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SPECIAL PROBLEMS IN DRAFTING AND INTERPRETING PROCEDURAL CODES AND RULES

CHARLES E. CLARK*

My contribution to this symposium will consist of the advancement of one main thesis and four subordinate and supporting ones. My main thesis is simple indeed. Procedural rules must be viewed as grants or creations of judicial power. My subordinate theses then indicate certain complications showing that in practice the matter cannot be thus wholly disposed of. Though too much reform has so assumed, it turns out that telling a court it has power does not guarantee exercise of that power. Judicial inertia, precedent-mindedness, love of technical niceties—all play their part in halting procedural improvement. So does, even more, a professional attitude which looks down on the subject save for an occasional broadside for its hasty reform. So does its lengthy history, some portions of which are wearily technical, though often not to the extent now assumed. So does the nature of the subject matter dealing as it does with routine which tends to progress only from mere habit into ironbound ritual. So does the countervailing cry, Away with all this foolishness; we want only justice—thus substituting aspiration for realistic endeavor. My subordinate theses call therefore first for that degree of skill and understanding which will know, recognize and appraise these pulls, pressures and diverting principles. They then suggest the need of casting the rules in terms to procure the desired results, stating court functions and operations rather than abstract mandates. Next they point out that the rules should instruct in the use of power, as well as grant it. Finally, since rules to shape habits do become routine and then ritual, they suggest the necessity of some further device, some continuing agency, constantly to revivify and restore them to their original purposes.

BASIC INTERPRETATION OF PROCEDURAL LEGISLATION

In contemplating this paper my first thought was to submerge the issue in the bromide that here we run into all the troubles of legal interpretation generally, plus some special ones. I am still disposed to let that stand even though some dabbling in other drafting—thus as far removed as property and trust law—warns me that each field can produce its own troubles.¹ Here

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1. And can yield its own experience; thus the clear-cut drafting rules of the uniform law commissioners, see note 16 *infra*, which I experienced in serving as draftsman of the

we do have the nice problem of harnessing broad grants of judicial discretion to the particularized definitions of parties' rights, which is the more usual province of statutes. And we have all the difficulties suggested above and explored later of a subject matter too coarse to be liked, but too pervasive to be ignored. But I do not want to stress the matter. I shall begin at least with a more general view, for I find my cue in a theory of legal interpretation recently advanced for the better construction of all legal instruments. It is contained in a paper, "A Better Theory of Legal Interpretation," read by Mr. Charles P. Curtis, distinguished lawyer and author of Boston, before the Association of the Bar of the City of New York last fall.² It is the theory of the written instrument as a grant of power.

As I understand Mr. Curtis, it is not merely futile, but unfortunately restrictive, to talk so much about "intent" of the makers; rather, we should think of what, in the eyes of the person addressed, is reasonably permitted to him under the instrument. Thus the author says:

"Words in legal documents—I am not now talking about anything else—are simply delegations to others of authority to give them meaning by applying them to particular things or occasions. The only meaning of the word meaning, as I am using it, is an application of the particular. And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation."³

And he goes on to say that words "mean not what their author intended them to mean" or even what meaning he expected others to give them, but "in the first instance, what the person to whom they are addressed makes them mean" and in the second instance, as "a further delegation" and "of a different authority" to the courts to decide whether or not the words authorized the meaning thus given them.⁴

In adapting Mr. Curtis' general proposition to my immediate purpose, I must point out certain qualifications doubtless inherent in his own statement. However useful his idea of a legal document as a grant of power may be—and it seems to me to suggest a fairly rich vein of persuasive examples or analogies—it must necessarily yield to higher policies. Much of interpretation is designed to prevent the acting parties from running wild, to either their own detriment or that of society generally. Thus concern for the harshness of the criminal law may call for reducing the statutory grant.⁵ Still closer at

Uniform Principal and Income Act (1931), 9 U.L.A. 593 (1942) [reprinted in SCHAPIRO AND WIENSHIENK, CASES, MATERIALS AND PROBLEMS ON LAW AND ACCOUNTING 799-804 (1949)], can be employed to add clarity to procedural rules.

2. First published in 4 THE RECORD 321 (Ass'n of Bar of City of New York, 1949), revised and reprinted, *supra* at 407.

3. *Supra* at 425, 4 THE RECORD at 340.

4. *Supra* at 425, 4 THE RECORD at 340-41.

5. As in *Jerome v. United States*, 318 U.S. 101, 63 Sup. Ct. 483, 87 L. Ed. 640 (1943), which may be compared with the opinions below, *United States v. Jerome*, 130 F.2d 514 (2d Cir. 1942). On a decision day in the Supreme Court, the divisions in the Court may

home, indeed discussed below, respect for the constitutional right of trial by jury may be a potent factor in procedural rule interpretation.

Again the stress of the Curtis theory is upon the power given the "person addressed." Since with us court activity occurs only upon stimulus from a litigant, a rule, too, is framed in terms of power to a litigant. But a danger in our subject is the overstress on the particular when it is not viewed in the light of the general policy to be subserved. Hence the second step, the delegation of authority to the court, is the one we are to view most sharply. I do not mean that there should be a complete dichotomy here. In fact, if rules are well framed in the light of modern objectives, the court's exercise of power should further the proper substantive rights of the party. But a procedural rule—the widely adopted rule for pre-trial conferences is an excellent example—should commit power to the court irrespective or, if necessary, in spite of the desires of the parties.⁶ Otherwise it is a weak reed, indeed, in any endeavor of the court to bring the case to clear-cut issue. In terms of present emphasis, the situation is not far different with respect to rules which seem to concern more directly the parties' own prerogatives. Take, as an example, the steadily broadening power to amend, even—horrendous thought two generations ago—to changing the "cause of action."⁷ Except in some such special case as the running of the statute of limitations, this is now definitely a party's right. Yet the only good reason for ever denying the privilege was the possible complication or confusion to the court. Modern judges are hardly less susceptible to confusion than their predecessors. There is rather a change of perspective. Now one would risk a little confusion to make sure that the dispute is being seen whole and that a half-view will not lead the court to greater injustice than the complications of the whole view. I am not saying that we should close our eyes to the rights and needs of the parties. I am saying only that for our present subject we must not forget we are endowing a tribunal with attributes working for effective judicial administration and that it is more fruitful to keep this emphasis in mind than to concentrate primarily upon the *ad hoc* needs of the parties.

Finally—and this is surely in line with Mr. Curtis' view—I need to say that, since the objectives are so identical, I can see no desirable difference in

well turn on just such policy issues as an approach to statutory or rule interpretation; thus see the various opinions in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 Sup. Ct. 309; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 70 Sup. Ct. 329; and *Bryan v. United States*, 338 U.S. 552, 70 Sup. Ct. 317, all decided Jan. 16, 1950.

6. FED. R. CIV. P. 16, now widely copied in state procedure. (Federal Rules are hereafter cited as F.R.) See VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 206-18, 506, 518-35 (1949); *Report of Pre-Trial Committee*, 4 F.R.D. 83, 99-103 (1944); CLARK, *CODE PLEADING* 52, 572-74 (2d ed. 1947).

7. F.R. 15 and state codes and rules, see note 8 *infra*. The trend away from the rule forbidding an amendment "changing the cause of action" is discussed in my text on *CODE PLEADING* 715-24 (2d ed. 1947).

our approach to procedural statutes from that to procedural rules. There is of course a vast practical difference. Our ideals, as I stress below, have some good chance of realization with the latter and not nearly so much with the former. But in stating my propositions, I think I can treat them alike. My emphasis upon *rules* therefore is not intended to exclude *statutes*. I must go further and say, as I shall without apology, that I am taking the federal procedural rules, of recent and still continuing history, as my exemplar and my example. I am bound to believe that their very existence makes the task of rule-making for the immediate future comparatively easy. For they may properly be held to furnish not alone the model and the type for future reformers, but also the very instrument itself. The civil rules have already been adopted in a dozen or more states; I certainly applaud their success on such transference and confidently look for more.⁸ But I would be the last to say that the federal rules represent the end of endeavor. There is of course the area not covered directly by the rules and requiring definition in state applications of the federal principles. There is the whole matter of their interpretation which, as we shall see, still presents some problems even in the federal system. And there is the important consideration—leading to my final thesis below—that no procedural system can stand still, and that left to itself it tends to harden and solidify. No matter how valuable the federal system is for the moment, it cannot remain the same and preserve its now important values for a hundred or fifty or even twenty-five years from now.

THE NEED OF TECHNICAL SKILL AND UNDERSTANDING

My main thesis is, therefore, that procedural rules should be viewed as enabling grants to the court to act under the circumstances variously detailed in the effective and wise administration of court business. My first subordinate proposition is that there must be brought to either the making or the executing of the rules all the technical skill and understanding which can possibly be found or developed. This seems surely a truism indeed, almost insulting as an admonition to would-be reformers. I am brought to emphasize it because I believe that, while a greater degree of legal sophistication is usually needed than in the substantive field to appreciate the subtle nuances of procedural causes and effects and their interrelation, yet the subject is often approached with a blitheness, indeed a naiveté, on the whole appalling. There are, however, natural reasons for this, which stem from the

8. I have traced these developments, present and prospective, elsewhere, and shall therefore content myself with general references to my text on CODE PLEADING 34-41, 50-54 (2d ed. 1947), and my articles, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1948); *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55 (1949); and *Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497 (1949), reprinted, with additions, in FEDERAL RULES OF CIVIL PROCEDURE 1 (Rev. ed. 1950) (West Pub. Co.).

apparent simplicity of the subject and the small regard for it currently held by the profession. These are matters most important to bear in mind in either the drafting or the interpreting of procedural rules.

The delusive simplicity comes from our "old-hat" attitude toward this lawyer's specialty whose very antiquity has served to increase the possible pitfalls. Every one knows all about motions and amendments, defenses and demurrers. Hence why isn't it easy to admonish a court to be liberal and consider the job done? But if a system is properly a grant of authority to the courts, as urged above, it becomes in large measure a careful negating of denials of power which have developed in the past. These of course must be understood if they are to be appreciated. Even so seemingly simple and straightforward a system as that of the new federal civil rules has many such instances—so many, indeed, as to cause doubts among rules-committee members whether they were not going too far in stating the obvious.⁹ My guess is that the members would have less question now after observing the inveterate tendency of past dogmas to reassert themselves.¹⁰

The professional attitude is shown by the disdain toward mere procedure shared alike by judges, leaders as well as the rank and file of the bar, and law teachers, coupled with an inveterate juristic tendency toward *ad hoc* procedural adjudications to achieve justice in a particular case. I have suggested as a truism that the greater the judge, the more impatient he is with procedure and hence the more likely to come out with a strange procedural principle which does dispose presently of the case before him. This approach I have ventured to term "procedural particularism."¹¹ It is a serious problem

9. I am thinking, for example, of such provisions as those of F.R. 7(a), reply to a counterclaim "denominated as such," of F.R. 13(c) and (d), a counterclaim "may or may not" diminish or defeat the opposing claim and may mature or be acquired after the commencement of the action (subject to the permission of the court), of the second sentence of F.R. 22(1), dealing with interpleader and negating such requirements as those of privity, of the new last sentence of amended F.R. 26(b), dealing with discovery; but, as a matter of fact, practically all the permissive rules might be cited as examples. I recall one distinguished committee member from a state with a liberal practice, who could not believe this all required, since he thought no state practice could really be so restrictive. Naturally enough, his reaction was quite the other way as to those few, but significant, instances where his local practice was rigid.

10. Many of these were corrected by the amendments, but some persist and some new ones seem in process of developing, as pointed out in my article, *Experience under the Amendments to the Federal Rules of Civil Procedure*, note 8 *supra*; thus note the belated attack on Fed. Form 9 of *Bush v. Skidis*, 8 F.R.D. 561 (E.D. Mo. 1948), or the curious limitation read into amended F.R. 12(b) in *Park-in-Theatres, Inc. v. Paramount-Richards Theatres, Inc.*, 7 F.R.D. 723 (D. Del. 1948), or the earlier view that the liberal construction required of pleadings necessitated the granting of the now abolished bill of particulars. *Anheuser-Busch, Inc. v. Dubois Brewing Co.*, 1 F.R.D. 406 (W.D. Pa. 1940), and other cases cited in 2 MOORE, *FEDERAL PRACTICE* 2278-2303 (2d ed. 1948). See also from recent state decisions *Livingston v. Stewart & Co.*, 69 A.2d 900, 903 (Md. 1949), praising the local practice as having the best of the common law while avoiding "the brood of new niceties of code pleading," avoiding mention of the recently adopted federal rules (in the law courts), and accepting a result in the sustaining of a pleading demurrer which the court itself terms a "barren victory" for defendant "from which plaintiff has prosecuted a barren appeal."

11. In my *CODE PLEADING* 69-71 (2d ed. 1947), also adverted to in my articles, note 8 *supra*. This of course is not a new idea; students of the subject have often referred to

for those who—notwithstanding this more usual disdain—do feel it necessary to labor in the field; for a procedural decision which does terminate unworthy litigation abruptly soon comes back in its now crystallized form as a rule to plague judicial administration for the future. I would that judges could be more frank in their reasons and, when they are moved by the apparent equities of the case, say so, rather than invoke some principle of pleading which, if really examined, would turn out to be of doubtful validity or at least generality.

But, even with greater judicial restraint and candor, the problem would still recur. Procedure is a means to an end, not an end in itself; and, often necessarily, its rules must be applied to do justice in the particular case, whatever the doubts raised as to the future. The problem is made acute by the writing of opinions and the extensive business developed from the marketing of opinions. With the popularity of procedural systems and their copying elsewhere, this is intensified; witness the accumulating reports, manuals, texts, and encyclopedias about the federal rules. Unfortunately by a kind of Gresham's Law, the bad, or harsh, procedural decisions drive out the good, so that in time a rule becomes entirely obscured by its interpretative barnacles. Of course the restrictive decision is the striking one; it tells the trial court or the litigant what's what in ringing terms. No such quotable or repeatable phrases can occur in a decision merely affirming a permissive rule. Indeed, the rule may not even be cited and thus the case may never get into the current groove for citation as a procedural authority.¹² Would that judges might be induced to refrain from writing procedural opinions or at least to confine themselves strictly to the case in hand! Would, too, that publishers would cease from exploiting procedural precedents!¹³ But these are of course vain hopes in a practical world. We must take the contrary situation as we find it.

Quite naturally there is a pitfall of the opposite sort—accepting the expert so thoroughly imbued with the subject that he wants more and greater

the low regard in which procedure is held, as VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xvii-xxi (1949); Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73 (1949), and Lord Chorley, *Procedural Reform in England*, in *id.* 98, 98-102 ("Unfortunately, evidence and procedure, particularly procedure, tend to be regarded as inferior subjects by professors in England, even to be treated with contempt" p. 101.) Compare FRANK, *COURTS ON TRIAL* c. 7, "The Procedural Reformers" (1949).

12. I think my good friends of the FEDERAL RULES SERVICE will not object to my relating this incident. When I called their attention to *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947) (see note 40 *infra*), as a valuable case on the summary judgment, they replied that they could not use it, since neither opinion cited the formal rule, F.R. 561

13. The great amount of material, both judicial and textual, and the numerous reprints are sometimes cited to suggest complexity in the federal rules, *e.g.*, Rothschild, *Reformulating the Jurisdiction of the Court of Appeals*, 13 BROOKLYN L. REV. 14, 16-17 (1947). In fact the great bulk of this is merely declaratory of the permissive grants on the part of the judges and explanatory on the part of the text writers—a real, if perhaps embarrassing, tribute to the popularity of and interest in the rules.

drafts of it and succeeds in weighing it down with precise details. The classic example is Stephen, English master of the law of pleading, who, called upon as the first expert in English reform, produced the Hilary Rules of 1834. These detailed requirements, administered by Baron Parke—the Baron Surrebutter of Sergeant Hayes' classic and brilliant "Dialogue in ye Shades on Special Pleading Reform"—made practice the most difficult of all English history and pleading a by-word for the next decade or two until new reform became a necessity.¹⁴ While this historic example has not been quite emulated here, we have some unfortunate trends that way.¹⁵

The conclusion is therefore that we need for the task skilled technicians not only with complete knowledge of their subject, but also with the poise and common sense to keep their technical knowledge from warping the result. Having such paragons it may be ungracious to suggest that then for the details of drafting they should employ some clerks who have actually studied draftsmanship: the organization of words, of paragraphs, of sections; the various schemes of numbering and lettering; the use of the present, future or mandatory tense; the simplifying of sentence construction; the need of reasonable consistency; and all the other earmarks of good legal writing.¹⁶ These are bare essentials; I shall now pass on to my more particular suggestions for this field.

RULES AS STATING TRIAL FUNCTIONS, NOT JURIDICAL MANDATES

As grants of judicial power, the rules should be stated in the terms of the functions they are to perform, or the results they are to achieve, rather than as arbitrary mandates. A partial failure of the original Field Code appeared right here. Field lived in an age of statutory command and it is not surprising that his new procedural reform followed the same course. Even its famous basic mandate—the one of all deserving of most careful compliance—that "there

14. See Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 *CAMB. L.J.* 261 (1923), quoting from Hayes, *Crogate's Case: A Dialogue in ye Shades on Special Pleading Reform* (c. 1850), which is reprinted in 9 *HOLDSWORTH, HISTORY OF ENGLISH LAW* 417 (2d ed. 1938); POLLOCK, *THE GENIUS OF THE COMMON LAW* c. 3, "Surrebutter Castle," pp. 27 *et seq.* (1912); Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts*, 6 *N.Y.U.L.Q. REV.* 95 (1929); and my pamphlet, *Simplified Pleading*, *A.B.A. JUD. ADM. MONOGRAPHS*, Ser. A, No. 18, reprinted in 27 *IOWA L. REV.* 272 (1942), 2 *F.R.D.* 456 (1943), 6 *FED. RULES SERV.* 819, and 4 *HANDBK. NAT. CONF. JUD. COUNCILS* 136 (1942).

15. From several potential examples I cite the Illinois Civil Practice Act of 1933. Fisher, *A Vindication of Simplified Pleading*, 35 *ILL. L. REV.* 270 (1940); Fisher, *Wedding Law and Equity*, 40 *ILL. L. REV.* 326, 339, 341 (1946); and other authorities cited in my *CODE PLEADING* 82, 83 (2d ed. 1947).

16. There are a considerable number of excellent technical pieces, including the one directly used in the drafting of the federal civil rules, *Drafting Rules and Suggestions, Prepared by the Committee on Legislative Drafting of the National Conference of Commissioners on Uniform State Laws*, 1944 *HANDBK. OF COMM'RS ON UNIFORM STATE LAWS* 369, quoted in READ AND MACDONALD, *CASES AND OTHER MATERIALS ON LEGISLATION* 936-37 (1948). This casebook has many valuable quotations and citations, particularly in its c. 6, § 3, "Arrangement of Language and Some Other Mechanics of Drafting," pp. 909-72. See also Conard, *New Ways to Write Laws*, 56 *YALE L.J.* 458 (1947).

shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs" with the "distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing" abolished, was inadequate.¹⁷ For courts still talk about the "inherent and fundamental difference between actions at law and suits in equity" with surprising and untoward results in actual decision.¹⁸ As experience has shown, the mandate had little significance by itself; it required implementation in various practical terms, ranging from the effect of the demand for judgment where there was no answer to the methods and form of waiver of trial by jury.¹⁹ Another example which really deserved a better fate was the direction for stating "the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended"—a quite appropriate directive which ran into grief under the weight of the question-begging terms "facts" and "cause of action."²⁰

Perhaps an even more striking example occurs with reference to the joinder of parties plaintiff. The code yardstick was that of all persons "having an interest in the subject of the action, and in obtaining the relief demanded."²¹ This was a statement of what was fundamentally a matter of trial convenience and expedition in terms of more or less arbitrary abstractions. Incidentally it involved a serious error in the use of the copulative "and," instead of the disjunctive "or," which would have been more appropriate for the equity rule the codifiers assumed to state. This provision has gone through many vicissitudes in states such as New York where attempts at reform have been halting and long delayed—a story elsewhere recounted and too long to be repeated here.²² The now accepted reform is that developed under the English pro-

17. N.Y. Laws 1848, c. 379, § 62; for modern versions see N.Y. CIV. PRAC. ACT § 8, and other statutes cited in my text on CODE PLEADING 81, 82 (2d ed. 1947), with which compare the simpler form of F.R. 2.

18. Jackson v. Strong, 222 N.Y. 149, 154, 118 N.E. 512 (1917), a case which has had a considerable vogue in New York and has promoted the problems referred to in note 19 *infra*. For the modern view under the federal rules see the apt statements of Mr. Justice Arnold in Groome v. Steward, 142 F.2d 756 (D.C. Cir. 1944), and Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir. 1943).

19. For the various difficulties which have ensued in New York, see Kharas, *A Century of Law—Equity Merger in New York*, 1 SYRACUSE L. REV. 186 (1949); Note, *Law and Equity in New York—Still Unmerged*, 55 YALE L.J. 826 (1946); Clark and Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV.—(1950), and my text on CODE PLEADING 83-122, 265-69 (2d ed. 1947). Compare Wicker, *Constitutional Revision and the Courts*, 19 TENN. L. REV. 718, 722, 723 (1947).

20. N.Y. Laws 1848, c. 379, § 120; N.Y. CIV. PRAC. ACT §§ 241, 255; cf. F.R. 8(a) and (e). For the difficulties ensuing see my pamphlet, *Simplified Pleading*, note 14 *supra*, and my text on CODE PLEADING 225-45, also 127-48 (2d ed. 1947).

21. N.Y. Laws 1848, c. 379, § 143, later N.Y. CODE CIV. PROC. § 484 and N.Y. CIV. PRAC. ACT § 258. The similar statutes of other states are collected in CLARK, CODE PLEADING 441, n.20 (2d ed. 1947). The "equity rule" which the commissioners planned to adopt, FIRST REP. COM'RS ON PRAC. AND PL. 124 (N.Y. 1848), is stated in cases such as Brinkerhoff v. Brown, 6 Johns. Ch. 139 (N.Y. 1822), and Ballou v. Inhabitants of Hopkinton, 4 Gray 324, 328 (Mass. 1855).

22. Most recently stated by Clark and Wright, *supra* note 19, with citations and references, including the final acceptance of the federal rule in New York, on recommenda-

cedure providing for joinder of parties where "a common question of law or fact is involved" and providing also that the trial court may order separate trials where desirable. This history represents a natural and desirable development from the original code abstractions to a kind of discretionary commission to the court, with the suggestion of the reasons which push toward joinder. This approach not only has been employed in the joinder rules proper of the federal system, but has been extended to corresponding issues such as class actions, intervention, and consolidation.²³

The moral of all this is that a procedural rule should shy away as much as possible from abstractions such as facts, cause of action, subject of the action, transaction, and the like, but should, so far as possible, indicate both the purpose in mind, such as trial convenience, and the kind of test for the exercise of jurisdiction. These are not always easy to work out, but a considerable amount of experience in procedure making can now be called upon with its fairly rich background of suggestive material.²⁴

RULES AS EXPLAINING AS WELL AS GRANTING POWER

The discussion thus far may well suggest the question, Why all this care in developing rules of some dynamic content, but susceptible to misinterpretation, whereas a simpler course would be to commit complete discretion to the trial court? The answer is very clear that, without a tradition for the exercise of discretion, a general grant of power is likely to accomplish little. Habitually courts act according to precept and custom. If left to their own devices, without any precise guide beyond a general authorization, they will stick to what they have known in the past. One of the most difficult problems in procedure is to develop a rule sufficiently complex to suggest the various applications to which it is susceptible and yet sufficiently flexible not to restrict. A basic reason for the effectiveness of the federal rule authorizing pre-trial procedure is its careful statement of possible issues to be pre-tried, at the same time that it grants broad discretion to the court. It has been often copied, but practically always with either the same or like general admonitions.²⁵

tion of the Judicial Council, FIFTEENTH REPORT 56-58, 209-40 (1949), in N.Y. Laws 1949, c. 147, after *Great Northern Tel. Co. v. Yokohama Specie Bank*, 297 N.Y. 135, 76 N.E.2d 117 (1947), had shown that New York at long last had rid itself of the unfortunate earlier limitations on the reform.

23. F.R. 20, 21, 22, and 42. The English joinder rules, Rules under the Judicature Act, Order 16, rules 1-5, Order 18, rules 1-5, have been now adopted not only in the states directly following the federal system, but in a considerable number of others; it is one of the more popular reforms. CLARK, *CODE PLEADING* 369-72, 389-408, 420-27 (2d ed. 1947).

24. Such as that referred to in note 23 *supra*. It should now be possible to avoid such a contretemps as has resulted from liberalizing rules for joinder of parties while overlooking those for joinder of causes, since the unfortunate consequences were so demonstrated by experience in England, 1894-1896, New York, 1925-1949, and elsewhere, although the possibilities provided by the conflicting rules still exist in other states. Clark and Wright, *supra* note 19.

25. F.R. 16, and other references in note 6 *supra*.

Somewhat similar considerations apply to the extensive and separately defined federal rules of discovery. Had there been a tradition of complete exercise of these devices thus newly created, it might have been possible or even desirable to have provided one single broad rule authorizing all forms of discovery in any civil action. But the past history had been very restrictive of discovery and the courts had hesitated to apply existing statutes or rules even generously. Consequently it was desirable to specify separately the different forms of discovery as by examination and cross-examination of witnesses, interrogatories to witnesses, questions to parties, discovery of books, documents, and so on.²⁶ Undoubtedly the general wide use of these devices and the widespread satisfaction in them have been materially aided by this complete exposition. There is of course the danger that they be treated as different compartments of the law subject to different principles. A somewhat developing tendency of this kind led to provisions in the amendments adopted in 1946 tying all the discovery rules to the same general principles—a good illustration of both the dangers and the advantages of this type of procedural specification.²⁷

There is one case in the federal rules disclosing an opposite trend which aptly illustrates the problem. As now known, the summary-judgment rule came into American procedure from the English practice by way of a New York rule rather substantially adopted in various progressive states. The rule began as a device for an immediate judgment for a debt or other liquidated demand, where there was no real defense. It proved sufficiently useful that there was a constant pressure to broaden its scope; and in its home state of New York it has become of ever widening content, although still in form limited to specified claims or defenses. This background suggested the course taken in the federal rules of making the procedure available in all civil actions, thus simplifying the practice with considerable gain as the early cases seemed to show.²⁸ But notwithstanding the need and value of the device, as well as admonitions for its use from the Judicial Conference of the United States,²⁹

26. F.R. 26-37, inclusive; VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 234-36, 575 (1949).

27. As recounted in my article, *Experience under the Amendments to the Federal Rules of Civil Procedure*, *supra* note 8.

28. F.R. 56, with which compare the narrower scope of N.Y. CIV. PRAC. RULE 113, supplemented by Rules 107, 108, 110, notwithstanding the extensive revision in 1944 on recommendation of the Judicial Council in its TENTH REPORT 305-33 (1944). For the background in English and other practices, see Clark and Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929); Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1928); SHIENTAG, *SUMMARY JUDGMENT* (1941), a revision of 4 FORDHAM L. REV. 186 (1935). For its use in the states see my *CODE PLEADING* 556-67 (2d ed. 1947); VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 219, 220, 531-33 (1949); and my pamphlet, *Summary Judgments*, A.B.A. JUD. ADM. MONOGRAPHS, Ser. A, No. 5, reprinted in 2 F.R.D. 364, 25 J. AM. JUD. Soc. 20 (1941), and 4 HANDBK. NAT. CONF. JUD. COUNCILS 55 (1942).

29. PROCEEDINGS OF JUDICIAL CONFERENCE OF THE UNITED STATES 36, 37 (Sept. 1948), approving and adopting committee recommendations which called attention to the value

a restrictive interpretation set by some appellate courts is materially limiting its employment as contrasted, for example, with its use in New York. As pointed out below, this attitude has stemmed from a very proper concern lest the right of trial, and particularly of jury trial, be unduly restricted. But unfortunately statements actually concerning particular issues have been set forth in more generalized form, and these mandates have naturally affected the trial courts.³⁰ This experience suggests the question whether restriction of this useful device to certain forms of claims might not have been a safeguard which would have prevented the arousing of judicial displeasure and would have kept the procedure a useful one in the instances where experience elsewhere had shown it workable. It may be, although I think it still too soon to be certain, that some such limitation may be necessary to save the device from disuse, except as a mere substitute for the old demurrer in presenting formal issues of law only.³¹

Before I come to my last proposition for procedural drafting, I shall turn briefly to the interpretation of the rules which set the background for the proposition itself.

RULES INTERPRETATION IN THEORY AND IN FACT

For the appropriate principle in the interpretation of procedural rules I can do no better than to refer back to Mr. Curtis' admonitions as to legal interpretation with which I started. It would seem proper that they be interpreted in the light of what the court or the litigant to whom they are addressed makes them mean and can reasonably be permitted to make them mean in the light of their purpose. Since they are grants of power, this is the obvious and the rational approach; and this is the one which is followed by the majority of cases in interpreting the federal rules.³² But as pointed out above, this is not a universal policy; probably it cannot be for the reasons already indicated. Whenever it is departed from, the restrictive interpretations are the ones which survive and are quoted and become the important guides. This is the Gresham's Law developed above. It is in the light of this very well-known characteristic that rule-making itself must be considered.

Here, too, the federal rules offer examples; perhaps the most apt is the already adverted-to fate of the summary-judgment rule. As we have seen,

of the "related provisions" of the federal discovery and summary-judgment rules, and urging the promotion of their use by the district judges.

30. See references in note 34 *infra*.

31. As some commentators have already concluded; see note 37 *infra*.

32. This is pointed out in some detail in my article, *Experience under the Amendments to the Federal Rules of Civil Procedure*, note 8 *supra*, and can be tested by following the collected cases in the various services and anthologies, as well as the discussion not only in my text so often cited in these notes, but in Professor Moore's outstanding treatise on *Federal Practice* in the supplements to his first edition and in his second edition now appearing. See also my article, *The Influence of Federal Procedural Reform*, note 8 *supra*.

notwithstanding its background and general support,³³ this rule has suffered the misfortune of a considerable number of restrictive interpretations which, however justified on their particular facts, have tendered broad glosses on the rule in place of the rule itself. The most usual is the now reiterated admonition to trial judges that a summary judgment is not to be granted where there is "the slightest doubt" as to the facts.³⁴ If this is to be applied as it is stated, there can hardly be a summary judgment ever, for at least a slight doubt can be developed as to practically all things human.³⁵ When this is compared with the words of the rule itself providing for the judgment when the pleadings, depositions, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,"³⁶ it will be seen how a transference of thought has sunk the rule itself under a restrictive gloss which practically eliminates it for all except errors of law.³⁷ This natural consequence is not merely the elimination of a useful remedy for effective disposition of many cases; it also presents a serious question of policy as to the forcing of litigants to a long trial on clearly worthless claims.³⁸ The very simplicity and generality of the pleading permitted

33. Notes 28, 29, *supra*.

34. *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Doehler Metal Furn. Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945); and see also *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949), using the expression "trial by affidavit."

35. Thus L. Hand, J., in *De Luca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949): "True, it may be too strong to say that it is impossible to conjure up any conceivable answer to them. . . . But if a motion for summary judgment is to have any office whatever, it is to put an end to such frivolous possibilities when they are the only answer"; and Miller, J., in *Carlander v. Dubuque Fire & Marine Ins. Co.*, 87 F. Supp. 65, 69 (W.D. Ark. 1949): "The court realizes that captious, immaterial and imaginary issues of fact may be found in any case, but if the motion for summary judgment is to serve any useful purpose, the court must unhesitatingly grant it when a careful consideration of the facts reveals no real genuine issue of fact involved." See also cases in note 40 *infra*.

36. F.R. 56(c) as amended. See Advisory Committee's note to this provision in its REPORT OF PROPOSED AMENDMENTS 74 (June 1946).

37. Thus trial judges are tending to use only the gloss, as in, *e.g.*, *La Salle Co. v. Kane*, 8 F.R.D. 625, 631 (E.D.N.Y. 1949); *Jan Products Co. v. Mills Bros.*, 9 F.R.D. 26 (S.D.N.Y. 1949); *American Mach. & Metals v. De Bothezat Impeller Co.*, 8 F.R.D. 324, 327 (S.D.N.Y. 1948); *Doyle v. Milton*, 73 F. Supp. 281, 284 (S.D.N.Y. 1947); the reported cases alone do not fully disclose the present tendency of the district judges to deny such motions, so much so that comparatively few cases can now be disposed of without trial. So commentators have pointed out the virtual limitation of the rule to questions of law in practically universal criticism of the restrictive decisions. ILSÉN, *FEDERAL RULES OF CIVIL PROCEDURE WITH APPROVED AMENDMENTS* (Rev. ed. 1947); Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments*, 13 BROOKLYN L. REV. 5 (1947); Melville, *Summary Judgment and Discovery*, 34 A.B.A.J. 187 (1948); *Judicial Conferences: Fifth, Eighth, and Tenth Circuits*, 33 A.B.A.J. 1111, 1112 (1947); Notes, 48 COL. L. REV. 780 (1948), 55 YALE L.J. 810 (1946); 45 COL. L. REV. 964 (1945); 61 HARV. L. REV. 375 (1948).

38. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), note 34 *supra*, led to a long and expensive jury trial, with verdict and judgment for defendant summarily affirmed on appeal, *Arnstein v. Porter*, 158 F.2d 795 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947), where a verdict for plaintiff surely could not have survived; the historian of the art terms this "one of the most absurd plagiarism suits on record." SIGMUND SPAETH, *A HISTORY OF POPULAR MUSIC* 553 (1948). *MacDonald v. Du Maurier*, 144 F.2d 696 (2d Cir. 1944), led to a long court trial and judgment for defendant by Judge Bright in 75 F. Supp. 655 (S.D.N.Y. 1948), on the same grounds as had been taken by Judge Bondy originally, as cited in the appellate opinion, but which he had to refuse

under modern practice systems makes necessary some method of testing claims for their falsity. This can be achieved somewhat through discovery and pre-trial, though these, too, may come to arouse judicial opposition.³⁹ On the other hand, there are many cases which apply the rule itself, in either granting or withholding judgment, without these difficulties. The appellate affirmances of summary judgments are perhaps of most immediate interest, since they show how the rule can be applied without question and with an eye single to the case before the court by even the sharpest critics of the procedure.⁴⁰ One can but regret the Gresham's Law of precedents, which appears to prevent these cases from having the wide authority they deserve.⁴¹

Another example, interesting because it concerns a perhaps narrower issue with less clearly observable consequences, may be found with respect to the carefully framed federal rule that the 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."⁴² In this rule the design was to develop a formula which would suggest to the trial court the appropriate value to be placed upon the direct observation of a witness, but would not make that the controlling criterion of the rule itself. Such, indeed, was the rationale of the equity cases upon which it was based.⁴³ Nevertheless there have appeared judicial statements which suggested a greater power of review where the evidence below was by deposition. This was perhaps not harmful, though to add an additional measure of discretion to a rule calling for the exercise of discretion was, if not confusing, at least gilding the lily. But by a process almost inveterate in legal thinking, a negative was soon

in 75 F. Supp. 653 (S.D.N.Y. 1946); appeal was abandoned after the appellate court ordered increased bond for costs. What these long delays proved for the better administration of justice I do not see. See on the other hand *Ricker v. General Electric Co.*, 162 F.2d 141 (2d Cir. 1947).

39. Compare the suggestion in the dissenting opinion in *American Mach. & Metals v. De Bothezat Impeller Co.*, 173 F.2d 890, 891 (2d Cir. 1949); and see also *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949), note 34 *supra*.

40. *Griffin v. Griffin*, 327 U.S. 220, 235, 236, 66 Sup. Ct. 556, 90 L. Ed. 635 (1945); *De Luca v. Atlantic Refining Co.*, 176 F.2d 421 (2d Cir. 1949); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *Ricker v. General Electric Co.*, 162 F.2d 141 (2d Cir. 1947); *Dixon v. American Tel. & Tel. Co.*, 159 F.2d 863 (2d Cir. 1947), *cert. denied*, 332 U.S. 764 (1947). See also *Creel v. Lone Star Defense Corp.*, 171 F.2d 964 (5th Cir. 1949); *Christianson v. Gaines*, 174 F.2d 534 (D.C. Cir. 1949); *Jameson v. Jameson*, 176 F.2d 58 (D.C. Cir. 1949). Thus the cases extensively cited in *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949), note 34 *supra*, in general indicate only an appropriate application of the rule to the particular case; necessarily there will often be cases where an appellate court will differ from the district court as to the propriety, on the particular facts disclosed, of a judgment, but this does not require dismemberment of the rule.

41. They are not widely cited as compared to the cases in notes 34, 38, *supra*; compare references in note 37 *supra*; *Hunter v. Mitchell*, 179 F.2d—(D.C. Cir. 1950); *Dewey v. Clark*, 179 F.2d—(D.C. Cir. 1950).

42. F.R. 52(a).

43. See Advisory Committee's Notes to F.R. 52(a); Clark and Stone, *Review of Findings of Fact*, 4 U. OF CHI. L. REV. 190 (1937); Yankwich, *Findings in the Light of the Recent Amendments*, 8 F.R.D. 271, 289 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 395, 68 Sup. Ct. 525, 92 L. Ed. 746 (1948).

deduced as the opposite of the affirmations; and now the definitely erroneous gloss is being stated in place of the rule itself to the effect that the stated rule does not apply at all unless the trial judge saw the witnesses in person.⁴⁴ Hence we 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.⁴⁵ This may seem like just a difficulty of words, but we must remember that this often leads to more serious difficulties; and in any event, much judicial fag could have been avoided by sticking to the rule itself.

As suggested earlier, it must be conceded that if some policy exists strong enough to override the interpretation of a rule as a grant of power, then the Curtis theory of interpretation can hardly prevail. So if the rule-making authorities have improperly circumscribed the right of trial by jury in their stated grants of power, a restrictive interpretation must correct this impropriety. But I do feel that appellate judges in some of their conclusions have conceded to the Court and its Advisory Committee less skill in draftsmanship as well as less concern for these fundamentals than seems altogether justified on the evidence of the cases. The rule-making authorities have tried to look at the problem as a whole, not in its segregated parts, and have attempted to find a correct balance between these rights on the one hand and a workable procedure on the other. This line of appellate decisions emphasizes only a single angle of the situation, with resulting overbalance of emphasis and rigidity of detail which lessens the operability of the whole system. The stiff answer may be that the fundamental rights must be preserved at whatever cost and no matter how long the delay. For my part I must believe, as a result of my experience, that there is more chance of hardship by long delay than by overbearing decisions under the modern procedure and that this cuts the hardest upon the litigant who has the likeliest case. Overemphasis on the assumed rights of litigants who have only the vainest of hopes in place of real rights will lead to delays and expenses which are actually denials of justice to the apparently successful litigants.⁴⁶

But these concern only a few rules—a surprisingly few for over a decade of extraordinarily active business in our largest judicial establishment. It points to the worth of the system as a whole, though it does suggest the desirability

44. *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). *Contra*: Advisory Committee's Note to F.R. 52(a), cited in *Heim v. Universal Pictures Co.*, 154 F.2d 480, 491 (2d Cir. 1946). In *Orvis v. Higgins*, 179 F.2d—(2d Cir. 1950), the court, one judge dissenting, went into an elaborate rewriting of the rule in terms of "approximate gradations" of finality.

45. See *Banister v. Solomon*, 126 F.2d 740 (2d Cir. 1942); *Equitable Life Assur. Soc. of United States v. Irelan*, 123 F.2d 462, 464 (9th Cir. 1941); *Himmel Bros. Co. v. Serrick Corp.*, 122 F.2d 740 (7th Cir. 1941).

46. Compare note 38 *supra*.

of some method whereby rule-making and rule interpretation should not become too widely divergent. And that brings me to my final proposition.

THE NEED FOR CONTINUAL EXAMINATION OF PROCEDURAL RULES

For the reasons I have reiterated above, it appears to be the essence of procedure that it tends to harden and solidify. This has been often stated, perhaps as succinctly as ever, by the first historian of code pleading, Professor Hepburn, in pointing out the "inveterate nature of the incongruity between procedure and substantive law," for "the former petrifies while the latter is in its budding growth," and "the conservatism of the lawyer preserves the incongruity."⁴⁷ Unless revived, the modern new procedure will soon become as hard and unyielding as the old systems to which reform was directed. Such, after all, is the nature of red tape, which procedure is and which all orderly conduct of human activities must be. A university dean, a bank vice president, a factory manager must establish some principles whereby grievances or policies which are within his jurisdiction are brought to focus and shunted along for his consideration. Unless he establishes some routine he cannot effectively meet his problems, but will be submerged in the details of particular issues of which he never disposes. On the other hand, if routine becomes too set and formal he will soon be so aloof from those he serves that his usefulness will likewise be gone. Routine is necessary, but it must be revised and made flexible at short intervals.

Decision in court matters based upon hoary learning and binding precedent is so much the habit that adherence to another course is difficult. The only way that it has seemed at all possible is through the medium of a continuing rules committee, for which the precedent is most strikingly the English one and which is now being followed somewhat, though perhaps not enough, in this country.⁴⁸ Parenthetically it is the final demonstration of what I suggested above as to the desirable similarities, but necessary differences, between statutes and rules controlling procedure. Though ideally they should produce like results, a statute seems instinctively to acquire a rigidity even in expression which is not necessary for a rule, and the possibilities of control and improvement become the less as the legislative hopper is the more crammed with proposals for the betterment of man. Shortly stated, the ideal situation is practically impossible of attainment with statutory control. While difficult, it is at least feasible with court rule-making.

Some may think that my final proposition suggests almost a counsel of despair. Since even rule-making can never be wholly successful, we must spend our time trying to catch up with the mistakes and patch up the

47. HEPBURN, *THE DEVELOPMENT OF CODE PLEADING* 31, 37 (1897).

48. As in the order of the Supreme Court continuing the Advisory Committee on the Civil Rules, 314 U.S. 720 (Jan. 5, 1942).

structure! I do not like to think of it in this way; rather let us put it that since improvement is so possible, we should always be striving for it. Meanwhile, of course, we are preventing the system from ever growing old. I suggest this, therefore, as one of the most necessary of procedural requirements, that the rules be subject to continuous intelligent examination and criticism. If I were to suggest definitely it would be that a procedural committee should make a report at definite and expected intervals and that in such report it should not hesitate to point out how judicial trends as to particular rules were developing and when and how soon reformulation might be necessary to preserve the original purpose of the rules.⁴⁹ And if it be urged that this is to render the law uncertain, why then I would answer that uncertainty in the sense of wise discretion is the very essence of procedural drafting and interpretation.

49. See my article, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521 (1942); also 3 MOORE, FEDERAL PRACTICE 3453 (1938); PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, Rule A, pp. 170, 171 (May 1936); REP. OF THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE vii (April 1937); and *Resolution of the American Bar Association*, 28 A.B.A.J. 711 (1942).