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Amendments to the Federal Rules: The Function of a Continuing Rules Committee

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AMENDMENTS TO THE FEDERAL RULES: THE FUNCTION OF A CONTINUING RULES COMMITTEE

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No development in American procedural history in the last century has exceeded in importance the adoption by the United States Supreme Court in 1938 of the Federal Rules of Civil Procedure. These rules, the product of a distinguished Advisory Committee, introduced a system and a philosophy differing as markedly from the code pleading then in vogue as code pleading, in its day, had differed from common-law pleading.[1] This new system has worked well in the federal courts, so well indeed as to stimulate a reexamination of procedure in many of the states, with nearly a dozen jurisdictions having already adopted the concepts introduced by the Federal Rules.

Changes in the Federal Rules are, therefore, of significance not limited to those who practice in the federal courts. The amendments are likely to be seriously considered by the states which have emulated the federal practice, and which may well wish to incorporate the new provisions in their local systems. The amendments are significant to states where groups are pressing for adoption of the Federal Rules. Indeed such amendments are of importance to lawyers everywhere who are interested in procedural reform.

The Advisory Committee to the United States Supreme Court on Rules of Civil Procedure has just distributed to the profession an extensive series of proposed amendments to the Federal Rules.[2] By way of contrast to those unlucky jurisdictions where procedure is still regulated by the legislature, and where tinkering with the code is a commonplace at every legislative session,[3] this is only the second time in the 16 years the Federal Rules have been in operation that substantial changes have been proposed.[4] In accordance with

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The views expressed herein are those of the author; except to the extent that the published Report of the Advisory Committee is relied upon, nothing in this article may be regarded as indicating, in any way, the views of the Committee.

1. The system is indeed so different that it may properly be referred to generically as "modern pleading," to distinguish it from "code pleading" and "common-law pleading." For a definition of modern pleading, and a list of the states which enjoy such a system, see Wright, *Modern Pleading and the Pennsylvania Rules,* 101 U. OF PA. L. REV. 909-10, 913 (1953).

2. The report, entitled PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, has been published by the Government Printing Office under date of May, 1954.

3. See Clark and Wright, *The Judicial Council and the Rule-making Power: A Dissent and a Protest,* 1 SYRACUSE L. REV. 346 (1950).

4. An amendment of December 28, 1939, effective April 3, 1941, made the

its usual practice, the Advisory Committee has put its proposals before the profession in order that it may have the benefit of the views of lawyers and scholars throughout the country before making final recommendations to the Supreme Court. This article will attempt to explain what changes it is that the Committee has proposed, but first it may be of interest to describe the procedures followed by the Committee in preparing its present report.

THE RULEMAKING PROCESS

Late in 1952 it was decided that the Advisory Committee should once again examine the operation of the Federal Rules. No overall study had been made by the Committee since 1946, when it reported to the Supreme Court the amendments which became effective in 1948. The Committee's Reporter, Judge Charles E. Clark, of the United States Court of Appeals for the Second Circuit, began preparing, for the guidance of the Committee, a survey of what had happened to the rules in the ensuing years. First attention was, of course, given to the cases. Were conflicts developing which should be resolved? Had the courts uncovered areas where the Rules required them to act in ways thought undesirable, or where the rules failed to give them authority to take actions which seemed needful? Was Gresham's Law of Procedural Precedents[5] leading to the development of restrictive glosses on some of the rules?

Study of the cases disclosed many questions on which amendments might be worthwhile, but examination of the cases did not end the preliminary research. Texts and treatises were carefully studied, as were articles and student work in every American law review. These scholarly sources contained many suggestions for amendment of the rules, and pointed out problems not apparent from a reading of bare cases. State experience was looked to, also, with particular attention to changes made by state advisory committees in adapting the Federal Rules to local needs. Finally, there had accumulated in the files of the Committee a large number of letters from earnest lawyers, making suggestions as to possible improvements.

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rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act; an amendment of December 31, 1948, effective October 20, 1949, made changes of name and citation required by the revision by Congress of the Judicial Code; and an amendment of April 30, 1951, effective August 1, 1951, added Rule 71A on condemnation. The only substantial amendments were those of December 27, 1946, effective March 19, 1948.

5. Thus see Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241, 245 (1953): "By what I have ventured to call a Gresham's Law of Procedural Precedents, the technical and the strict in due course drives out the liberal and flexible. The latter is not striking; indeed, it may never be written into a formal opinion. For what the trial judge lets the

All this material was synthesized in a 102-page document, "Experience under the Federal Rules of Civil Procedure." This document was available to Committee members prior to their meeting in May, 1953. At this meeting the members of the Committee—judges, lawyers, and professors from all over the country—spent three days deliberating about the suggestions for amendment. Many suggestions were rejected, not necessarily because they lacked merit but because the Committee was opposed to change merely for the sake of change, and approved only those amendments for which there was a showing of clear need.

In the months that followed the Committee meeting, the changes approved were put into amendment form, and Notes to accompany the amendments drafted. The document thus compiled was distributed to the Committee, and comments thereon by members of the Committee were circulated. The Reporter prepared a new 40-page memorandum bringing experience with the rules down to date. All of this material was before the Committee when it assembled again in Washington in March of this year for another three days of intensive work on the proposed amendments. Many improvements came from this new examination. Subsequently the amendments and Notes were again redrafted to conform with the decisions the Committee had made. This newest draft was sent to the Committee, and members' comments on it once more circulated. After final changes to meet suggestions produced by this last step, the amendments were finally released for study by the profession.

The proposed amendments which have resulted from this arduous process may be divided into four classes: those which make important advances over the existing practice; those which codify results which most courts have already reached but which should be made clear and definite; those which remove undesirable glosses added to the rules by the courts; and those which are added for purely technical reasons, usually to conform with some important change to another rule.[6] Finally there are two rules, Rule 8(a) (2) on statement of a claim in the complaint, and Rule 54(b) on judgment on multiple claims, where the Committee proposes no change but has added a Note intended to clarify the meaning of the rule.

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litigant or his counsel do, and the appellate court permits, is not something to stimulate a legal opinion in any of the famous Cardozo styles—ranging from 'magisterial or imperative' to 'tonsorial or agglutinative.' But a restrictive opinion finding some grievous fault in the methods of justice is different. In an attitude ranging from defiant virtue to sad reproof, it will exude limiting mandates and technical precepts which expand as they ripple down through later cases and trial court rulings."

6. The technical amendments, which are not commented upon in the body of the article, may be briefly listed here for the sake of completeness. The amendments to Rules 20(b) and 42(b) tie those rules in with Rule 54(b),

IMPORTANT ADVANCES

The Committee has proposed amendments which must be regarded as important advances over present practice to Rule 4, on service of process, Rule 14, on third-party practice, Rule 25, on substitution, and Rule 30(c), on transcription of depositions. Of all the amendments proposed by the Committee, probably no others will attract as much attention as those to subdivisions (e) and (f) of Rule 4.

Rule 4(e). "Quasi-in-Rem" Actions, etc. This rule as it now stands has allowed service by publication, or by notice to someone not found in the state, in a very limited group of cases, usually where the plaintiff has a pre-existing lien on property in the state.[7] The amendment adds to the rule the following sentence:

> "Whenever a statute or rule of court of the state in which the district court is held provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or for notice on such a party to appear and respond or defend in an action by reason of the attachment or garnishment of his property located within the state, it shall also be sufficient if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule."

The purpose of this amendment is to give the federal courts the same techniques for bringing in nonresidents that have long been enjoyed by the courts of every state. The principal usefulness of the amendment will be to let the federal courts entertain so-called "quasi-in-rem" actions, *i.e.*, actions in which the defendant is absent from the state and jurisdiction is obtained over his property in the

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as had previously been done with Rule 13(i) and as is also done in the proposed amendment to Rule 14(a). For an explanation, see p. 522 *infra*. The amendments to Rule 7(a) and to Form 22 were needed to remove the references in those two places to granting of leave to serve a third-party complaint, since the amendment now proposed to Rule 14(a) eliminates the need for obtaining such leave. The amendment to Rule 81(f) reflects the fact that Collectors of Internal Revenue, there referred to, have had their titles changed, and are now District Directors of Internal Revenue. The proposed new Rule 86(d) states the effective date of these amendments. The amendment to Rule 41, stating that dismissal for lack of an indispensable party is without prejudice, states what has always been the law, and conforms to an amendment effective in 1948 to Rule 12(h). The amendment to Rule 34 conforms with the changes now made to Rule 33 on interrogatories. For an explanation, see pp. 541-43 *infra*. The amendment to Rule 37 conforms to the changes now made in Rule 35 on physical examinations. See pp. 543-44 *infra*. The amendment to Rule 6(b) deletes mention of Rule 25 in the list of rules as to which time cannot be extended, since proposed amendments to Rule 25 take out the time limits from that rule. See pp. 528-31 *infra*.

7. The rule has been used principally for actions under 28 U.S.C. § 1655, which allows suit without personal service where the defendant cannot be served within the state and the action is to remove a pre-existing lien on, or to remove an encumbrance against the title to, property within the state. Blume, *Actions Quasi In Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH. L. REV. 1 (1951).

state by attachment or garnishment. This means of acquiring jurisdiction has long been familiar to all the states, and the federal courts hear every day such actions removed from the state courts by the defendants.[8] Until now it has not been possible to commence such an action in the federal courts, not because of any constitutional barrier but merely because there has been no statute or rule of court authorizing this means of acquiring jurisdiction.[9] The amendment also should still doubts which have recently been raised as to whether it is possible to bring an action against a nonresident motorist in federal court by the convenient device of service on some designated state official.[10]

Of course the amendment cannot, and does not, alter requirements of jurisdiction or venue. It provides only that where an action is within the jurisdiction of the federal courts, and the venue is proper, an additional means is available by which the defendant may be brought into court.[11]

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8. Removal of such cases, though there has been no personal service, is upheld in Clark v. Wells, 203 U.S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138 (1906) and see 28 U.S.C.A. § 1450 (1950).

9. Rorick v. Devon Syndicate, Ltd., 307 U.S. 299, 59 Sup. Ct. 877, 83 L. Ed. 1303 (1939). For a time it was thought that Rule 64, allowing attachment and garnishment when they are permitted by state law, supplied the lack of authorization, and meant that these procedures could be used as a means of acquiring jurisdiction. 13 So. CALIF. L. REV. 361 (1940). Courts which have held to the contrary: Branic v. Wheeling Steel Corp., 152 F.2d 887 (3d Cir. 1945), *cert. denied*, 327 U.S. 801 (1946); Davis v. Ensign-Bickford Co., 139 F.2d 624 (8th Cir. 1944); McMinn County v. Mansfield, 12 FED. RULES SERV. 64.6, Case 1 (E.D. Tenn. 1949); Stockard S.S. Corp. v. Industries Reunidas F. Matarazzo, C.A., 7 FED. RULES SERV. 64.6, Case 2 (S.D.N.Y. 1944); and see MOORE, FEDERAL RULES 288 (1951).

10. In Olberding v. Illinois Central R. Co., 346 U.S. 338, 74 Sup. Ct. 83, 98 L. Ed. 7 (1953), the Supreme Court unfortunately held that there is no waiver of federal venue requirements by driving on the highways of a state, and thus that suit can be brought in federal court against a nonresident motorist by service on a state official only where all of the plaintiffs are residents of the district in which suit is brought. The amendments, of course, do not touch this question, or any other matters of venue. FED. R. CIV. P. 82.

The problem which the amendment will touch is raised by Judge Maris' concurring opinion in McCoy v. Siler, 205 F.2d 498, 501 (3d Cir.), *cert. denied*, 346 U.S. 872 (1953). Judge Maris had argued that Rule 4(f), limiting extra-territorial service, is a direct limitation upon the broad terms of Rule 4 (d) (7) generally authorizing service in the state manner, and that it is the notice by registered mail to the nonresident motorist, rather than the service of the complaint upon the state official, which is the actual service of process for jurisdictional purposes. This view would make it impossible to bring the nonresident motorist into court in the district where the accident occurred, even though all the plaintiffs resided there and no problems of venue were, therefore, present. This construction is neither practically desirable nor constitutionally required, and, as a district court has since held, does not rest on a persuasive construction of Rules 4(d) (7) and 4(f) as they now exist. Giffin v. Ensign, 15 F.R.D. 200 (M.D. Pa. 1953). In any event, this amendment to Rule 4(e) makes it crystal clear that a notice may be served outside the state whenever the state allows such a procedure for its own courts.

11. Thus the amendment is properly within the scope of the rule-making power. Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 66 Sup. Ct. 242, 90 L. Ed. 185 (1946).

Rule 4(f). Extra Territorial Service. Being, as it tells us in its Note, "in doubt," the Committee has presented alternative proposals for amendment of Rule 4(f), and has solicited the advice of the bar in choosing between these alternatives. Rule 4(f) sets out the territorial limits of service. In most cases, service may only be made within the borders of the state where district court is held, though with regard to subpoenas, Rule 45 has continued the ancient practice of allowing service without the state at points within 100 miles of the court. Each of the alternative forms of amendment conforms service of all process to that of the subpoena, and allows process to be served without the state but within 100 miles of the court. One form of the proposal authorizes such extra-territorial service in all cases; the other allows it only on third-party defendants, additional defendants to counterclaims, indispensable parties to an existing action, and persons against whom process is being served to enforce an earlier order, as in the case of contempt proceedings.

The need for some amendment here is clear. Perhaps the best example is presented by a case in which a woman had obtained a divorce in the District of Columbia. When the divorced husband failed to make alimony payments, the court in the District was willing to order him committed for civil contempt but was powerless to do so as long as he remained across the river in a Virginia suburb.[12] Such a situation is possible too often in our great metropolitan areas, which have refused to be confined within state lines.

Third-party practice, under Rule 14, is a useful technique for cleaning up in one lawsuit matters which might previously have required two actions. Use of this device is in the interest of efficient and economical judicial administration. Yet from the reported decisions alone, the Advisory Committee has found six cases in which the third-party defendant has had to be let out of the suit because he lived in another state, though within 100 miles of the place of trial.[13] Undoubtedly there must be scores of other cases where use of Rule 14 would have been convenient and desirable but where the lawyers refrained from employment of the rule because the third party was just over the state line and service on him was impossible. The amendment will allow impleader in such cases.

As between the alternatives the Committee has proposed, the relevant considerations are these: the more limited proposal covers the situations now brought to the attention of the Committee and

12. Graber v. Graber, 93 F. Supp. 281 (D.D.C. 1950).

13. Banachowski v. Atlantic Refining Co., 84 F. Supp. 444 (S.D.N.Y. 1949); Thompson v. Temple Cotton Oil Co., 2 F.R.D. 373 (W.D. Ark. 1942); O'Brien v. Richtarsic, 2 F.R.D. 42 (W.D.N.Y. 1941); F. & M. Skirt Co. v. Wimpfheimer & Bro., 27 F. Supp. 239 (D. Mass. 1939); *cf.* Hook v. Hook & Ackerman, 89 F. Supp. 238 (W.D. Pa. 1950); *see* Lesnik v. Public Industrials Corp., 144 F.2d 968 (2d Cir. 1944).

will cure immediately pressing problems; the broader proposal would cover all situations, and would obviate the need for another amendment in the future if new problems should arise. My own view is that the 100-mile limitation conforms realistically to the growth of metropolitan areas, and that modern means of transportation would make it burdensome to no one. It might be harsh to whisk a resident of California off to New York to answer a law suit, but the amendment doesn't do that. It does make it possible for a person who lives in New Haven to sue a New York corporation in the Connecticut District Court, rather than being required to pursue his defendant to the crowded Southern District of New York. Why not?

Rule 14(a). Third-Party Practice. Third-party practice is the technique, more usually referred to as "impleader," by which a defendant may have a person who is or may be liable to defendant for all or part of plaintiff's claim against him added as a third-party defendant. The existing practice has required defendant to get the permission of the court before serving a summons and third-party complaint against the third party. It is entirely proper that the court should have discretion as to whether the third party is to be added. There are rare cases where bringing in the third party may cause delay or confusion, and use of the procedure would not, therefore, be in the interests of justice. But it makes no sense to ask the court to exercise its discretion until the third party is before the court, for not until that time can anyone tell what additional issues will be raised, what confusion caused, by bringing in the outsider.[14] If the court, as it wisely should under the present rule, grants leave to bring in the third party as a matter of course, subject to a later motion to vacate after all parties are in, then the requirement of judicial consent is delaying and wasteful to no good purpose. And if, as one court has recently held,[15] the court must exercise its discretion at the outset, and may not reconsider the matter after the third party is in, then we have the sorry spectacle of a rule which requires courts to make uninformed decisions.

For these reasons better state practices have allowed defendant to implead third parties as a matter of course, without leave of the court, and have empowered the court to exercise its discretion at a later stage.[16] The proposed amendment to Rule 14(a) makes a similar change in the federal practice. By specific provision it gives any party the right to move for severance, separate trial, or dismis-

14. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules,* 36 MINN. L. REV. 580, 612 (1952).

15. Texas Eastern Transmission Corp. v. Standard Acc. Ins. Co., 13 F.R.D. 324 (M.D. Tenn. 1952), criticized 37 MINN. L. REV. 634 (1953).

16. *E.g.,* N.Y. CIV. PRAC. ACT § 193-a(1); PA. R. CIV. P. 2252(a); Wright, *Modern Pleading and the Pennsylvania Rules,* 101 U. OF PA. L. REV. 909, 942 (1953).

sal[17] of the third-party claim, and the court can exercise its discretion on such a motion when everyone is before it and it is completely informed.

Rule 25(a). Substitution for a Dead Party. Plaintiff in a case a few years back was attempting to enforce assessments against more than 5000 stockholders. Mortality took its inevitable toll, and as plaintiff learned of deaths among the defendants, he moved, under Rule 25(a), to substitute the successors or representatives of the dead parties. In a few cases plaintiff inevitably did not learn of the deaths until more than two years after the event. Yet the United States Supreme Court held, rightly enough under the existing rule, that substitutions must be made within two years, and that plaintiff was now barred on his claim against the estates of those for whom he had not made substitutions within that time limit.[18]

This notion of a fixed and inflexible limit on the time for substitution is inconsistent with the general philosophy of the Federal Rules, which elsewhere give the trial court broad discretion to do whatever justice demands. And there is a further anomaly about the existing rule. Rule 25(a) as originally promulgated had a two-year limit because there was such a limit in the relevant statute. In the 1948 revision of the Judicial Code, the statute was repealed for the stated reason that it had been superseded by the rule. Thus the rule, originally drawn merely to conform with the statute, now stands as a statute of limitations without support in the statutes. It is at best doubtful whether such a statute of limitations is properly within the rule-making power.[19] It is hardly doubtful that the rigid limit of the rule is unsatisfactory. Thus the proposed amendment eliminates the two-year limit and provides only that if substitution is not made "within a reasonable time," the court may dismiss the action.

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17. Though the literal language of the amendment would seem to allow a plaintiff to move for dismissal of defendant's claim against the third party, it is difficult to see what standing the plaintiff has to urge such a course. Presumably a motion to dismiss for failure to state a claim on which relief can be granted, or for any of the other reasons listed in Rule 12(b), must be made by the party against whom the claim is asserted, *i.e.*, the third-party defendant. Voluntary dismissal under Rule 41(a) must be made by the claimant, which in this case would be the original defendant, while involuntary dismissal, under Rule 41(b), comes on a motion by the party against whom the claim is stated. The question is of intellectual interest—as a practical matter, the legitimate claims of the plaintiff for a speedy trial not cluttered up with irrelevant issues are protected by his right to move for a separate trial, under Rule 42(b), or for severance of the third-party claim, under Rule 21.

18. Anderson v. Yungkau, 329 U.S. 482, 67 Sup. Ct. 428, 91 L. Ed. 436 (1947).

19. That statutes of limitations are substantive for some purposes was held in Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945). If this statute of limitation on revivor is, indeed, substantive, then it is invalid in diversity cases because of conflict with the *Erie* doctrine, and it is invalid in federal matters because beyond the scope of the rule-making power. 28 U.S.C.A. § 2072 (1950). Though several cases have held that state

Rule 25(d). Substitution of Public Officials. This rule has some quite notable distinctions. Already castigated, in common with Rule 25(a), as "easily the poorest rule of all the Federal Rules" by Professor Moore,[20] it has since achieved the unique position of being the only one of the rules for which amendment has been demanded by a lay newspaper. Commenting on two Supreme Court interpretations of this rule, the Washington Post, in an editorial entitled "Sand in the Wheels," said:

> "If the Federal Rules of Civil Procedure require such results, certainly they ought to be amended."[21]

The rule covers the situation where a public office changes hands. Under the existing rule, substitution must be made within six months after the successor takes office, and a showing must be made of substantial need for continuing the action by or against the successor official.

The existing rule is frequently a trap for the unwary. Its rigid six-month provision—like the similar provision in Rule 25(a) no longer supported by statute—has led often to judicial waste motion by requiring the dismissal of actions well on the way to decision.[22] Further, by requiring substitution at all, the rule imposes needlessly on the time of courts. During the days of price control, thousands of actions were brought in the name of the administrator. Every time that office acquired a new incumbent, substitution was necessary in each of these actions.[23]

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law is not controlling as to substitution in diversity cases—Commercial Solvents Corp. v. Jasspon, 10 F.R.D. 356 (S.D.N.Y. 1950), Hofheimer v. McIntee, 179 F.2d 789 (7th Cir.), *cert. denied*, 340 U.S. 817 (1950)—these decisions have not been very thoroughly reasoned, and Professor Moore takes a contrary view. 4 MOORE, FEDERAL PRACTICE ¶ 25.06 (2d ed. 1950). Moore also expresses serious question as to the validity of the existing rule in federal matters.

20. 4 MOORE, FEDERAL PRACTICE ¶ 25.01[7] (2d ed. 1950).

21. Washington Post, Oct. 21, 1952.

22. In Snyder v. Buck, 340 U.S. 15, 71 Sup. Ct. 93, 95 L. Ed. 15 (1950), plaintiff had had a judgment directing the Navy Paymaster to pay her claim. The Paymaster went out of office, but the Government took its appeal in the name of the former incumbent. After the six month period for substitution had expired, the Government called to the attention of the court the change in office. The Supreme Court held that, because of the failure to make a timely substitution, "plaintiff loses her judgment and must start over." The case is criticised at 5 MIAMI L.Q. 611 (1951) and 50 MICH. L. REV. 443 (1952). Of equally great interest is the little noticed case of McGrath v. National Ass'n of Manufacturers, 344 U.S. 804, 73 Sup. Ct. 31, 97 L. Ed. 627 (1952). McGranery replaced McGrath as Attorney General after a district court had decided that an act against lobbying was unconstitutional, but before judgment had been entered. The court went ahead and gave judgment enjoining McGrath from enforcement of the statute. Plaintiff made several motions in the Supreme Court to substitute McGranery, but even before the six month period had expired, the Court ordered dismissal of the suit as moot in a brief per curiam opinion, which merely cited Snyder v. Buck, *supra*. Two Justices dissented on a motion for rehearing, 344 U.S. 887 (1952), but the inexplicable—and indefensible—result stands.

23. Some courts permitted an *ex parte* blanket substitution of the new

The amendment eliminates the six-month limit entirely, and provides only that substitution must come within a reasonable time. But it goes beyond that. It ends altogether the necessity for substitution in the great bulk of cases by a provision that when the officer is suing or being sued in his official capacity, he need not be mentioned by name at all. Thus where in reality the Government is the litigant, we shall no longer have the time-consuming formality of substituting one nominal party for another nominal party.[24] There are two good arguments supporting this change: one is that it will save time, the other is that already many lawyers are resorting to this practice.[25]

Of course "official capacity" is not such a term of art that it will be crystal-clear in every case whether the officer need be named. The Advisory Committee Note suggests that it will be sufficient to name the office

> ". . . in mandamus actions, proceedings to obtain judicial review of his orders, etc., and in all actions brought by him for the government."

As examples of cases for personal wrongdoing beyond the official power of the officer, where he must be individually named, the Committee points to suits for

> ". . . misconduct, nuisance, trespass, or enforcement of an unconstitutional statute."

In the latter class of cases, substitution, and the showing of a substantial need therefor, will still be required. But the answer to the difficulties in placing border-line cases in one class or the other is that the remedy for a wrong guess is merely to make the needed change in the caption. Usually the error will be on the side of naming the office where the individual should have been named. When this is discovered, the name will be inserted and the suit need not abate.

It was noted earlier that the amendments to Rule 4 will probably

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Price Administrator in all actions brought by his predecessor pending in the particular court. Bowles v. Blue Ribbon Provisions, Inc., 7 F.R.D. 603 (E.D.N.Y. 1947); Bowles v. Goldman, 7 F.R.D. 12 (W.D. Pa. 1947); Bowles v. Weiner, 6 F.R.D. 540 (E.D. Mich. 1947). The necessity for substitution was also avoided in some cases where the United States was discovered to be the real party in interest. 4 MOORE, FEDERAL PRACTICE ¶ 25.09 (2d ed. 1950).

24. This has long been the practice where the action is by or against a board or agency with a continuity of existence. Irwin v. Wright, 258 U.S. 219, 42 Sup. Ct. 293, 66 L. Ed. 573 (1922); Marshall v. Dye, 231 U.S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206 (1913); Murphy v. Utter, 186 U.S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070 (1902); Commissioners v. Sellew, 99 U.S. 624, 25 L. Ed. 333 (1878); Note, 102 A.L.R. 943, 956-58 (1936).

25. In any recent volume of the Federal Reporter, there will be three or four cases in which the office, rather than the officer, has been named.

receive the most attention. At the same time it seems fair to suggest that this amendment to Rule 25(d) will probably do more than any other in assisting the smooth and efficient operation of the courts.

Rule 30(c). Transcription of Depositions. The amendment here, while a clear advance from the restrictions of the present rule, is not of the same order of importance as the amendments thus far considered. This amendment continues the existing rule that depositions are to be transcribed unless the parties agree otherwise, but it adds a provision that the court may order the cost of transcription paid by one or some of the parties, or apportioned among them.

The situation which requires the amendment is this: a party takes a deposition and gets nothing helpful from it. He has, therefore, no wish to bear the expense of transcription. His adversary, who may have conducted a lengthy cross-examination, wants a copy and insists on transcription. In one extreme case, a party was required to have the deposition transcribed at a cost of $1200-$1400 so that his adversary, on payment of the $250 cost of an extra copy, could have it available.[26] In such a case under the amendment, transcription would still be required, since the parties had not agreed otherwise, but the court, on motion, could require the adversary to bear the entire cost.

Removing Glosses on the Rules

Probably the most important single function of a continuing rules committee is removing glosses which courts have written onto the rules.[27] The whole history of procedural reform throughout the years is a recurring cycle of good codes soon hardened and restricted by judicial rulings. In the very nature of things, a decision which says a party can do something is not very exciting, but a decision telling him that he cannot do it lends itself to vigorous rhetoric. The whole trend of reform for the last century has been in the direction of removing restrictions and allowing parties to do more and more things. Thus inevitably the vigorous restrictive opinions, which attract such a disproportionate amount of attention, are contrary to the design of the codifiers and the rulemakers. One of the advantages of regulating procedure by judicial rule is that such a system usually carries with it a standing advisory committee, charged with the function of detecting the undesirable gloss and proposing amendments to remove it.

The Advisory Committee has proposed amendments intended to

26. Burke v. Central-Illinois Securities Corp., 9 F.R.D. 426 (D. Del. 1949); 4 Moore, Federal Practice ¶ 30.17 (2d ed. 1950). *Contra:* Odum v. Willard Stores, 1 F.R.D. 680 (D.D.C. 1941).

27. See generally note 5 *supra,* and Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules,* 3 Vand. L. Rev. 493 (1950).

remove glosses added by courts to Rule 15(d), on supplementary pleadings, Rule 38(d), on waiver of jury trial, Rule 52(a), on findings of fact, and Rule 60(b), on reopening judgments. They will be considered out of numerical order.

Rule 60(b). Reopening Judgments. The Advisory Committee has proposed two important amendments to Rule 60(b). The amendment which is here taken up is a classic example of how and why courts add to rules glosses which rulemaking committees must remove.

Before the adoption of the Federal Rules, it was necessary to get leave from the appellate court before seeking to reopen a judgment which had been affirmed on appeal. The rule on this subject made no such requirement. Since in other rules a requirement of appellate permission was clearly stated,[28] it is fair to suppose that the Committee deliberately refrained from making any such requirement in the careful provisions of Rule 60(b). There were a few court decisions on this point. Some of the decisions pointed out that the rule required no appellate permission, and therefore said that there need be no such permission.[29] Other decisions applied, without much consideration, the pre-Rules requirement of appellate leave.[30] All the decisions, one way and the other, were obscure and little noticed.[31]

Then within the last year the Third Circuit was confronted with a hard case. It involved a hyper-litigious appellant who had previously been before the Court of Appeals 4 times, and had 14 times sought review in the Supreme Court by means of petitions for certiorari, motions for rehearings of denials of certioriari, and applications for leave to file yet more motions for rehearing. One can easily sympathize with the desire of the appellate judges to see the case terminated, and understand their dismay when one of their district judges granted a motion to reopen the judgment and have a new trial. But one can also see here the truth of the old maxim that hard cases make bad law.

For here the appellate court handed down a striking opinion, loaded with quotable epigrams, in which it announced that it is

28. *E.g.*, Rules 60(a), 73(a), 75(h).

29. Von Wedel v. McGrath, 100 F. Supp. 434 (D.N.J. 1951), *aff'd*, 194 F.2d 1013 (3d Cir. 1952); *see In re* Long Island Lighting Co., 197 F.2d 709, 710 (2d Cir. 1952); S. C. Johnson & Son v. Johnson, 175 F.2d 176, 177, 184 (2d Cir.), *cert. denied*, 338 U.S. 860 (1949); Perlman v. 322 West Seventy-Second Street Co., 127 F.2d 716, 719 (2d Cir. 1942).

30. Home Indemnity Co. of New York v. O'Brien, 112 F.2d 387 (6th Cir. 1940); Switzer v. Marzall, 95 F. Supp. 721 (D.D.C. 1951); Carpenter v. Rohm & Haas Co., 9 F.R.D. 535 (D. Del. 1949), *aff'd*, 180 F.2d 749 (3d Cir.), *cert. denied*, 340 U.S. 841 (1950); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 911 (2d Cir. 1949); Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579 (D. Idaho 1945).

31. Thus Moore's monumental treatise mentions the problem only in a supplement, and expresses no view on it.

beyond the jurisdiction of a district judge to grant such a motion reopening a judgment which had been affirmed on appeal unless the appellate court has first given leave. It granted writs of prohibition and mandamus requiring the district judge to vacate his order allowing a new trial.[32]

It is bad enough that the Third Circuit, regardless of the provocation, added a requirement to the rule which the rule does not contain. Worse yet, the requirement so added is a particularly unfortunate one, which would introduce into an attempted simplification of the practice for reopening judgments a useless and delaying formalism. An appellate court has no idea whether the requirements for reopening a case under Rule 60(b) are met until there has been a full record developed. Such a record can only be made in the trial court. Of course the district judge is not free to flaunt the decision of the appellate court so far as it goes, but he should be free to consider whether some circumstances of fraud or mistake or excusable neglect or newly discovered evidence not previously known to either court compels a new trial. If the trial judge goes too far, and grants, in effect, a rehearing of the appellate court's decision, the normal processes of review are still open. To require in every case the formality of application to the appellate court, which has no facility for examining the merits of the claim for a new trial, to guard against the possibility that a rare district judge may go too far, is inconsistent with the entire philosophy of the rules. Thus the Committee has proposed the addition to Rule 60(b) of a sentence expressly negativing the requirement of appellate leave.

Rule 52(a). Findings of Fact. At common law appellate courts could reverse only for errors of law. In admiralty review was said to be *de novo;* thus the appellate court could refuse to give any weight to what the court below had said. In equity, a middle course was followed; the trial court could be reversed for errors of fact, as well as law, but only where its findings of fact were "clearly erroneous." Federal Rule 52(a) sought to codify for all court-tried cases, whether legal or equitable, and regardless of the nature of the evidence, the equity rule. As originally promulgated, Rule 52(a) said:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In most cases this rule has worked with great success. Some problems have arisen, however, where all or part of the evidence below was documentary or by deposition. First there developed a gloss

32. Butcher & Sherrerd v. Welsh, 206 F.2d 259 (3d Cir. 1953), *cert. denied,* 346 U.S. 925 (1954).

that the reviewing court was in as good a position as the trial court to interpret evidence of this sort, and thus could more readily hold the trial court's findings on such evidence clearly erroneous.[33] There is reasonable justification for such a view.

But as is the way with court-made glosses, other courts went on to reason from the gloss and ignore the rule, and soon there were cases holding that the appellate court was not bound at all, and review was *de novo*, where the evidence below had not been oral.[34] This process was carried to an extreme in a famous opinion in which one court undertook to write a rule of its own, with seven narrowly-defined classes turning on the proportion of testimony that was oral, and with the freedom of review dependent upon the class into which a particular case falls.[35]

A few courageous[36] courts have continued to apply Rule 52(a) as it is written, and have recognized that it is the function of trial courts to resolve fact questions and of appellate courts only to keep the trial judges in bounds.[37] The contrary view, now so in vogue, reduces the function of the trial court to passing on the credibility of live witnesses, and no more. It is not hard to see that what is now the minority view is far the sounder, and that the other position, in the words of a distinguished court, is

33. Fleming v. Palmer, 123 F.2d 749 (1st Cir. 1941), *cert. denied*, 316 U.S. 662 (1942); Banister v. Solomon, 126 F.2d 740 (2d Cir. 1942); Ball v. Paramount Pictures, Inc., 169 F.2d 317 (3d Cir. 1948); Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Crapet, 199 F.2d 850 (5th Cir. 1952); Himmel Bros. Co. v. Serrick Corp., 122 F.2d 740 (7th Cir. 1941); State Farm Mut. Automobile Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940); Smyth v. Barneson, 181 F.2d 143, 144 (9th Cir. 1950); Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541 (9th Cir. 1949); Smith v. Royal Ins. Co., 125 F.2d 222 (9th Cir.), *cert. denied*, 316 U.S. 695 (1942); Equitable Life Assur. Soc'y v. Irelan, 123 F.2d 462, 464 (9th Cir. 1941).

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

35. Orvis v. Higgins, 180 F.2d 537, 538 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). The case brought forth scathing criticism: ". . . difficult to justify . . . not consistent with that intended under Rule 52(a). . . . [I]n approaching the problem it must always be remembered that the function of an appellate court is to review the facts, not retry them. Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." Comment, *Scope of Appellate Fact Review Widened*, 2 STAN. L. REV. 784, 787-88 (1950). But compare 5 MOORE, FEDERAL PRACTICE ¶ 52.04 (2d ed. 1951).

36. ". . . [W]e have the rule now so overturned that when the appellate court wishes to apply the policy of nonreviewability of the original rule, it finds it necessary to utter an apology for seeming to violate the rule of the case law." Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 506 (1950).

37. Holt v. Werbe, 198 F.2d 910 (8th Cir. 1952); Jacuzzi Bros., Inc. v. Berkeley Pump Co., 191 F.2d 632, 637-38 (9th Cir. 1951); Quon v. Niagara Fire Ins. Co. of New York, 190 F.2d 257 (9th Cir. 1951); *see* Heim v. Universal Pictures Co., 154 F.2d 480, 491 (2d Cir. 1946); Yankwich, *Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 271, 289 (1948).

". . . detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."[38]

The Advisory Committee has undertaken to remove the gloss by amending the relevant part of Rule 52(a) to read as follows:

"Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge of the credibility of those witnesses who appeared personally before it."

In this way, as is well explained by the Committee's Note, it will be made plain that the "clearly erroneous" portion of the rule is applicable in all cases, and that the ensuing language does not qualify the "clear erroneous" provision but rather emphasizes the particular hesitation with which an appellate court may hold "clearly erroneous" findings based on oral testimony.

Rule 38(d). Waiver of Jury Trial. Another unfortunate gloss has been added by many courts to the provisions for waiver of jury trial. The Federal Rules have always provided that a party must demand jury trial of an issue within 10 days after service of the last pleading directed to such issue, and that jury trial is waived in the absence of such a demand.[39] These principles are well understood, and have operated with great success.

Trouble has come, however, in this situation. An action is brought for patent infringement, asking for an injunction, damages, and an accounting. Neither party makes a timely demand for jury trial of any of the issues. Subsequently plaintiff eliminates his claim for an injunction and accounting, and now demands jury trial. Is he entitled to it? Some courts have held that he is, on the ground that the amendment striking the claims for an injunction and accounting has introduced a new "legal" cause of action in what was formerly an "equitable" suit.[40]

This view is unsound.[41] In the first place, the amendment is unnecessary and should not be allowed; one of the first tenets of code

38. Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).
39. FED. R. CIV. P. 38(b), (d).
40. Canister Co. v. Leahy, 191 F.2d 255 (3d Cir.), *cert. denied*, 342 U.S. 893 (1951); Bereslavsky v. Kloeb, 162 F.2d 862 (6th Cir.), *cert. denied*, 332 U.S. 816 (1947); Bereslavsky v. Caffey, 161 F.2d 499 (2d Cir.), *cert. denied*, 332 U.S. 770 (1947); Nolan v. Columbia Broadcasting System, 11 F.R.D. 194 (S.D.N.Y. 1951); Bates v. Wilcox, 8 F.R.D. 369 (W.D. Mo. 1948); Tynan v. R.K.O. Radio Pictures, 77 F. Supp. 238 (S.D.N.Y. 1948); Pallant v. Sinatra, 7 F.R.D. 293 (S.D.N.Y. 1945); Glauber v. Agee Department Stores, 1 F.R.D. 137 (W.D. Ky. 1939); 5 MOORE, FEDERAL PRACTICE ¶ 38.41 (2d ed. 1951).
41. Moore v. United States, 196 F.2d 906 (5th Cir. 1952); American Fidelity & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951); Fidelity & Deposit Co. of Maryland v. Krout, 157 F.2d 912 (2d Cir. 1946); Gulbenkian v. Gulbenkian, 147 F.2d 173 (2d Cir. 1945); Roth v. Hyer, 142 F.2d 227 (5th Cir.), *cert. denied*, 323 U.S. 712 (1944); Telechron, Inc. v. Parissi, 108 F. Supp.

pleading has been that a party is to be given the remedy to which he is entitled, regardless of the prayer for relief, in all except default cases. There is, therefore, no need to amend the prayer for relief.[42] Further, the rules make no mention of "cause of action"; they stress instead the factual basis on which the claim rests. Holdings that a shift in relief asked introduces a new "cause of action" are an anachronism.[43] And finally, the anachronism is particularly unfortunate when it is couched in terms of separation between "legal" and "equitable" causes, and thus seeks to undo the merger of law and equity.[44]

The correct analysis in the situation presented would be that the party has been claiming all along that one set of circumstances entitles him to help from the court. If these circumstances give rise to any issue as to which the Constitution guarantees jury trial, the party should have demanded a jury trial at the outset, and may not subsequently regain, by procedural skullduggery, a right which he has previously waived. This analysis is seemingly adopted by the Committee in its proposal to add to Rule 38(d) the following sentence:

> "A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

Rule 15(d). Supplemental Pleadings. This is the least explicable gloss of all. The rules distinguish between an amendment to a pleading, which restates occurrences that took place before the original pleading was filed, and a supplemental pleading, which sets forth occurrences which have happened subsequent to the original plead-

897 (N.D.N.Y.), *aff'd*, 203 F.2d 454 (2d Cir. 1953); Reeves v. Pennsylvania R.R., 9 F.R.D. 487 (D. Del. 1949); Stewart-Warner Corp. v. Staley, 2 F.R.D. 446 (W.D. Pa. 1942); Munkacsy v. Warner Bros. Pictures, 2 F.R.D. 380 (E.D.N.Y. 1942). Also in point are decisions sustaining a waiver where a case is started in admiralty, without a seasonable claim for a jury, and then transferred to "law." United States v. The John R. Williams, 144 F.2d 451, 454 (2d Cir.), *cert. denied*, 323 U.S. 782 (1944); James Richardson & Sons v. Conners Marine Co., 141 F.2d 226, 230 (2d Cir. 1944).

42. FED. R. CIV. P. 54(c). *Compare* Couto v. United Fruit Co., 203 F.2d 456, 457 (2d Cir. 1953), *with* Bereslavsky v. Socony-Vacuum Oil Co., 7 F.R.D. 444 (S.D.N.Y. 1946).

43. Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241, 248 (1953).

44. It is not a mere coincidence that the leading case for the position here criticized, Bereslavsky v. Caffey, 161 F.2d 499, 500 (2d Cir.), *cert. denied*, 332 U.S. 770 (1947), extols the glories of ancient equity in terms so nostalgic as to now form the motto for a casebook on Equity. COOK, CASES AND MATERIALS ON EQUITY 12 (4th ed. 1948). And a very similar New York case, reaching an equally bad result, turns on a confused and generally erroneous statement that "the inherent and fundamental difference between actions at law and suits in equity cannot be ignored." Jackson v. Strong, 222 N.Y. 149, 154, 118 N.E. 512, 513 (1917).

ing. Everyone agrees that it is possible to amend an insufficient pleading; indeed the principal usefulness of amendment is in making sufficient a defective pleading.[45] But there has grown up in the cases a strange quirk that it is not possible to supplement an insufficient pleading. If the original complaint, for example, was defective, so these cases say, then a supplemental complaint may not be filed, even though the later events may be just what is needed to cure the defects in the original complaint. Instead the parties must start all over again.[46]

This limitation is completely unjustifiable. The Committee has proposed language which will make it clear that a defective pleading can be supplemented just as well as it can be amended.

Codifying the Good

The largest group of amendments proposed by the Committee codify sound and desirable practices already held proper by many courts. The purpose of such codifying amendments is two-fold: to end confusion caused by a minority of courts which have rejected the practices involved; and to eliminate the necessity of an extensive search of the decisions in order to find out whether a particular procedure is possible. In broad effect, such amendments as these take the questions involved out of the area of permissible debate. Codifying amendments are proposed by the Committee to: Rule 16, pre-trial conference; Rule 23(d), class actions; a number of the discovery rules, including Rules 30, 33, 35, and 36; Rule 50(b) and (c), motions for a new trial and for judgment *n.o.v.*; Rule 56, summary judgment; Rule 58, entry of judgment; and Rule 60(b), reopening judgments.

Rule 16. Pre-Trial Conference. Two amendments have been proposed to this popular rule. Subdivision (4) has been amended to include among the purposes of a pre-trial conference "the disclosure of the identity of witnesses expected to be called at the trial." A new subdivision (6) has been added—with the former subdivision (6) now numbered (7)—to state that where protracted litigation of an action is probable, a particular judge may be assigned in advance to try the case and to control all matters preliminary to the trial.

45. *E.g.*, Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 200 F.2d 876 (2d Cir. 1952); Fed. R. Civ. P. 15(c).

46. Bonner v. Elizabeth Arden, Inc., 177 F.2d 703, 705 (2d Cir. 1949); Randolph v. Missouri-Kansas-Texas R. Co., 78 F. Supp. 727 (W.D. Mo. 1948); Bowles v. Senderowitz, 65 F. Supp. 548 (E.D. Pa. 1946); Berssenbrugge v. Luce Mfg. Co., 30 F. Supp. 101 (W.D. Mo. 1939). *Contra:* Porter v. Block, 156 F.2d 264 (4th Cir. 1946); Genuth v. National Biscuit Co., 81 F. Supp. 213 (S.D.N.Y. 1948); *see* Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 200 F.2d 876, 879 (2d Cir. 1952); 3 Moore, Federal Practice ¶ 15.16 (2d ed. 1948); Comment, 2 Fed. Rules Serv. 656.

Subdivision (4) has an interesting background. For some years there has been quite a spirited conflict in the cases as to whether a party must answer an interrogatory asking what witnesses he intends to call at the trial. A majority of courts held such an interrogatory improper.[47] At the same time it has been common practice, both in the federal courts and in the courts of states which have adopted modern pleading, for such information to be required at the pre-trial conference. This practice has operated smoothly and quietly. This seeming inconsistency, refusing such information on interrogatories but requiring it at pre-trial, is explained by the time factor. Interrogatories may be served almost at the outset of the action.[48] At that time discovery has not been had, trial is far off, and the lawyer usually will not know what witnesses he will need to call. The pre-trial conference, on the other hand, is normally held shortly before trial, when trial strategies will have crystallized. Since disclosure of the identity of witnesses is consistent with the whole philosophy of the rules, in eliminating surprise from the trial of lawsuits, it should be encouraged, and the pre-trial conference is the best place at which to make such disclosure.

Against the possibility that some courts do not yet regularly employ the pre-trial conference, an amendment has also been made to Rule 33 allowing a party to ask by interrogatory which witnesses will be called for trial. Though there is no time limit made on submitting such an interrogatory, if it comes too early it would seem proper for the party receiving such an interrogatory to answer that he does not yet know which witnesses he will call—if that is truly the case—but that he will give the information to his opponent when he has it. What is asked for here is merely good faith. The answering party cannot wait until the morning of trial before sending the list of witnesses to his opponent. But on the other hand, he will not be expected to be a crystal-gazer. If he has given a list of witnesses, whether at a pre-trial conference or in answer to an interrogatory, he is still free to change his plans, provided that he informs the opponent of such a change. If the change comes so late as to prejudice the party who has relied on the original list, a continuance would seem appropriate.[49]

47. Aetna Life Ins. Co. v. Little Rock Basket Co., 14 F.R.D. 383 (E.D. Ark. 1953); Fidelis Fisheries, Ltd. v. Thorden, 12 F.R.D. 179 (S.D.N.Y. 1952); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949); McNamara v. Erschen, 8 F.R.D. 427 (D. Del. 1948); Cogdill v. T.V.A., 7 F.R.D. 411 (E.D. Tenn. 1947); Coca Cola Co. v. Dixi-Cola Laboratories, 30 F. Supp. 275 (D. Md. 1939). *Contra:* United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); Kling v. Southern Bell Telephone & Telegraph Co., 9 F.R.D. 604 (S.D. Fla. 1949); 4 MOORE, FEDERAL PRACTICE ¶ 26.19 (2d ed. 1950).

48. Normally interrogatories may be served 10 days after commencement of an action; with leave of court they may be served even earlier. FED. R. CIV. P. 33.

49. A party is always under a duty to advise his opponent if new informa-

The new subdivision (6) merely emphasizes, by way of codification, a power which courts undoubtedly have at present, and which such an authoritative study as the Prettyman Report has urged them to use extensively in appropriate cases.[50] The amendment is directed at the so-called "Big Case," usually a large anti-trust action, where the court must keep a tighter rein than usual on the proceedings to prevent them from getting completely out of hand.[51]

Rule 23(d). Orders to Ensure Adequate Representation in Class Actions. This new subdivision, modelled on a proposal by the New York Judicial Council for amendment of the statutes of that state,[52] spells out a variety of powers which courts may exercise to ensure that members of a class are adequately represented and fairly dealt with. Basically the amendment authorizes the court to direct that the absent members of the class be notified of what is going on in the action, and even that they be asked to come in and present their own claims and defenses.[53] The rule goes on to provide that even where notice has been given and the action is properly a class action, the court may nonetheless eliminate all representative aspects of the suit if it believes that the absentees are not sufficiently protected.

The amendment will be very useful as far as it goes, in that it gives specific authorization for very flexible treatment of class suits by the courts in the interest of fair and expeditious results. The amendment will not satisfy scholarly critics who have demanded a complete overhaul of Rule 23. Since the class suit became popular upon its codification in Federal Rule 23, practically all courts have followed the lead of Professor Moore in pinning the labels "true," "hybrid," and "spurious" on the kinds of class actions described in the three subdivisions of Rule 23(a), and have agreed with Moore that only in the "true" class action are the absent members of the class bound on their individual claims and liabilities. The scholarly critics think that the absentees should be bound in all class actions if they have been adequately represented.[54]

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tion or change in circumstances makes a previous answer to any interrogatory no longer accurate. Smith v. Acadia Overseas Freighters, Ltd., 19 FED. RULES SERV. 33.412, Case 1 (E.D. Pa. 1953); Capone v. Norton, 8 N.J. 54, 83 A.2d 710 (1951); N.J.R.R. 4:23-12.

50. Jud. Conf. of the United States, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1951).

51. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950); Whitney, *The Trial of an Anti-Trust Case*, 5 THE RECORD 449 (1950); Comment, *Tactical Use and Abuse of Depositions under the Federal Rules*, 59 YALE L.J. 117 (1949).

52. N.Y. JUD. COUNCIL, EIGHTEENTH ANNUAL REPORT 80, 217-49 (1952).

53. Thus in Dickinson v. Burnham, 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952), absent members of the class were asked to come in and claim their share of a fund which had been found owing to the class by the defendants.

54. The leading discussions are CHAFEE, SOME PROBLEMS OF EQUITY 243-95 (1950); Keeffe, Levy and Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Note, 67 HARV. L. REV. 1059 (1954).

The Advisory Committee Note says that the amendment

> ". . . is intended to make the class suit device more flexible and to allow in all kinds of class suits that full and fair protection of the absentees which is said in *Hansberry* v. *Lee*, 311 U.S. 32, 132 A.L.R. 741 (1940), to be necessary if the absentees are to be bound by the judgment."

Despite this statement, the full Committee Note lends no support to the view that the Committee intends to make such a fundamental change as to bind the absentees in all class actions. Quite aside from the present amendment, however, the courts would do well to weigh the arguments which the critics have been making, and reexamine for themselves the notion that an absent member of a class, whose interests have been fairly and vigorously represented, is not bound by the judgment merely because his is the "several" right of the "spurious" class action rather than the "joint, or common" right of the "true" class action.

DEPOSITIONS UPON ORAL EXAMINATION

Rule 30. The rules have not previously said anything as to the order of taking depositions where both sides wish to use this procedure. There has grown up a court-made rule of priority by which the party who first serves notice of the taking of depositions may do so first.[55] As a rule of thumb, this is probably as good as any, but in a procedure intended to be flexible, any rigid rule can be harmful. Some courts have applied this rule of priority in a rigid manner under circumstances when another course might have been more wise. The result has been a race of diligence by parties anxious to be first in the taking of depositions.[56] Thus the Committee, by way of amendment to Rule 30(a), has spelled out the power of the court to regulate the order of depositions "as shall best serve the convenience of the parties and witnesses and the interests of justice." Probably in most cases the courts will continue to adhere to the rule of "first come, first serve," but the amendment should perform a useful function in emphasizing the power of the court to vary this order where some other would be more just.

The amendment to Rule 30(b) includes among the protective orders which courts may make regarding discovery orders that the deposition be taken at some time other than that desiguated in the notice of taking, and orders to protect the party from "undue expense." The substance of these amendments—which surely codify what is

55. 4 MOORE, FEDERAL PRACTICE ¶ 26.13 (2d ed. 1950).
56. Note, 36 MINN. L. REV. 364, 376 (1952); Comment, 59 YALE L.J. 117, 134-36 (1949). For an example, see Stover v. Universal Moulded Products Corp., 11 F.R.D. 90 (E.D. Pa. 1950).

now the law—was proposed by the Committee in 1946,[57] but not adopted at that time because the amendment then put forward for Rule 30(b) touched on an area which the Supreme Court already had under consideration in the famous case of *Hickman* v. *Taylor*.[58]

There has been some tendency, though not universal, for states adopting the Federal Rules to include a provision codifying, with varying degrees of rigor, the Supreme Court's decision in *Hickman v. Taylor,* where it was held that the work-product of an attorney is immune from discovery.[59] Such state amendments have extended the protection of the *Hickman* doctrine even to claims agents, investigators, and insurers, though most federal courts have held such non-attorneys outside the area of immunity.[60] The Advisory Committee has proposed no amendment touching the *Hickman* situation. The absence of amendment seems to imply that the Committee believes the courts have been interpreting and applying *Hickman* in a sound manner.

Rule 33. Interrogatories. The amendments to Rule 33 do four things. They substitute "undue expense" for the simpler "expense" in order to conform with the similar usage in Rule 30(b).[61] They allow inquiry as to witnesses expected to be called at the trial, for the reasons explained in the discussion of the similar provision in Rule 16(4).[62] They provide that a party may require to be attached to the answers to interrogatories a copy of any statement concerning the subject matter of the action previously made by the party. And they authorize a demand, by interrogatories, for copies of documents, papers, books, etc.

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57. In 1946 the Committee proposed to add merely "expense" rather than "undue expense" as at present. The new language follows LA. REV. STAT. 13:3762 (1950). Studies of discovery in operation have demonstrated that its expense is not usually great, and is far outweighed by its value. Speck, *The Use of Discovery in United States District Courts,* 60 YALE L.J. 1132, 1150 (1951); Wright, Wegner and Richardson, *The Practicing Attorney's View of the Utility of Discovery,* 12 F.R.D. 97, 103-04 (1951); Note, 36 MINN. L. REV. 364, 373 (1952).

58. 329 U.S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451 (1947).

59. KY. R.C.P. 37.02; LA. REV. STAT. 13:3762 (1950); MINN. R.C.P. 26.02; NEV. R.C.P. 30(b); N.J.R.R. 4:16-2; PA. R.C.P. 4011(e); UTAH R.C.P. 30(b); WASH. RULE OF PLEADING, PRACTICE AND PROCEDURE 26(a). But compare ARK. STAT. 28-347 to 28-360 (Supp. 1953) and FLA. COMMON LAW RULES 20 to 30, which contain no such provision.

60. Claim agents: Herbst v. Chicago, R.I. & P. R. Co., 10 F.R.D. 14 (S.D. Iowa 1950); Hughes v. Pennsylvania R. Co., 7 F.R.D. 737 (E.D.N.Y. 1948); Thomas v. Pennsylvania R. Co., 7 F.R.D. 610 (E.D.N.Y. 1947); *cf.* Newell v. Capital Transit Co., 7 F.R.D. 732 (D.D.C. 1948). *Contra:* Raudenbush v. Reading Co., 9 F.R.D. 670 (E.D. Pa. 1950); Hanke v. Milwaukee Electric Ry. & Transport Co., 7 F.R.D. 540 (E.D. Wis. 1947). Insurer: Browner v. Firemen's Ins. Co. of Newark, 9 F.R.D. 609 (S.D.N.Y. 1949). Investigator: Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953); Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); *cf.* Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D.N.Y. 1951).

61. See note 57 *supra.*

62. See pp. 537-38 *supra.*

The provision allowing a party to get a copy of his own statement is in line with the better-reasoned cases,[63] though it must be conceded that there are a number of contrary decisions.[64] Refusal to allow a party to have a copy of his statement has been based on *Hickman v. Taylor,* with the claim made that the other side has obtained the statement in anticipation of litigation or in preparation for trial, and thus that it can be obtained only on a showing of good cause. The truth is that it is the proposed amendment, not the restrictive decisions, which carries out the principles laid down by the Supreme Court in the *Hickman* case. The rationale of *Hickman* is one of preserving the adversary system, and of recognizing the importance of independent counsel in the workings of that system. But the situation in which the party's statement is important is where representatives of the other side have hurried to him and gotten his statement before he has retained an attorney. Denial of a copy of the statement means that one of the attorneys must work in the dark, not knowing what remarks of his client are hidden in the files of the other side.[65] Surely this does not advance the adversary system. A number of states have recently adopted legislation requiring that a party be given a copy of any statement obtained from him immediately after the occurrence sued on.[66] The proposed amendment to Rule 33 reflects this same public policy.

The other amendment to Rule 33, allowing a party to obtain copies of documents, etc., in connection with interrogatories, integrates more closely the various discovery techniques in a way which will eliminate useless delays. Some courts had held that a party could ask, by way of interrogatory, whether his adversary had documents of a certain sort, but he could not require copies thereof to be attached to the answers. Instead, after learning just what his opponent had, he

63. Burns v. Philadelphia Transp. Co., 113 F. Supp. 48 (E.D. Pa. 1953); Szymanski v. New York, N. H. & H. R. Co., 14 F.R.D. 82 (S.D.N.Y. 1952); Miehle v. United States, 11 F.R.D. 582 (S.D.N.Y. 1951); Meyers v. National Tube Co., 15 FED. RULES SERV. 34.411, Case 11 (N.D. Ohio 1951); Vironi v. Wheeling & Lake Erie Ry., 10 F.R.D. 45 (N.D. Ohio 1950); Hayman v. Pullman Co., 8 F.R.D. 238 (N.D. Ohio 1948); Neff v. Pennsylvania R. Co., 7 F.R.D. 532 (E.D. Pa. 1948), *aff'd,* 173 F.2d 931 (3d Cir. 1949); 4 MOORE, FEDERAL PRACTICE ¶¶ 26.23[8], 34.08 (2d ed. 1950).

64. Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949); Sisco v. Charles Kurz & Co., 94 F. Supp. 525 (E.D. Pa. 1950); Hudalla v. Chicago, M., S. P. & P. R. Co., 10 F.R.D. 363 (D. Minn. 1950); Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950); Raudenbush v. Reading Co., 9 F.R.D. 670 (E.D. Pa. 1950); Molloy v. Trawler Flying Cloud, Inc., 10 F.R.D. 158 (D. Mass. 1950).

65. It is no answer to say that the client need only tell his own attorney the truth. Even honest forgetfulness as to details can be made to look damning by a cross-examiner. Even worse, statements taken under these circumstances enjoy no very good reputation for accuracy. See the comments of Judge Guy Bard at 12 F.R.D. 131, 155-57.

66. *E.g.,* FLA. STAT. ANN. § 92.33 (1943); LA. REV. STAT. 13:3732 (1950); MASS. ANN. LAWS, c. 271, § 44 (Cum. Supp. 1953); MINN. STAT. § 602.01 (1953); *cf.* Blank v. Great Northern Ry., 4 F.R.D. 213 (D. Minn. 1943).

was required to go to court and make a new motion under Rule 34 to require production of these documents.[67] The amendment eliminates this extra step, and leaves Rule 34, with its requirements of motion and leave of court, for the unusual case where the party wants the original of the document—normally so that he may introduce it into evidence—rather than a copy.

The amendment also integrates the various discovery devices better by ending the need for a showing of "good cause" in order to get copies of documents. Throughout the rules generally, and particularly in the discovery rules, the philosophy has been to allow parties to do things without leave of court or any other special formality, but to provide machinery by which the other side could get protection from the judge on a showing that he was being unduly harassed or otherwise prejudiced. This will now be the practice where copies of documents are sought. Of course the amendment does not end the need for a showing of cause in obtaining a document obtained in anticipation of litigation, as set out in the *Hickman* case. But the amendment does leave it to the adverse party to raise this question by a motion for a protective order, rather than requiring the showing of cause to be made in every case by the party seeking discovery.

Rule 35. Physical Examinations. The amendment makes it clear that blood tests can be required, as had been held in a leading decision,[68] and also provides that physical, mental, and blood examinations are not limited to parties, but may also be required of agents or persons under the legal control or in the custody of a party. By way of amendment to subdivision (b), the Committee also proposes closing a loophole. As the rule now stands, the person examined is entitled to demand a copy of the report of the physical examination, and upon doing so is required to give his opponent copies of *all* examinations, previously or thereafter made, of the same condition. But the party examined is not entitled, under the existing rule, to copies of any examinations of himself which his opponent may have had made earlier without an order under Rule 35(a). The amendment corrects this inadvertent unbalance, and requires both sides to turn over reports of all examinations, no matter when made.[69]

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67. There is a vast number of cases on this point, with an "irreconcilable conflict among the decisions." Alfred Pearson & Co. v. Hayes, 9 F.R.D. 210 (S.D.N.Y. 1949). The cases are collected at 4 MOORE, FEDERAL PRACTICE ¶ 33.22 (2d ed. 1950).

68. Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

69. The Committee Note to Rule 35(b) also approves the line of cases which have held a party entitled to obtain, by discovery, a report on any physical examination to which he voluntarily submitted even though no examination has ever been ordered under Rule 35. Keil v. Himes, 13 F.R.D. 451 (E.D. Pa. 1952); Dumas v. Pennsylvania R.R., 11 F.R.D. 496 (N.D. Ohio 1951); Lipshitz v. Bleyhl, 5 F.R.D. 225 (E.D.N.Y. 1946); Nedimyer v. Pennsylvania R.R., 6 F.R.D. 21 (E.D. Pa. 1946); Rutherford v. Alben, 1 F.R.D. 277

The amendments to Rule 35 show the importance of having functioning rules committees in the states, who may well contribute valuable ideas which the federal committee would otherwise miss.[70] The amendment to Rule 35(a), including blood tests and persons under the legal control or in the custody of a party, is an almost verbatim adoption of a change which Minnesota made when it drafted rules closely modelled on the Federal Rules.[71] The amendment to Rule 35(a) making clear that agents are covered was inspired by a Colorado decision holding that agents do not come within the identical language of the Colorado Rule.[72] And the amendment to Rule 35(b), providing for the exchange of reports, closes a loophole first noted by the Utah Advisory Committee when it was adapting the Federal Rules for state adoption, and since picked up also by the draftsmen of the Louisiana statute which enacted the federal discovery rules in that state.[73]

Rule 36. Requests for Admissions. The last of the discovery rules to produce a codifying amendment is Rule 36, dealing with requests for admission of facts and of genuineness of documents. Some courts had held that a party only had to admit or deny facts which were within his personal knowledge.[74] Most courts, and all commentators, said that the party had to admit or deny if the means of securing information were reasonably within his power, even though he did not have personal knowledge of the facts inquired about.[75] The Committee has sought to codify the latter view by adding a sentence at the end of Rule 36 stating such a view.

Rule 50. Motions for Judgment Notwithstanding the Verdict. The Committee, following the lead of the group which drafted the Kentucky Rules,[76] proposes a new subdivision (c) stating in some detail the procedure to be followed where a party has moved, as he may, in the alternative for judgment *n.o.v.* and for a new trial. This procedure was spelled out by Justice Owen Roberts, for the Supreme

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(S.D.W. Va. 1940); Kelleher v. Cohoes Trucking Co., 25 F. Supp. 965 (S.D.N.Y. 1938).

70. This point is made in more detail in Wright, *Modern Pleading and the Pennsylvania Rules,* 101 U. OF PA. L. REV. 909, 944-47 (1953).

71. MINN. R.C.P. 35.01.

72. Kell v. Denver Tramway Corp., Civil No. A-81314, Div. 4, Denver County, 1953.

73. UTAH R.C.P. 35(c); LA. REV. STAT. 13:3783(C) (1950); Hubert, *The New Louisiana Statute on Depositions and Discovery,* 13 LA. L. REV. 173, 201-02 (1953).

74. United States v. Lewis, 10 F.R.D. 56 (D.N.J. 1950); Wilson v. Gas Service Co., 9 F.R.D. 101 (W.D. Mo. 1949); Hopsdal v. Loewenstein, 7 F.R.D. 263 (N.D. Ill. 1945); Booth Fisheries Corp. v. General Foods Corp., 27 F. Supp. 268 (D. Del. 1939).

75. United States v. Scofield, 17 FED. RULES SERV. 36a.21, Case 1 (D. Conn. 1952); 4 MOORE, FEDERAL PRACTICE ¶ 36.04 (2d ed. 1950), and cases there cited.

76. KY. R.C.P. 50.03.

Court, some years ago,[77] but it is sufficiently complicated that it should be helpful to the courts, and to the bar, to have it set forth with precision in a rule, rather than having to consult Roberts' opinion at every step along the way.

As an amendment to Rule 50(b), the Committee also proposes that a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include in the alternative a motion for judgment *n.o.v.* This amendment merely states what must always be the hope, if not the expectation, of the losing lawyer. Whenever a court will give it to him, he will be delighted to have judgment notwithstanding the verdict. But there has been some indication in the cases that he must use precise language in asking for this relief on pain of being held not to have moved therefor.[78] The amendment will prevent emphasis on undue formalism by requiring the court to consider whether judgment *n.o.v.* should be given in every case in which the party has made a motion attacking the verdict and judgment *n.o.v.* would otherwise be proper. Of course this does not work the other way around. A party may still move for judgment without moving for a new trial, if the verdict against him seems to him reasonable. But since it seems inconceivable that there would ever be a lawyer moving for a new trial who would not like judgment if he could have it, the motion for a new trial will henceforth always be deemed to include the motion for judgment.

Rule 56. Summary Judgment. Some states have provided specifically that where a motion for summary judgment is made, the court is not limited to giving such relief to the moving party, but may grant summary judgment to his adversary if he is entitled to it. Most federal courts have held the same way. A few federal courts, however, have refused to give summary judgment to the non-moving party, no matter how much he may be entitled to such judgment.[79] The amendment to Rule 56(c) adopts the majority view, and states that summary judgment may be rendered for or against any party to the action when one party has moved therefor.

77. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

78. Most recent is the 5 to 4 decision in Johnson v. New York, N.H. & H. R. Co., 344 U.S. 48, 73 Sup. Ct. 125, 97 L. Ed. 77 (1952), where the Court already had under advisement the reserved motion for a directed verdict, and the lawyer, in conformity with New York custom, moved to set aside the verdict. The Supreme Court held that since he had not moved for judgment *n.o.v.*, he could not be given such relief. The line of cases leading up to the *Johnson* decision, as well as the Court's refusal to adopt the amendment to Rule 50(b) proposed by the Advisory Committee in 1946, are penetratingly criticized in 5 MOORE, FEDERAL PRACTICE ¶¶ 50.01[8]-[12], 50.11 (2d ed. 1951).

79. Roman v. Great American Indemnity Co., 9 F.R.D. 49 (D.P.R. 1949); Truncale v. Blumberg, 8 F.R.D. 492 (S.D.N.Y. 1948); Pinkus v. Reilly, 71 F. Supp. 993 (D.N.J. 1947); see Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 570-71 (1952).

The amendment to Rule 56(e) codifies the holdings of many cases, and is needed only because of a strange restrictive rule which has been adopted by one circuit. The restrictive rule is that the formal allegations of a pleading are enough to create a "genuine issue as to any material fact" even against the most detailed showing by affidavits and depositions to the contrary.[80] Where this gloss has been adopted, summary judgment is entirely valueless, for it is no longer able to serve its normal function of piercing the pleadings and getting to the areas of real controversy.[81] Most courts have held that where one side has backed up its motion for summary judgment by depositions and other evidentiary matter, the other side must make a similar showing in order to demonstrate the existence of a genuine factual issue, or else judgment will be entered.[82] The amendment adopts this view by adding at the end of Rule 56(e), dealing with use of affidavits, the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must answer in detail as specific as that of the moving papers, setting forth the material facts as he believes and intends to prove them to be. If he does not so answer under oath, summary judgment shall be entered against him."

Rule 58. Entry of Judgment. For the most part the Federal Rules have avoided the "cold and inhuman" treatment with which lawyers

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80. Chappell v. Goltsman, 186 F.2d 215, 218 (5th Cir. 1950); Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580, 581 (3d Cir. 1948); Durkin v. Chambers Const. Co., 15 F.R.D. 52 (D. Neb. 1953); Welcher v. United States, 14 F.R.D. 235, 239 (E.D. Ark. 1953); United Lacquer Mfg. Corp. v. Maas & Waldstein Co., 111 F. Supp. 139 (D.N.J. 1953); McCulloch v. Zapun Ceramics, Inc., 18 FED. RULES SERV. 56c.41, Case 5 (S.D.N.Y. 1953); Chenault v. Nebraska Farm Products, Inc., 107 F. Supp. 635 (D. Neb. 1952); Gunn v. Association of Casualty & Surety Executives, 16 FED. RULES SERV. 56c.41, Case 1 (E.D. Tenn. 1951); United States v. Bernauer, 10 F.R.D. 400 (D.N.J. 1950); Leigh v. Barnhart, 10 F.R.D. 279 (D.N.J. 1950); Thomas v. Martin, 8 F.R.D. 638 (E.D. Tenn. 1949); Postel v. Caruso, 86 F. Supp. 498 (D.N.J. 1949); Alamo Refining Co. v. Shell Development Co., 84 F. Supp. 325 (D. Del. 1949); Reynolds Metals Co. v. Metals Disintegrating Co., 8 F.R.D. 349 (D.N.J. 1948), *aff'd*, 176 F.2d 90 (3d Cir. 1949); Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (E.D. Pa. 1947). This rule has been applied, though with reluctance, even where the allegations of the pleading thought to create an issue are made merely on information and belief. *Compare* Dimet Proprietary, Ltd. v. Industrial Metal Protectives, Inc., 109 F. Supp. 472 (D. Del. 1952), *with* Shafer v. Reo Motors, Inc., 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd*, 205 F.2d 685 (3d Cir. 1953).

81. Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2d Cir. 1943); *see* Forde v. United States, 189 F.2d 727, 729 (1st Cir. 1951); Willingham v. Eastern Airlines, 199 F.2d 623 (2d Cir. 1952).

82. I have before me the citations of 18 cases so holding, and this list is not exhaustive. Most of the cases are cited at 6 MOORE, FEDERAL PRACTICE ¶ 56.11[3] (2d ed. 1953); and see Asbill and Snell, *Summary Judgment Under the Federal Rules—When An Issue of Fact Is Presented*, 51 MICH. L. REV. 1143, 1159-65 (1953).

and judges tend to greet changes in procedure.[83] The new concept of judicial administration embodied in the rules, of a few flexible provisions guiding the procedure with the details left to the wise discretion of the trial judge, has stimulated a new spirit in the profession.[84] The courts, and counsel, have vied with each other in employing the rules to bring about "the just, speedy, and inexpensive determination of every action."

A conspicuous exception has been the provisions dealing with the judgment. The rules are surely clear enough. Judgment is to be "entered forthwith by the clerk."[85] "The notation of a judgment in the civil docket . . . constitutes the entry of judgment."[86] The judgment "shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."[87] The provisions are much needed, too, since among the law's criticized delays, which it is the responsibility of the courts to minimize, none is more inexcusable than the strange lapses of time between adjudication and judgment which have so frequently occurred in the federal courts.

All these rules, sad to say, have not prevailed against the habits of a lifetime at the bar. Too often the winning counsel comes, long after the court has decided the case, with a document entitled "Judgment" to be entered. Such a document usually is replete with those lengthy recitals beloved in state practice. Attorneys are shocked to learn that the clerk has entered judgment, and the time for appeal has started running, long months before. Appellate courts have had to be ingenious to save such attorneys from having their appeals dismissed as untimely.[88]

The Advisory Committee has tried to combat this tendency by doing two things. It has proposed adding the following sentence to Rule 58 on entry of judgment:

> "If an opinion or memorandum is filed, it will be sufficient if a specific direction as to the judgment to be entered is included therein or appended thereto; and any such direction either for an immediate or for a delayed entry of judgment is controlling and shall be followed by the clerk."

83. The quotation refers to Chief Justice Winslow's famous opinion in McArthur v. Moffett, 143 Wis. 564, 567, 128 N.W. 445 (1910), where he was referring to the treatment of the Field Code at the hands of the New York courts. In the striking language of a commentator, state experience usually shows that both bench and bar are "notoriously adept in finding ways of utilizing their ancient learning at the cost of thwarting legislative efforts at procedural simplification. . . ." Newman, Book Review, 24 ST. JOHN'S L. REV. 190 (1949).

84. For some of the more noteworthy comments on this phenomenon, see Clark and Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest,* 1 SYRACUSE L. REV. 346, 360 n.75 (1950).

85. FED. R. CIV. P. 58.

86. *Ibid.*

87. FED. R. CIV. P. 54(a).

88. See the cases discussed in United States v. Roth, 208 F.2d 467, 471 n.1 (2d Cir. 1953).

This is surely gilding the lily, since it states what has clearly been the rule before. But a few courts have expressed doubts, and the amendment will end these doubts and emphasize how the rule has always been intended to work.[89]

The Committee has also included, in its official Appendix of Forms, two new forms of judgment, one on a jury verdict and one on judgment by the court. These forms will help to keep the control of the judgment in the hands of the clerk and thus of the court, by giving the clerks forms to follow in drawing up judgments. And they will illustrate to all the brevity and simplicity of judgments which should be used.

Rule 60(b). Reopening Judgments. One of the Committee's amendments to Rule 60(b) was discussed earlier, as it removed a gloss on the rules dealing with appellate leave to make a motion to reopen a judgment.[90] The amendment now considered is purely codifying in its nature. The rule sets out six categories of reasons for reopening a judgment. The first five categories allow a judgment to be reopened for any of the usual reasons of mistake, excusable neglect, newly discovered evidence, etc. The sixth allows the motion for "any other reason justifying relief from the operation of the judgment."

The categories were important because the rule went on to provide that a motion to reopen the judgment for any of the first three reasons had to be made within one year after judgment, while a motion for any of the last three reasons need only be made within a reasonable time. Thus if a party wanted a judgment reopened for reasons (1), (2) or (3), and more than a year had expired, he would normally move under the residual reason (6). Some courts held that (6) covered only vestigial equities, and therefore could not be used for any case which could properly fall under (1), (2) or (3); these courts then hurried on to find that the case before them properly belonged in (6), no matter how many similar cases, where the motion came within a year, had previously been classified under (1), (2) or (3)![91] Bolder courts came right out and ignored the supposed mutual exclusiveness of (6) and the other clauses.[92] It made little difference which course

89. See the cases discussed in Comment, *Entry of Judgment,* 18 FED. RULES SERV. 927 (1953).

90. Pp. 532-33 *supra.*

91. Note, *Federal Rule 60(b): Relief from Civil Judgments,* 61 YALE L.J. 76, 83 n.36, 84 n.38 (1952), and cases there cited.

92. The most forthright opinion was in United States v. Karahalias, 205 F.2d 331, 333 (2d Cir. 1953), but the views there expressed were modified on rehearing. *Id.* at 335. To the same effect also are, *e.g.,* United States v. Williams, 109 F. Supp. 456 (W.D. Ark. 1952); Nelms v. Baltimore & O. R. Co., 11 F.R.D. 441 (N.D. Ohio 1951); Weilbacher v. United States, 99 F. Supp. 109 (S.D.N.Y. 1951), *rev'd on other grounds,* 197 F.2d 303 (2d Cir. 1952); Fleming v. Mante, 10 F.R.D. 391 (N.D. Ohio 1950); United States v. Miller, 9 F.R.D. 506 (M.D. Pa. 1949).

was followed. The result was that the federal courts were giving the relief sought in deserving cases regardless of the time limit and regardless of the literal language of the rule. This should hardly surprise anyone, for through their history, in the vivid language of a commentator, the federal courts "have twisted technicalities, if need be, in order to remedy injustice."[93]

The amendment will make proper what the courts have been doing anyway.[94] It will provide that for reasons (1), (2), (3) and (6), the motion must be made within a reasonable time, and not more than one year after the grounds therefor have accrued and are known to the moving party. By making the period run from discovery of the grounds of motion, rather than from judgment, the amendment ensures that all needful cases can be taken care of, and by treating reason (6) on a parity with the others, it will let the courts apply the rule honestly as it is written, rather than manipulating reason (6) in order to achieve a good result.

No Change

For two of the rules the Committee has proposed no amendment. It has, however, added explanatory Notes to the existing rules. Easily the more famous of these is Rule 8(a)(2), dealing with the statement of a claim. The other rule to receive this treatment is Rule 54(b).

Rule 8(a)(2). Statement of Claim. Lawyers who have grown up under code pleading are familiar with the requirement that the complaint must contain "facts constituting a cause of action." The trouble with this mouth-filling phrase is that it is all things to all

93. 10 Cyc. Fed. Proc. § 37.01 (3d ed. 1952).

94. The courts have maintained a scrupulous regard for the aims of finality in construing the existing rule. Thus they have held that the motion must be made within a "reasonable time," even though the stated limit had not expired. *E.g.*, Kahle v. Amtorg Trading Corp., 13 F.R.D. 107 (D.N.J. 1952); Willard C. Beach Air Brush Co. v. General Motors Corp., 88 F. Supp. 849 (D.N.J. 1950); *see* Woods v. Severson, 9 F.R.D. 84 (D. Neb. 1948). The courts have been unyielding in requiring that a party show good reason for his failure to take appropriate action sooner. *E.g.*, Ackerman v. United States, 340 U.S. 193, 71 Sup. Ct. 209, 95 L. Ed. 207 (1950); Morse-Starrett Products Co. v. Steccone, 205 F.2d 244 (9th Cir. 1953); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952); Perrin v. Aluminum Co. of America, 197 F.2d 254 (9th Cir. 1952); Von Wedel v. McGrath, 100 F. Supp. 434 (D.N.J. 1951), *aff'd*, 194 F.2d 1013 (3d Cir. 1952); M. Lowenstein & Sons v. American Underwear Mfg. Co., 11 F.R.D. 172 (E.D. Pa. 1951); Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942). The courts have prevented the needless protraction of litigation by requiring the movant to show a good claim or defense to the judgment. *E.g.*, Fernow v. Gubser, 136 F.2d 971 (10th Cir. 1943); Sebastiano v. United States, 103 F. Supp. 278 (N.D. Ohio 1951). The courts have been diligent to consider the hardship that a reopening of the judgment might cause to other persons, and thus have denied such relief where many actions had been taken on the strength of the judgment, *e.g.*, Menashe v. Sutton, 90 F. Supp. 531 (S.D.N.Y. 1950); or where a party would be unable to obtain his witnesses for a new action, *e.g.*, McCawley v. Fleischmann Transp. Co., 10 F.R.D. 624 (S.D.N.Y. 1950); or where many persons had relied on the judgment, *e.g.*, Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579 (D. Idaho 1945).

people. In some states it has led to all manner of nice distinctions, with dismissal being the penalty for the pleader who departs from the ideal of "ultimate facts" to plead either "conclusions" or "evidence." In other states—Minnesota is a good example—the requirement was given a liberal interpretation, and any concise and convenient statement by the pleader of why he sought relief was held sufficient.[95]

The Federal Rules avoided this vexing question, and all the diverse precedents which had accumulated about the code provision, by making no requirement of "facts constituting a cause of action." Instead they have asked, in Rule 8(a)(2), for "a short and plain statement of the claim showing that the pleader is entitled to relief."

Any unbiased study of the cases under Rule 8(a)(2) leads to the conclusion that it has worked well, and has put an end to wasteful controversies about details of the form of statement. But recently there has been some demand, spurred largely by offhand judicial statements that the rules embody a system of "notice pleading" rather than "fact pleading," for an addition to the rules spelling out the old code requirement.[96] The Advisory Committee's Note takes cognizance of this demand, and explains why the Committee believes no change in the rule is required or justified. It points out that the rules obviously do contemplate the statement of the occurrences giving rise to the claim,[97] describes the purpose of the rule to avoid the old battles as to what is a "fact," and notes a consensus that the rule has worked satisfactorily and has advanced the administration of justice in the district courts.[98]

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95. See CLARK, CODE PLEADING 225-45 (2d ed. 1947); Cook, *Statements of Fact in Pleading under the Codes*, 21 COL. L. REV. 416 (1921).

96. This demand is largely to be found in two places. The discussion at the Ninth Circuit Judicial Conference on September 11, 1952, reprinted under the title, *Claim or Cause of Action*, 13 F.R.D. 253 (1952), and an article by a life-long opponent of modern pleading, McCaskill, *The Modern Philosophy of Pleading*, 38 A.B.A.J. 123 (1952).

97. As evidenced by, *inter alia*, Rules 8(c), 8(e), 9(b)-(g), 10(b), 12(b)(6), 12(h), 15(c), 20, 54(b), and the Appendix of Forms.

98. Even in the Ninth Circuit, from which has come the demand for change, the objective evidence shows a smoothly working rule. Thus of more than 300 motions brought before one district judge in California in June, 1953, only 4 were to make the complaint more definite and certain, and in each case these motions were either alternative or supplementary to a motion to dismiss. This is surely a great improvement over the constant battles about the mere form of words which were the bane of code pleading.

Also of interest is the great vogue that Rule 8(a)(2) has had in the states. It has been adopted verbatim as ARIZ. CODE ANN. § 21-404(2) (1939); DEL. R. SUPER. CT. 8(i)(1); KY. R.C.P. 8.01(1); MINN. R.C.P. 8.01(1); NEV. R.C.P. 8(a)(1); N. MEX. STAT. ANN. § 19-101 (8)(a)(2) (1941); UTAH R.C.P. 8(a)(1). Colorado gilded the lily by adding to the federal language the following: "Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state all of the facts, as distinguished from conclusions of law." COLO. R.C.P. 8(c)(a)(2), 8(e)(c)(1). The enthusiasm with which the courts have accepted and applied these state rules is truly amazing. *E.g.*, Reese v. DeMund, 74 Ariz. 140, 245 P.2d 284

The Committee concludes that:

> "as it stands, the rule adequately sets forth 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."

Rule 54(b). Judgment upon Multiple Claims. Here again the Committee has found no need for amendment of the rules, but in a spirit of keeping the profession advised as to what it has not done, as well as what it has done, it has appended a Note explaining why a particular amendment strongly urged by scholars seems to it unnecessary.

Rule 54(b) provides that in an action in which more than one claim for relief is presented, the court may direct entry of final judgment on less than all the claims upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The validity of the rule is now well settled, despite some early doubts, even though it admittedly makes appealable some judgments which would not have been appealable before adoption of the rule.[99]

The question which has attracted much attention is a very narrow one. Typically it comes up where a plaintiff has brought action against persons claimed to be joint tortfeasors. The trial court orders the dismissal of one of the defendants. May plaintiff appeal this dismissal or must he wait until he has tried his case against the remaining defendant and then appeal from the judgment?

The question is of great practical importance. If, for example, an erroneous order of dismissal as to the one solvent defendant is not appealable, plaintiff must go through a long, expensive trial, lasting several months in some cases, in which he will get a judg-

(1952); Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Costello v. Cording, 91 A.2d 182 (Del. Super. 1952). The only state court case to give an unsympathetic reading to such a rule was Malin v. Southern Pacific Co., 62 Ariz. 126, 154 P.2d 790 (1944), which has been repudiated by later Arizona cases. By way of contrast New Jersey retained a requirement of "a statement of the facts on which the claim is based." N.J.R.R. 4:8-1(a). The resultant confusion and judicial waste motion would have warmed the heart of Baron Parke. *E.g.*, Grobart v. Society for Establishing Useful Manufacturers, 2 N.J. 136, 65 A.2d 833 (1949); Zabady v. Frame, 22 N.J. Super. 68, 91 A.2d 643 (1952); Clark, Book Review, 62 YALE L.J. 292, 297 n.19 (1953).

99. Boston Medical Supply Co. v. Lea & Febiger, 195 F.2d 853 (1st Cir. 1952); Lopinsky v. Hertz Drive-Ur-Self Systems, 194 F.2d 422 (2d Cir. 1951); Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952); Town of Clarksville, Va. v. United States, 198 F.2d 238 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953); Tauzin v. Saint Paul Mercury Indemnity Co., 195 F.2d 223 (5th Cir. 1952); Winsor v. Daumit, 179 F.2d 475 (7th Cir. 1950); Williams v. Protestant Episcopal Theological Seminary in Virginia, 198 F.2d 595 (D.C. Cir.), *cert. denied*, 344 U.S. 864 (1952); 6 MOORE, FEDERAL PRACTICE ¶ 54.29 (2d ed. 1953). *Contra:* Flegenheimer v. General Mills, 191 F.2d 237 (2d Cir. 1951).

ment that is practically worthless, before he can procure a reversal of the order dismissing the solvent defendant, and thus be able to try to prove his case against that defendant. Thus everyone agrees that such an order should be appealable.[100] And indeed every case to have passed squarely on the question has found the order appealable where the trial judge has made the requisite determination that there is no just reason for delay.[101]

Scholars have argued, however, that the rule should be amended to codify this result.[102] Their reasoning is that, as all concede, such an order was not a final judgment, and thus not appealable, before the rules. They argue further that Rule 54(b) makes no change since, by its terms, it is applicable only to multiple claims, and a suit against multiple tort-feasors, according to these authorities, is but a single "claim."

The Committee Note states briefly this history, cites the scholarly arguments, and says:

> "Since the courts are already reaching the result conceded by all to be desirable, the Committee has proposed no amendment to this rule. The amendments, set forth above, to Rules 14(a), 20(b), and 42(b) should add whatever clarification is thought needed."

100. Pabellon v. Grace Line, 191 F.2d 169, 179 (2d Cir.), *cert. denied*, 342 U.S. 893 (1951); Audi Vision Inc. v. RCA Mfg. Co., 136 F.2d 621, 626 n.3 (2d Cir. 1943); Note, 62 YALE L.J. 263, 271 (1953).

101. Colonial Airlines v. Janas, 202 F.2d 914 (2d Cir. 1953); Boston Medical Supply Co. v. Lea & Febiger, 195 F.2d 853 (1st Cir. 1952); Williams v. Protestant Episcopal Theological Seminary in Virginia, 198 F.2d 595 (D.C. Cir.), *cert. denied*, 344 U.S. 864 (1952); Lopinsky v. Hertz Drive-Ur-Self Systems, 194 F.2d 422 (2d Cir. 1951); Vale v. Bonnett, 191 F.2d 334 (D.C. Cir. 1951); *see* Felder v. D. Loughran Co., 188 F.2d 623 (D.C. Cir. 1951); Roberts v. American Newspaper Guild, 188 F.2d 650 (D.C. Cir. 1951); Tobin Packing Co. v. North American Car Corp., 188 F.2d 158 (2d Cir. 1951); Russell v. Texas Co., 19 FED. RULES SERV. 54b.4, Case 6 (9th Cir. 1954). In several cases denying appealability there is nothing to indicate that the trial judge has made the finding requisite under Rule 54(b); thus see Minnesota Mining & Mfg. Co. v. Technical Tape Corp., 208 F.2d 159 (7th Cir. 1953); Dunaway v. Standard Oil Co., 178 F.2d 884 (5th Cir.), *cert. denied*, 339 U.S. 965 (1949); Tauzin v. Saint Paul Mercury Indemnity Co., 195 F.2d 223 (5th Cir. 1952); Drown v. United States Pharmacopoeial Convention, 198 F.2d 470 (9th Cir. 1952). The question is explicity left open in Farmer v. Powers, 204 F.2d 509 (5th Cir. 1953).

The case of Youpe v. Moss, 19 FED. RULES SERV. 12b.26, Case 2 (D.C. Cir. 1954), which has come out since the text was written, does not require alteration of the statement there made. The cited case held that an order quashing service of process upon one defendant, leaving the suit pending as to other defendants, is not a final appealable order. In that case there had been no certificate under Rule 54(b) so that the court's comments as to what the result would be had there been such an order are at best mere dicta. They are also quite indefensible. The court reasons that "A claim that service of process was validly made is not a claim for relief . . . presented in an action . . . !" This is at best misleading, since the real question is whether the judgment disposes of the claim of the plaintiff against the particular defendant. It is confidently believed that the exotic reasoning of the *Youpe* case would not be adopted by the court in a case where it was necessary to judgment, and where, therefore, more careful consideration would be given it.

102. 6 MOORE, FEDERAL PRACTICE ¶ 54.34[2] (2d ed. 1953); Note, 62 YALE L.J. 263 (1953); Note, 28 N.Y.U.L. REV. 203 (1953).

The Committee has proposed neither amendment nor Note dealing with another much-mooted question about Rule 54(b). This concerns the applicability of the rule to so-called "collateral orders." There is a certain limited class of orders, said to be "offshoots" of the main action, which have historically been appealable in the federal courts without final judgment in the main action, on the grounds that they are sufficiently independent of the main action that they can properly be considered apart from it, and of such importance as to justify prompt attention.[103] No one doubts that there may still be such orders and that they are still appealable, though the limits of the orders which will fall within this class are defined very vaguely. The question now is whether a certificate of no just reason for delay is required before these orders may be appealed.

The argument for requiring a certificate from the trial judge before allowing appeal of a "collateral order" is that the broad language of Rule 54(b) directly encompasses the situation, and that there seems little justification for reading into such a general rule a limitation based only upon history, particularly when the limitation is inherently difficult of definition and is thus both confused and confusing. So vague is the offshoot concept that the very case accepting dissolution of an attachment as within this class suggested that an order sustaining an attachment would not be collateral and thus not appealable.[104]

There is some scholarly support for finding collateral orders outside of Rule 54(b).[105] The cases are not well settled; they lean somewhat toward requiring the 54(b) certificate.[106] In the absence of any mention of this subject by the Committee, it is not possible to discern their views on the question or why they chose to propose no amendment settling this question one way or the other. A possible explanation is that the whole matter of interlocutory appeals has been under-

103. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949).

104. Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 689, 70 Sup. Ct. 861, 94 L. Ed. 1206 (1950).

105. 5 MOORE, FEDERAL PRACTICE ¶ 53.04[2] (2d ed. 1951), 6 *id.* ¶¶ 54.14, 54.31; Underwood, *Appeals in the Federal Practice from Collateral Orders*, 36 VA. L. REV. 731 (1950); Note, 28 N.Y.U.L. REV. 203, 211 (1953).

106. Appeal from dissolution of an attachment was upheld in Republic of Italy v. DeAngelis, 206 F.2d 121 (2d Cir. 1953), but this specific issue is discussed only in a concurring opinion. Other cases upholding appeals from possible "collateral orders" in somewhat unusual situations, but without reference to or discussion of the effect of Rule 54(b), are Collins v. Miller, 198 F.2d 948 (D.C. Cir. 1952), involving an order dismissing a petition for removal of an administrator in general proceedings for administration of an estate, and Weilbacher v. J. H. Winchester & Co., 197 F.2d 303 (2d Cir. 1952), where the order vacated an earlier order approving a stipulation for dismissal of an appeal and allowed the case to continue. In the only other appellate decision found, the court made no exception, but held unappealable without the Rule 54(b) finding an order fixing the fee of a special master before final judgment was entered on the claim originally litigated. Lyman v. Remington

going intensive study by a Special Committee of the Judicial Conference of the United States. Since most of the questions about interlocutory appeals are beyond the rulemaking power and must be settled by legislation, it may be that the Committee thought it better to leave the "collateral order" to be dealt with as part of a comprehensive solution of the whole problem by the Judicial Conference.

CONCLUSION

Doubtless the Advisory Committee hopes that it has not done those things which it ought not to have done. On the examination of the Committee's recommendations made in this article, that hope seems well justified. But it is reasonable to expect that practically every lawyer will think of some area where, in his view, the Committee has left undone those things which it ought to have done. Several such areas occur offhand. An amendment to Rule 4(c) allowing papers subsequent to the summons and complaint to be served by any person of suitable age, without the requirement of a special appointment by the court to serve the papers, would eliminate an expense and inconvenience which experience in Minnesota, at least, indicates is wholly unnecessary. An amendment to Rule 20(a) would have been highly desirable to remove a thoroughly unjustified and unwise limiting gloss placed on that rule by a distinguished judge which has now been accepted by so many prominent authorities that it is likely soon to be universal.[107] Other lawyers will have their own ideas as to additional amendments which the Committee might well have proposed.

But this is entirely as it should be. A continuing rulemaking committee must be in the van of the bar in the adoption of new and desirable procedures, but it must not be so far ahead of the profession as to succumb to the tendency to adopt untried ideas merely for the sake of change. The federal Advisory Committee has discharged this difficult job in a very creditable manner. It has prevented hardening of the judicial arteries by scrapping of limiting glosses. It has accepted the better court interpretations and state innovations and

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Rand, Inc., 188 F.2d 306 (2d Cir. 1951). And in Ace Grain Co. v. American Eagle Fire Ins. Co. of N.Y., 11 F.R.D. 164 (S.D.N.Y. 1951), the trial court granted a Rule 54(b) certificate with the express intention of thus making final and appealable an order requiring defendant to post a bond or security as a condition precedent to filing an answer, which order had been previously held interlocutory and nonappealable.

107. The case referred to is Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939), which has been followed in other cases and accepted as the law by leading textwriters. The case is criticized in detail in Comment, 5 FED. RULES SERV. 822, and Wright, *Joinder of Claims and Parties under Modern Pleading Rules*, 36 MINN. L. REV. 580, 604-11 (1952).

codified these in the rules. It has pushed forward in a few areas where advance seems most clearly indicated.

It is now up to the bar to do its job in the making of court rules by giving the Committee the views of the practicing lawyer, the judge, and the teacher on the recommendations which the Committee has put forth.[108] If the careful work of the Committee is followed by real participation and informed comment from the bar, the amendments finally adopted should ensure that the Federal Rules of Civil Procedure will continue to be the outstanding system of procedure in the world.

108. Comments should be directed to the Secretary of the Committee, Leland L. Tolman, Esq., Advisory Committee on Rules of Civil Procedure, Supreme Court Building, Washington 13, D. C.