Chancellor, as direct representative of the king, to order the doing of justice in cases where the ordinary processes of the law proved inadequate, this simple process in time became so complex and dilatory that it was a prime example of the law's delays. Who, reading Dickens' famous account in *Bleak House* of the weary course in chancery of *Jarndyce v. Jarndyce* over many years, would think that this was the court and this the system of justice which had its origin as a way of redressing the injustices of the law?

The trend of procedural rules towards undue rigidity is often at variance with a developing substantive law. New political and economic forces are likely to force new relationships between persons, and new governmental attempts to control such relationships, while the process of enforcement becomes ever slower and more cumbersome. The antithesis between process and substance has been pointed out by Professor Hepburn, leading historian of the movement for code reform of pleading during the

7. 2 Holdsworth, *History of English Law* (3d ed. 1923) 251.

last century. He speaks of "the inveterate nature of the incongruity between procedure and substantive law" and goes on to say, "The former petrifies while the latter is in its budding growth" and "the conservatism of the lawyer preserves the incongruity."⁸

No wonder that there has been pressure for a ministry of justice, as Cardozo has eloquently urged, to see to it that the processes do not lag too far behind the public needs.⁹ Already there are signs of a changed attitude. The judicial councils as public bodies, and various private organizations, such as the American Bar Association and the American Judicature Society, are now expressing that demand for procedural reform which the political movements of the day show for social and economic reform.

Reform has, however, been hampered by the extreme reverence for the judicial process in this country. The American doctrine of judicial supremacy seems to foster such an awe of the courts as to hinder movements for procedural improvement by making them seem unnecessary. It is popular to compare the processes of court with that of other governmental agents, to the disadvantage of the latter. We speak of governmental red tape or of bureaucracy triumphant, without realizing both that courts have it also and further that they, like all governmental boards, ought to have it. Not red tape, *i. e.*, orderly procedure, but too much of it and of the wrong sort is to be criticized. My colleague, Professor Thurman Arnold, has provided the illustration for this point by one of his favorite bits of light irony which contains more than a grain of truth. Discussing why courts are considered to be so much more effective than boards, he refers to the literature and philosophy which has grown up to explain the assumed fundamental difference between a government of laws exemplified by court decisions in contested cases and a bureaucracy operating through administrative boards and tribunals. In the conventional literature of explanation, the difference is something like this:

8. Hepburn, *The Development of Code Pleading* (1897) 31, 37.

9. Cardozo, *A Ministry of Justice* (1921) 35 Harv. L. Rev. 113, reprinted in Cardozo, *Essays in Law and Literature* (1931). See also Sunderland, *The Machinery of Procedural Reform* (1924) 22 Mich. L. Rev. 293. The Journal of the American Judicature Society reports regularly on all procedural developments.

Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when it leads to absurd results because of their solemn obligation not to do anything in the future very much different from what they have done in the past. But bureaus in allowing themselves to be bound by red tape do so out of pure malice and lack of regard for the fundamentals of freedom, because they have taken no oath not to violate the rules and analogies of the past. Therefore they are much worse than courts because courts only act unreasonably when they can't help it, and bureaus act unreasonably when it is in their power to do differently.

And hence it appears

that bureaus, even though given absolute power to enforce the decrees of other persons in the government, do not use that judgment in enforcing them which is so characteristic of courts. They do not, on the one hand, check the government in its wilder flights of regulatory fancy, nor on the other hand are they able to carry out the decrees of the government efficiently because they are too bound down by that particularly silly form of rule and precedent known as red tape. Courts, on the contrary, do not concern themselves with red tape, but only with procedure and substantive law. Both may sometimes be antiquated, but that is never the fault of the court, whereas the red tape is always the fault of the bureau.

So by definition a court must be a body of judges whose decisions are right or caused by the fault of some one else (usually the legislature) or unfortunate but unavoidable accidents due to the circumstances that no human system can be perfect, while a bureau is a body which, if it happens to make a wrong decision, has no one to blame but itself, and if it happens to make a right decision, offers us no assurance that it will do so again. A commission is half-way between a court and a bureau.¹⁰

Mr. Arnold's explanation of all this is that we have developed an attitude of respect toward a court because we use it to symbolize an ideal of impersonal justice, whereas a bureau has as yet little symbolic function and is therefore entitled to no greater respect than are the individuals composing it. Whether or not this is good social anthropology, it is still important that both be subjected alike to critical consideration as to how efficiently

10. Arnold, *The Symbols of Government* (1935) 199-206.

and satisfactorily they are carrying out their more mundane and immediate tasks of adjudication of matters before them. Without question the many points of similarity between the courts and those administrative agencies we even now term quasi-judicial will become more and more apparent as time goes on. Each should share the benefits of experience with the other.

It is true, too, that in some quarters, of much importance politically, there is a reaction against the judicial process which is carrying more and more activities of government away from the courts and into the hands of expert commissions. This reaction goes to the extent of making the ordinary rules of court procedure, notably the rules of evidence, taboo before such agencies. This trend may well be a healthy development, just as was the growth of equity in former days,¹¹ if it is not carried to the point of throwing the baby out with the bath. But let us not make the mistake our forefathers made as to equity. They believed its process could be formless, until at length they found that they were caught in technicalities more rigid than ever found in law. Even now the administrative boards are in danger not of being unlike, but of being too much like courts. A friend of commercial arbitration—that process whereby business men substitute their own processes of adjustments for the slow legal settlement of business disputes—has warned that in England, where an arbitration act has been in existence for years, there is danger that the process by its increasing complications may prove to be slower than that of the courts themselves.¹² Vigilant care that the procedure remain simple and effective is the effective weapon against such a danger which is being employed by the American Arbitration Society. But the danger exists and must be guarded against. Already administrative tribunals are falling behind in their activities. Thus, the counsel for the Bureau of Internal Revenue has pointed out recently that the procedure of the Board of Tax Appeals should be re-examined and reformed, just as—and this, I think, is especially interesting—has the federal practice by the new rules.¹³

11. An historical analogy suggested by Mr. Justice Stone, *The Common Law in the United States* (1936) 50 Harv. L. Rev. 4, 18, and reprinted in *The Future of the Common Law* (1937) 137, 138.

12. See Sturges, *Book Review* (1926) 26 Col. L. Rev. 785, in which he points out the technical trend under the English Arbitration Act of 1889.

13. Kent, *Some Current Problems of Tax Administration* (1937) 23 A. B. A. J. 947, 949.

One teaching of all this experience should continually be emphasized. There is danger of naïveté as to both the uses and the abuses, the need for and the limitations of, formal rules. All too often judges and law professors alike condemn the technicalities of the procedural methods and then turn about and for lack of understanding achieve results more technical than any experienced student of the history of procedure would think of even suggesting. In the law schools the study of procedure in the past has been pushed into a corner as dull, uninteresting, and unimportant, whereas it is most necessary for the understanding of what has gone on in the past, not to speak of the social need of knowing what effective law administration is. Again a brilliant court may show a general impatience with procedural delays and faults only to make some of the strangest of procedural rulings, either without appreciating their significance and how far they are departing from modern viewpoints or in an endeavor to rid themselves of unattractive cases through an assumed procedural fault.¹⁴ But such omissions come back to plague us mightily. Knowledge as a means of emancipation from the shackles of error is just as sound a policy for the law of practice and procedure as it is for other affairs of life. If we know what the rules are or have been, we shall know how and when we may free ourselves from such part of them as is really overtechnical.

Now perhaps the first thing which experience teaches us is that our rules should be continually changed and improved. Certainty and stability in the rules of substantive law is desirable, though there seems to be little even of that obtainable in the swiftly moving currents of modern society. But in procedural law, while there should be rules clear enough to be understood and applied, yet these should be changed as soon as they are found by experience to be hampering. Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay. The element of flexibility and adjustability to newly developing needs is therefore important. That element is being found in the grant of rule-making authority to the courts, thus making the court and not the legislature responsible for keeping the tools of justice bright.

14. See the preface to Clark, *Code Pleading* (1928), and also Clark, *The Union of Law and Equity* (1925) 25 Col. L. Rev. 1.

Until recent times the courts were laggards in reform. Pressure for change came from the legislatures and from them alone. The first modern system of practice, the forerunner of much of the reforms which have since followed, was the Louisiana Code of Civil Procedure drafted by Edward Livingston in 1805. From it came much of the best of the New York Code of 1848, the work of David Dudley Field and his associates, and the model of the code reform of pleading which has been adopted in a majority of American states, has been imitated in England and the English Colonies, and has profoundly affected the procedure of all other American states.¹⁵ As late as 1933, the great state of Illinois adopted code pleading, with its characteristic feature of the union of the law and equity practices, in its new Civil Practice Act effective 1934.¹⁶ Code pleading, as its name implies, is reform by code, or statute. But modern legislatures are concerned with all sorts of matters other than judicial procedure, and rarely take action as to it unless it be to pass some limited and particularistic measure at the behest of a politically potent attorney. It is now apparent that if detailed practice reforms are to be left to legislative initiative, they will not take place. And so has developed the movement for the lodging of the power to make procedural rules in the courts. It happens that some text writers and some courts, by way of dictum, have suggested, as a conclusion from the political and constitutional doctrine of the separation of powers, that the courts, and the courts only, have power to regulate their procedure. But for one hundred and fifty years no such claim was made, while the legislature was freely exercising authority over court procedure, and it seems doubtful whether it is now worth while to contend that that history is erroneous. Generally the indicated step is an enabling statute delegating such power to the courts, a delegation which the courts have consistently upheld as justified.¹⁷

15. See Clark, *Code Pleading* (1928) ch. 1, and Hepburn, *The Development of Code Pleading*, *supra* note 8.

16. See the Illinois Civil Practice Act Annotated and Clark, *The New Illinois Civil Practice Act* (1933) 1 U. of Chi. L. Rev. 209.

17. Of the extensive literature on the rule-making power, the following may be cited: Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 22 WASHINGTON U. LAW QUARTERLY 459-509 (containing many references to articles and statutes at pp. 463-469); Hyde, *From Common Law Rules to Rules of Court* (1937) 22 WASHINGTON U. LAW QUARTERLY 187; Warner, *The Role of Courts and Judicial Councils in Pro-*

Arguments made for rule-making power in the courts emphasize the quality of expertness. That is important, but perhaps even more vital is the quality of flexibility and adjustability to the needs which develop as experience shows. Even the courts, left in their own inertia, are not likely to take affirmative action, but they at least may be stimulated by professional associations, judicial councils, and like bodies.¹⁸ The courts, too, need not themselves undertake the work of detailed draftsmanship, but may appoint committees to assist them. Such committees may in turn make use of expert assistance and may hold hearings or submit drafts to the bench and bar and otherwise obtain the best professional advice upon suggested changes. In other words, the legislatures are not, the courts are, in a position to see that whatever is needed may be done expertly, continuously, and effectively in refashioning the procedure which they apply.

Hence there is an increasing tendency to delegate such rule-making authority to the courts. Perhaps the most complete and effective exercise to date of such power in state tribunals is found in Wisconsin, where the statute, like the federal act of 1934, goes properly to the extent of providing that rules adopted by the courts shall have the effect of rendering inconsistent statutes ineffective. This statute has been expressly upheld in an authoritative opinion of the Wisconsin Supreme Court,¹⁹ and the system has given satisfaction even to those who initially opposed it.²⁰ The important power to adopt rules superseding statutes exists also in the statutes of at least eleven other states.²¹ There

cedural Reform (1937) 85 U. of Pa. L. Rev. 441; Tyler, *The Origin of the Rule Making Power and its Exercise by Legislatures* (1936) 22 A. B. A. J. 772 (A. B. A. prize essay, 1936).

18. Cardozo, *A Ministry of Justice* (1921) 35 Harv. L. Rev. 113.

19. *In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice, and Procedure in Judicial Proceedings* (1931) 204 Wis. 501, 236 N. W. 717, involving Wis. Stat. (1935) sec. 251.18.

20. Testimony of Judge Padway, General Counsel of the American Federation of Labor, before the House Judiciary Committee, supra note 5.

21. *Colorado*, 1 Stat. Ann. (1935) Code Civ. Proc. sec. 444; *Delaware*, Rev. Code (1935) ch. 108, sec. 6; *Florida*, Comp. Stat. (Supp. 1936) sec. 4682 (1); *Indiana*, Acts 1937, ch. 91, p. 459; *Maryland*, Const. 1867, art. 4, sec. 18, for equity; Code 1924 (Supp. 1935) art. 26, sec. 35, for law; *New Jersey*, Comp. Stat., 2 Cum. Supp. secs. 163-308, p. 2820, for law; Laws 1915, ch. 116, sec. 11, p. 168, for equity; *New Mexico*, Laws 1933, ch. 84; *Pennsylvania*, Laws 1937, Act No. 392, approved June 1, 1937; *South Dakota*, Laws 1937, ch. 60, p. 77; *Washington*, 2 Rem. Rev. Stat. sec. 13-1 et seq.; *West Virginia*, Laws 1935, ch. 37, p. 169, Code Ann. (1937) sec. 5183.

are, however, at the present time commissions or councils actively engaged in the consideration of revision of civil procedure in North Dakota, Indiana, Pennsylvania, and Alabama, and perhaps elsewhere.²²

The work in these various states should receive a great stimulus from the work of the Supreme Court of the United States in presenting the new federal rules. Dean Gavit of Indiana, secretary of the judicial council of that state, reports a study of these rules to consider the changes which their adoption as state rules would effect, and a first article reporting that study has already appeared.²³ I am informed that in North Dakota a similar consideration of the federal rules is being had. Adoption of the new rules in various states, with, of course, such changes as may be necessary, is a development greatly to be desired. Uniformity in procedure will be a boon to all; and the growth of habits and customs whereby there is an interchange of ideas as to noteworthy advances in practice between the various state and federal systems is eminently desirable. Perhaps we may cease to remain independent and foreign sovereignties as in the past, so far as law administration is concerned, and may at least tend in the direction of being a united people.

The new federal reform is likely, therefore, to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally. This is doubtless heightened by the long and strenuous campaign and final dramatic climax which preceded the adoption of the act of 1934. Although the American Bar Association had waged its battle for the statute since 1912, though on one occasion news came from Washington that the bill was passed and the faithful flocked to witness its ceremonial signing by the President, only to discover that it was another bill which had been enacted, yet the senatorial opposition led by Senator Walsh of Montana could not be overcome. At length in 1933 the Association disbanded its committee, and ceased its efforts, only to have the present Attorney General, Mr. Cummings, taking office on the

22. Correspondence of the writer. And see also current number of the *Journal of the American Judicature Society*.

23. Gavit, *The New Federal Rules and Indiana Procedure* (1938) 13 *Ind. L. J.* 203.

death of the Attorney General designate, Senator Walsh, press forward its enactment with such vigor that it became law the next year without opposition and in fact after a final legislative history of only two or three months' duration.²⁴ Further, the extensive participation of the bench and bar in the work makes it notable. The Advisory Committee appointed by the Court was engaged for two years and a half in the task of draftsmanship. The number of comments and critical suggestions, and their detailed and intelligent character, which the drafts of rules presented by the Advisory Committee received from individual lawyers and judges and representative committees appointed by the district courts and various bar associations show what an amazing amount of professional time and effort went into the undertaking. No finer example of collective effort of the profession for reform has been known.²⁵ It shows the possibility of effective procedural reform at its best. If, as the American Bar Association has recommended, the Supreme Court, upon the taking effect of the rules, appoints a standing Advisory Committee to assist it in considering such changes as experience may determine necessary, then the quality of flexibility seems definitely assured.

What should be the general direction of civil procedural reform, once that step is decided upon? The practically universal trend of reform has been in favor of less binding and strict rules of form enforced upon the litigants and their counsel and with a large measure of discretion accorded to the trial judge in directing the course of a particular lawsuit. Specifically this means general as distinguished from special pleading and freedom to join diverse claims and various parties in a single civil action. The new federal rules exemplify this trend. Since, nevertheless, some lawyers and judges still are opposed to it, claiming that the pleadings should produce, and trials should be limited to, clearly defined and narrow issues,²⁶ it is desirable to consider its background in history and experience.

24. See note 3, *supra*.

25. See Clark, *A Striking Feature of the Proposed New Rules* (1936) 22 A. B. A. J. 787, and also Clark, *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts* (1938) 24 A. B. A. J. 97.

26. For an able statement of this point of view, see Fee, *The Proposed New Rules for Uniform Procedure in the Federal District Courts* (1937) 16 Ore. L. Rev. 103. And compare the speech of Congressman Ramsay, 83 Cong. Rec. 4377-4381 (1938).

Now there exists a considerable misunderstanding of just what went on in common-law pleading, that system which existed in England and America until it was supplanted during the last century by the more or less formless procedure of the code reform. Lawyers still speak with longing of the logical precision which the common-law system was supposed to provide and to compel the parties to employ. Actually while special pleading could be had in the old days, yet in such usual cases as claims for debt or negligence a simple form of general allegation was permissible, a practice so admirable that it was carried over to the more successful of the code systems, and thence directly into the new federal rules. As I shall point out later, some of the basic illustrative forms of pleading issued by the Court as an appendix to these new rules come directly from the common law. Lawyers and judges in the old days might appear to worship form and obey formal rules. Yet they had a penchant for getting things done, and so they used the rules, with the aid now and then of some convenient fiction or subterfuge, to accomplish results without unnecessary trouble.

That the older system is so generally regarded as inflexible and restrictive seems due to the two causes that the historic forms of action were actually restrictive and that the authorities continually stressed the issue-formulating objective of pleading. As to the forms of action, and its corollary, the separation of law and equity into different systems enforced in different courts, these were the main occasions for the wave of pleading reform in the nineteenth century. The forms had an historic significance illustrating the triumph of the king's courts and of the central power of the early Norman kings. A suitor desiring the king's justice went to the king's clerks in chancery to procure a writ or royal command of the king to his sheriff to summon a defendant before the high courts. The clerks being typical lawyers looked to their precedents before issuing a writ. Hence unless one could make his claim conform to the recognized forms—trespass, case, trover, detinue or covenant, debt, or assumpsit—one had no remedy. And if one started with the wrong writ for his case, one was just out of luck until and unless he procured a new writ to start a new case along proper grounds. Just so the separate law and equity systems developed, the latter as both a supplement and a corrective of the former; but if one chanced

to get into the wrong tribunal, there was nothing to be done short of starting over again in the correct place.

When the historic reasons for division had for several centuries ceased to have point, there seemed, as there was, no reason for penalizing suitors for having come to the wrong court, or having come to the right court in the wrong way. And so the code reform caused the abolition of the forms of action, the union of law and equity, and the use of the one form of action for all civil causes. It is true a few states pride themselves on retaining the division. I saw recently such a case in New Jersey where the claim of the bar is that the separation makes for better and abler lawyers.²⁷ This was a case of suit brought in a court of law by a partial assignee of a debt against the debtor. Had the original creditor assigned all the claim to the plaintiff, it was agreed that the case was properly brought; but since this creditor retained a part interest in the claim, and since a partial assignee can sue only in equity, the case was thrown out.²⁸ Now that may make for better lawyers, but one wonders what the litigants think of that. Perhaps the only reply to that suggestion is the exquisite bit of irony in Serjeant Hayes's famous dialogue, "Crogate's Case," where Baron Surrebutter (transparent disguise for the master technician Baron Parke) makes his classic reply to the inquiry as to what the suitors may think of a legal technicality which has caused them to lose their cases. "Mr. Crogate," said the distinguished justice, "that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant."²⁹

But that answer has not been found adequate in most jurisdictions. And in the federal system, too, the new rules mark the latest triumph of the one form of civil action. It is true that under the Conformity Act of 1872 practice at law in the federal

27. Honorable Merritt Lane, *Chancery Practice*, N. J. St. Bar Ass'n Q., (1937) 210; Stevenson, V. C., in *L. Martin Co. v. L. Martin & Wilckes Co.* (1908) 75 N. J. Eq. 39, 71 Atl. 409; Justice V. A. Griffith, *Should the Court of Chancery Remain Separate* (1930) 2 Miss. L. J. 369, 380; cf. Kenyon, L. J., in *Bauman v. Radenius* (1798) 7 Durnford & E. 663, 667 ("the most perfect system").

28. *Glaser v. Columbia Laboratories* (1933) 11 N. J. Misc. 707, 167 Atl. 201; see also *Young v. Weber* (1934) 117 N. J. Eq. 242, 175 Atl. 273; *San Giacomo v. Oration Inv. Co.* (1928) 103 N. J. Eq. 273, 143 Atl. 329.

29. Hayes, *Crogate's Case; A Dialogue in the Shades on Special Pleading Reform*, quoted by Sir Frederick Pollock, *The Genius of the Common Law* (1912) ch. III, Surrebutter Castle.

district courts was supposed to conform to the local practice of the state within which the court was held; and hence to the extent which the conformity principle permitted, the adoption of the one civil action in a state would operate also in the federal court of that district. But in the federal tribunals law and equity were (and still are, until next fall at least) separate systems, even though administered by the same judge. This separation was all the more annoying because by the equity rules of 1912 and the Law and Equity Act of 1915 provision had been made for transfer back and forth from one calendar to another, and for the filing of equitable defenses in legal actions and the converse. One had to watch out that one was on the proper side of the court, though one could change around as needed. In other words whatever of substance there was had already gone; only the vestiges remained to trouble by the question whether they did actually mean anything and if so what.³⁰ These, and the luckless conformity principle, to which I shall make reference later, will be wiped out by the new reform.

Even when these divisions are formally abolished the experience of the state courts is to demonstrate the reluctance of even great judges to let the past go. "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored," dogmatizes one distinguished tribunal. And so it suggested that an action be dismissed, in order to be begun over again in the same court and in the same way.³¹ One would not realize from the court's way of speaking that what it really had in mind was the protection of the historic trial by jury, constitutionally a right of litigants in law, but not in equity, cases. To see to it that the case is *tried* properly, the court seemed to think that it must throw out all the preliminary steps from the institution of suit down through the pleadings and force the litigants to start over, if indeed the defendant had stayed around where he could be caught again, or had retained his assets sufficient to satisfy a judgment. Yet that is clearly unnecessary. The right to jury trial does not prevent the single civil action or simplified pleading. Provision for proper and clear claim of jury

30. Clark, *The Challenge of a New Federal Procedure* (1935) 20 *Corn. L. Q.* 443; Clark and Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 *Yale L. J.* 387.

31. *Jackson v. Strong* (1917) 222 *N. Y.* 149, 118 *N. E.* 512. See Clark, *The Union of Law and Equity* (1925) 25 *Col. L. Rev.* 1.

trial when trial approaches, coupled with a rule of definite waiver (since the parties can have the more expeditious trial to the court if both prefer it), such waiver to be shown by failure to make jury claim within a stated period, will solve this difficulty. Such is the proposed plan under the federal rules, copied from effective state practice.³²

The formulary system of the common law did operate to cut down the kinds of claims which could be presented in a single action. This was because claims could be joined only if within the same form of action. Several trespasses could be joined; so could several debts, even when they arose purely by operation of law. But no crossing of the line of division of the forms of action was permissible. In equity, on the other hand, the test was otherwise, based upon the transaction or factual situation out of which the claims arose—all claims thus arising out of one affair being joinable. With the one action, these restrictions were blotted out. The early code makers, David Dudley Field and his associates, feared to permit quite free joinder, as we have seen to be desirable. Why should not people be encouraged to bring all their opposing claims out in the open to be settled at one time, so that they can thereafter go about their business without fear of further and reprisal lawsuits? Why, too, should not all parties interested in fundamentally similar claims join to adjudicate them? But this was too great a step and the Field Code provided for the joining of parties only by certain rules of formal limitation (interest in the subject of the action and in the relief to be granted) which even yet are not understood.³³ And the joining of claims was limited by a scheme of stating usually seven or eight classes of what were termed causes of actions and allowing joinder only within a class.³⁴ Here was a new term, *cause of action*, quite undefined (apparently on the principle that everybody knew what it was) and destined to a long, inglorious, and destructive career. In the hands of some courts and some text-writers and restrictively defined, it has done more damage than ever the forms of action could possibly do. And there has been

32. Rules 38, 39 FRCP. And see citations in the Committee's notes to these rules; James, *Trial by Jury and the New Federal Rules of Procedure* (1936) 45 *Yale L. J.* 1022; Clark, *Trial of Actions Under the Code* (1926) 11 *Corn. L. Q.* 482.

33. Clark, *Code Pleading* (1928) ch. 6.

34. *Id.*, ch. 7.

no agreement as to its meaning, so that there was any certainty what courts would do next in applying it not only to joinder of causes, but in other situations, such as stating the cause, amending it after the statute of limitations had run, or splitting it into two or more lawsuits. I consider myself a battle-scarred veteran of this rather futile, or at least unnecessary, war. In a rash moment, in the days of my youth, I perpetrated an article defining the "cause" and attempting to read some pragmatic significance into it by considering the purposes it might have been intended to subserve. Substantially I considered it to be the old equity concept of the factual situation giving ground or cause for multiple possible claims, or rights of action, and that it should not be given the restrictive significance of a single right of action.³⁵ I thought, and still think, that, notwithstanding the clamor and confusion of tongues, I had history and logic as well as practical convenience with me; and several courts of some renown seemed to agree with me, for they quoted the definition approvingly.³⁶ To my surprise, however, many of my colleagues, the professors, went off the deep end, and a lot of law review articles blossomed forth and have been blooming ever since.³⁷ To say that I had desecrated the ark of the covenant—of special form in pleading—is to put it mildly.

I have been interested to note that recently a formidable huntsman has come hot on my trail in the shape of your fellow townsman and my good friend, Professor Carl Wheaton.³⁸ Professor Wheaton pays me the subtle compliment of suggesting that I have succeeded in misleading some very distinguished judges and

35. Clark, *The Code Cause of Action* (1924) 33 *Yale L. J.* 817; Clark, *The Cause of Action* (1934) 82 *U. of Pa. L. Rev.* 354.

36. *United States v. Memphis Cotton Oil Co.* (1933) 288 *U. S.* 62, 53 *S. Ct.* 278, 77 *L. ed.* 619; *Harris v. Tams & King* (1932) 258 *N. Y.* 229, 179 *N. E.* 476; *Stafford Sec. Co., Inc. v. Kremer* (1931) 258 *N. Y.* 1, 179 *N. E.* 32; *Covey v. England & McCaffrey, Inc.* (1931) 233 *App. Div.* 332, 253 *N. Y. S.* 340; *Whalen v. Strong* (1930) 230 *App. Div.* 617, 246 *N. Y. S.* 40; cf. *Bemis Bros. Bag Co. v. United States* (1933) 289 *U. S.* 28, 53 *S. Ct.* 454, 77 *L. ed.* 1011.

37. Most of the articles are cited in Clark, *The Cause of Action* (1934) 82 *U. of Pa. L. Rev.* 354. A typical selection would be McCaskill, *Actions and Causes of Action* (1925) 34 *Yale L. J.* 614; Gavit, A "Pragmatic Definition" of the "Cause of Action"? (1933) 82 *U. of Pa. L. Rev.* 129; McCaskill, *The Elusive Cause of Action* (1937) 4 *U. of Chi. L. Rev.* 281; Wheaton, *The Code "Cause of Action": Its Definition* (1936) 22 *Corn. L. Q.* 1.

38. Wheaton, *The Code "Cause of Action": Its Definition* (1936) 22 *Corn. L. Q.* 1; see also Wheaton, *Causes of Action Blended* (1938) 22 *Minn. L. Rev.* 498.

then says that he should like to follow me, only the limitations imposed by a due respect for mental honesty prevent. Certainly I do not feel I ought to put such a strain on any one. And so I recommended to the Advisory Committee, and the Committee agreed, that we forget this phrase totally and completely, as it had outlived its usefulness, if it ever had any. Several of our learned colleagues always felt lost without it, but I think most of us feel it is good riddance. At any rate the rules provide, in accordance with the trend in the newer procedure in the states and the English model, that joinder of claims shall be quite free, and joinder of parties had on the basis of the existence of a common question of law or fact arising out of a single transaction or series of transactions. Any possible injustice is obviated by the power in the court to order separate trials of any issues.³⁹

Now the other feature of the common-law system, the formulating of issues, need not cause trouble if the requirement is not of too narrow issues. Ancient pleading did stress the theory that the parties by their successive written pleadings admitting and avoiding or denying the assertions of their opponents should ultimately isolate the one point in dispute between them and leave that alone for the formality of trial, all other extraneous matter being thus removed.⁴⁰ This might occasionally happen in the comparatively simple case. But many times it would not, for the simple reasons, either that there were actually more matters in dispute, or that counsel could not afford to admit that there were not more. The latter is most important. In advance of trial it is not to be expected that the attorneys will put themselves in a position of showing more of their case than they have to, or where they cannot take advantage of whatever favorable evidence may later develop. Actually special pleading is a game where you try to catch the other fellow in an admission caused by his saying too much while you say as little as you can. It is obvious, since words can be used to conceal as well as to betray information, that wise lawyers are not so caught. As to the unwise lawyers, an admission may really be a betrayal of an innocent client, and courts are properly unwilling to penalize clients for the mistakes of their lawyers. Consequently amend-

39. See particularly Rules 18-21, 24, 42, 13 and 14, and the Committee's notes to them.

40. Clark, *Code Pleading* (1928) pp. 10, 11, 29, 30, 150, 479, 480.

ments are permitted and the whole idea of the single isolated issue is gone. Experience should teach us not to fight this tendency of the lawyer to protect his client—indeed we teachers could not consider him well trained unless we teach him this—but to develop our rules on the basis of it. No case is won by admissions in the pleadings unless the lawyer is willing or dumb. He is willing only when there is only an issue of law anyhow, and an agreed statement to present such an issue is easily obtained. Special pleading, in other words, just does not work. It never has; it cannot be expected to in the future.⁴¹

Now at common law the harshness of the formal statement of the issue-formulating process was avoided in several ways, such as the use of several counts or defenses to present either the same matter or different matters, but in different compartments of the pleading. That was permitted at common law; it is permitted today. But it leads to wordy and repetitious statement. A more adequate method which was anciently used was the broadening of the issue, *i. e.*, general pleading. Consider the common counts in *assumpsit*. These allowed a very broad and general statement of a debt due. With the defendant's plea of the general issue ("non-*assumpsit*"—he did not promise) the issue was made. Consider Forms 4 to 8 set forth in the new federal rules. They are modern direct statements based on these common law models, which, although criticized from time to time by theorists, were found practically too convenient to be rejected in code pleading. Thus, Form 5 is the common-law complaint for goods sold and delivered, "Defendant owed plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936, and December 1, 1936." And Form 6 is money lent, "Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1936," while Form 8 is money had and received, "Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff."⁴²

41. The author has discussed this matter elsewhere. See Clark, *Pleading Negligence* (1923) 32 *Yale L. J.* 483; the discussion with Chief Justice Maltbie appearing in (1935) 9 *Conn. Bar J.* 282-297; and Clark, *The New Federal Rules of Civil Procedure: The Last Phase* (1937) 23 *A. B. A. J.* 976.

42. For discussion of the function of this count, see Mr. Justice Stone in *Stone v. White* (1937) 301 *U. S.* 532, 57 *S. Ct.* 851, 81 *L. ed.* 1265. See also Clark, *Code Pleading* (1928) 196-202; Cook, "Facts" and "Statements of

These forms which I have referred to may prove to be about the most important feature of the new rules. They afford the illustrations to show what the words in the rules proper mean, to show as Rule 84 states, "the simplicity and brevity of statement which the rules contemplate." The success of several of the best state practice codes is held to depend on the fact that they were accompanied by illustrative forms.⁴³ With these as examples no pleader should feel compelled to long and involved assertions. Not that such allegations, where necessary to present a complicated case, are forbidden. The rules definitely permit a considerable choice to the pleader as to how he shall tell his story. Thus prohibitions developed in certain codes against alternative or conditional statements are expressly removed.⁴⁴ If he is not sure of his facts he may show what his doubt is so long as he honestly sets forth what he knows. But the model is the simple, direct, and rather general statement familiar to generations of lawyers by its use from common-law times to the present.

The advantage of such a flexible system seems obvious. Are there disadvantages? Does this permit a party unfairly to conceal his case? I think it can be shown that it does not. Of course we must decide what we expect of the pleadings, the formal written statements of the parties in advance of trial. If it is proof of the other fellow's case, that is a vain hope, as I have tried to show. I verily believe, however, that the supporters of detailed pleading still hope to dispense with proof in this way. What we can expect, however, is such a statement of the case as will isolate it from all others, so that the parties and the court will know what is the matter in dispute, the case can be routed through the court processes to the proper method of trial and disposition, and the judgment will be *res adjudicata*, so that the same matter cannot again be litigated. There is no fixed and

Fact" (1937) 4 U. of Chi. L. Rev. 233; Ilsen, The Preliminary Draft of Federal Rules of Civil Procedure (1937) 11 St. John's L. Rev. 212. Compare Mr. Chief Justice Hughes's approval of simplified form of statement in patent litigation: *Mumm v. Jacob E. Decker & Sons* (1937) 301 U. S. 168, 57 S. Ct. 675, 81 L. ed. 983.

43. Rossman, Approved Forms of Pleading (1932) 12 Ore. L. Rev. 3; Cook, Statements of Fact in Pleading Under the Codes (1921) 21 Col. L. Rev. 416; Sunderland, The Michigan Judicature Act of 1915 (1917) 14 Mich L. Rev. 551. And see also (1935) 44 Yale L. J. 1483 and references to the Connecticut Bar Journal, note 41, supra.

44. Rule 8(e). This was criticized by Congressman Ramsay at the hearing, and also in his address, both supra note 5.

certain rule as to the detail required. It is more or less of a compromise determined by the habits and traditions of the lawyers and the needs and exigencies of each of the parties in intelligently fighting the particular case through. Let us turn to one of the most usual situations now litigated, the automobile accident case, to see how the matter of pleading actually works out.

Form No. 9 of the new rules deals with this matter. The vital allegation is, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Then follows a brief description of the plaintiff's injury. This form is taken directly from the Massachusetts statute.⁴⁵ In turn it comes from Chitty and the common-law action of trespass on the case.⁴⁶ It has stood the test. It shows the one kind of case the plaintiff is relying on—an automobile accident case where the autoist is claimed to have run a pedestrian down. What more could one properly ask?

Now some lawyers have thought that further details should be added. But details will not necessarily paint a truer picture. They may even mislead. I recall one shrewd and successful negligence lawyer who always added to every case three pages of detailed facts of negligence copied from a standard form he had devised. Of course many, even on their face, would have no relevancy to the matter in dispute. But they would do no harm, since the inappropriate would be automatically eliminated at the trial without penalty to the pleader. And in any event he and his client were protected against any developments. So with our form, what can be added with profit? Defective brakes, lack of headlights, failure to keep a lookout, *etc.*? It would be nice, indeed, for the plaintiff if the defendant would admit any of these things. And yet it is the plaintiff who is making the allegations. Moreover none of them are primary or ultimate in the sense that even if they existed the case would be proven. After all in an accident case such as this, the question really is one of timing of the two bodies in collision with reference to each other and the ultimate essential points of testimony are, therefore, the relative speed of each actor and the course on the street each traveled

45. 2 Mass. Gen. Laws (1932) ch. 231, sec. 147, Form 13.

46. 2 Chitty, *Pleading* (7th ed. 1844) 529; *Williams v. Holland* (C. P. 1833) 10 Bing. 112.

up to the point of impact. The succinct statement of the old form brings out the plaintiff's essential claim as clearly as a wealth of details would. Except for the possibility of entrapment of an opponent by inducing him to admit what he does not wish to—and that is as unlikely as it should be undesirable—the complaint serves every reasonable purpose, without forcing the plaintiff unduly to prejudice his case.⁴⁷

Attempted use of the pleadings as proof is now less necessary than ever with the development of two devices to supply such elements of proof as may be necessary before trial. These are discovery and summary judgment, both the subject of extensive provisions in the new rules.⁴⁸ By means of discovery—proceedings for the examination of witnesses or opposing parties before trial—a party may learn whatever he needs to know about his case or his opponent's case before trial. Formerly this was thought undesirable, for counsel was entitled to have something in reserve with which to surprise his opponent at the last minute of trial. Now it is felt fairer, and more productive of truth in ultimate analysis, to require disclosure of all of a claim or defense at an early stage of the proceedings. The possibility of the manufacture of rebuttal testimony, which cannot be detected, seems less objectionable than concealment and surprise and is offset by the desirability of putting the observers on record at an early stage and to that extent preventing the concoction of false evidence. Summary judgment, unlike the pleadings proper, does call for a searching examination of the opposing party with the penalty that he will lose his case if he does not respond. It can therefore accomplish what pleadings cannot. By it the party moving for judgment summarily supports his own case by detailed affidavits of fact and thus forces his opponent to reply in like detail. It should be noted, however, that it is adapted only for rather simple issues where the facts are on the surface. The motion will be denied when a disputed question of fact is disclosed. When this happens resort to the procedure has only delayed the case. But since it is usually the plaintiff who is pressing the case to summary judgment, he is likely to refrain from asking for this remedy if the chances are that he will have only

47. See discussion in 9 Conn. Bar J. 282 et seq.; cf. *Mezzi v. Taylor* (1923) 99 Conn. 1, 120 Atl. 871.

48. Rules 26-37 and 56, and the Committee's notes thereto.

delay to show for his pains. Nevertheless the remedy, while important for the disposal of cases where the opponent has no real defense on the facts, is very far from universal in its applicability. In fact in the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice.

I have spoken thus at some length of the general philosophy of modern pleading, because knowledge of that is important in order to understand present-day reforms. And the way in which that philosophy is embodied in the new federal rules seems to me one of the important and interesting features of that reform, particularly to students and teachers. Let me reiterate that I am attempting no complete summary of the rules. The activities of law publishers announcing many books, one of three-volume size, indicate that no brief paper can adequately describe them. Some features, such as the discovery and summary judgment provisions, I have mentioned in passing; others, such as those broadening the rules of admissible evidence and simplifying the taking of appeals and the preparation of appellate records, deserve more than the bare reference with which I must leave them. As I close, I would like, however, to stress the approach to uniformity in the procedural law of this country which the rules should stimulate. Senator Walsh in so long opposing the new reform objected that a complicated metropolitan practice was to be forced upon the lawyers of various remote states in place of the simple practice they knew. If that result was likely, his opposition was justified. I do not believe in retrospect that it can now be said to have followed; for the practice recommended is the simplest and most flexible known in this country. And it supplants one in the highest degree complex and involved. Lawyers still speak of the principle of the old conformity act of 1872 as allowing local lawyers to go into the federal courts secure in the knowledge that their state procedure will be followed.⁴⁹ But the actual situation is far otherwise. Federal practice is now the most esoteric, the most highly specialized of procedural systems. One needs unusual preparation to venture into it. The conformity principle,

49. Compare discussion at the hearing; also Congressman Ramsay's speech, both *supra* note 5.

by definition and decision, does not apply to matters of jurisdiction and constitutional right, and hence it governs only to a limited extent the institution of suit, and not at all matters of trial and appeal; it does not apply in equity or to matters where equity and law are already partially blended, as in the case of equitable defenses; it is set aside by special acts of Congress, a broadening field as Congress acts more and more to reform at least parts of practice, such, for example, as amendment of pleadings and process. In fact it is difficult to know when it begins and where it ends.⁵⁰ Yet its existence makes impossible a definite body of general procedural precedents. What it does is to force a special federal practice in each state, which is unique for that territorial area, and is neither the local nor the ancient chancery, nor the federal statutory and constitutional, procedural, but is a mixture of all.

It is for that complex and complicated structure that a single uniform system of simple uncomplicated allegation, and answer, of production of proof and trial and appeal, is to be substituted. If it happens thereafter that the states go on to adopt this procedure as their own, then Senator Walsh's fears may prove indeed to have been groundless. For instead of pressing a strange practice on those accustomed to a simplified one, the simplified system not only will operate throughout the entire establishment of national courts, but may well serve to exorcise a complex procedure from the state courts as well.

50. Cf. Tolman, *The Origin of the Conformity Ideas, Its Development, the Failure of the Experiment* (1937) 23 A. B. A. J. 971, and Clark and Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 Yale L. J. 387.