A NEW FEDERAL CIVIL PROCEDURE II. PLEADINGS AND PARTIES

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IN OUR first article on the historical background of the proposed new rules of civil procedure for the United States courts authorized by the Act of Congress of June 19, 1934, we traced the developments of federal practice at law under the Conformity Act and in equity under the uniform equity system and pointed out the real steps toward an amalgamation of the federal law and equity systems which had taken place after the adoption of the Uniform Equity Rules of 1912 and the Law and Equity Act of 1915.¹ As a conclusion we urged the adoption of rules providing for the complete union of law and equity, a conclusion which we had expected to support by further reasons in this article. The action of the United States Supreme Court in the meantime has, however, made elaboration of the point no longer necessary. On May 9, 1935, the Chief Justice in his annual address to the American Law Institute announced that the Court had decided to act under the second section of the Act, and, in accordance with its authorization, to draft rules for a united system in the federal district courts. So definite was the decision, so forcefully and persuasively was it stated, so completely were the arguments to the contrary answered and demolished, that it is now believed the considerable discussion which had developed on this point will be set at rest.² Our earlier article had characterized the opportunity of procedural reform afforded by the new Act as a challenge to the profession and a test of its ability to keep its methods of work abreast of the needs of an increasingly complex social organization.³

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1. Clark and Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 YALE L. J. 387.

2. 2 U. S. L. Week, May 14, 1935, at 866, 880: "After careful consideration, the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, 'so as to secure one form of civil action and procedure for both,' so far as this may be done without the violation of any substantive right."

3. Clark and Moore, loc. cit. *supra* note 1. See also Clark, *The Challenge of a New Federal Civil Procedure* (June, 1935) 20 CORN. L. Q. 443.

The response of distinguished practitioners and jurists to the call to serve on the committees already appointed in the various districts to consider and make suggestions as to the new rules⁴ shows not only the greatest interest but an intense desire on the part of lawyers to see that the plan is carried to a successful conclusion. Now that the Court has so promptly chosen the one workable way of making the plan effective, we can feel confident that this reform, so long supported by the American Bar Association and pressed to such dramatic legislative success a year ago by the Attorney General, will be real, complete, and lasting.

In view of these developments the detailed discussion which we had contemplated for this article seems no longer desirable. Since, however, certain differences in methods of achieving the united system are still possible or arguable within the limits of the plan as now adopted by the Court, we think it profitable to point out these possibilities, at least in summary form. Accordingly we discuss briefly the ways of providing for the union of law and equity, and the rules of pleading and of parties and joinder of actions which may be developed by using the Uniform Equity Rules of 1912 as a basis for action. These will provide the central framework of the new structure, although many important details dealing with matters as important as evidence and appellate review, process, venue, summary judgments, declaratory judgments, discovery, and motion and trial practice must be left for consideration at another time.⁵

I. THE UNION OF LAW AND EQUITY

At least three possible models may be considered in planning the new federal rules for a united system of law and equity. One is in substance what might be termed the "hangover" system, since it still maintains a formal division, the separate law and equity dockets being maintained, although comparatively free interchange is permitted. It may be that the new Illinois Civil Practice Act of 1934 is of this form, since its chief annotators apparently so interpret certain ambiguous

4. As to these committees, appointed by the judges at the suggestion of the Attorney General acting for the Court, see (1935) 20 MASS. L. Q. 41-44; 2 U. S. L. WEEK, March 19, 1935, at 661, 676; 18 J. AM. JUD. SOC. 163, 164.

5. As to evidence we have already indicated our tentative conclusions in favor of "a uniform and unified federal system of rules of evidence such as now exists in the equity and admiralty cases and under most recent decisions, in the criminal law cases." Clark and Moore, *supra* note 1, at 415. As to appellate review we have urged a single form of review, and the abolition of a separate type of review in law and equity cases. *Id.* at 414, 429-434. The new federal declaratory judgment act, 48 STAT. 955 (1934), 28 U. S. C. A. § 400 (1934), needs to be carefully considered and worked into the procedural framework. This should not be extremely difficult. See New York Rules of Civil Practice, Title 25; Borchart, Declaratory Judgments (1934) on the procedural and substantive aspects of this new remedy.

provisions.⁶ Another is the historic code practice of New York, which, although desirable in purpose, was limited in practical operation because of unfortunately ambiguous and narrowly interpreted provisions for jury trial and its waiver. And finally there is the effective system exemplified by the English and Connecticut practice of substantially complete union, with jury trial preserved except where waived by failure to claim it. The latter we urge as the model to be followed.⁶

As to the first plan, it may well be said that it is not different enough from the present federal system to justify the change, and that it is already foreclosed by the Supreme Court's determination to provide for a real union. In any event we believe it should not be followed. It operates to preserve the form after the substance has been rejected as undesirable. That is, it forces a determination of the difficult and confused distinction between law and equity for a more unsubstantial purpose than in the old days. Then, at least, the distinction meant the difference between a trial before a common law judge and jury in King's Bench or the Court of Common Pleas or before the Chancellor alone in the court of chancery; now it means simply a shift from one *calendar* to another. In this connection we may repeat what the senior author hereof said in discussing the Illinois Act:

"Amalgamation of law and equity and abolition of forms of action is often objected to on the grounds that legal and equitable remedies are inherently different and that our law of rights grew out of our law of remedies. This is true but not particularly apt or pertinent to the problem how to get the issues in our modern cases most quickly and effectively before the court. The daily grist of a trial court is composed largely of contract and negligence cases wherein it little boots any one to puzzle over the ancient distinctions among debt, covenant, account and assumpsit, general and special, or between trespass and case. In the more involved cases concerning our complex commercial life involving corporations and business trusts, debenture bonds and trust receipts, receiverships and reorganizations, and new and unprecedented state and federal legislation, there is little occasion, at the *issuc-formulating stage* of the case, to go back on historical excursions. Moreover where a judge is sitting without a jury, as he does more and more when dockets become crowded and jury waiver automatic, it is not going to help him much in deciding whether or not to issue or continue an injunction to recall that once on a time there was an historic struggle between Coke and Ellsmere in which equity triumphed.

6. The Illinois system was criticized in Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209, 211-216. For the annotators' views see McCaskill, Jenner and Schaefer, *Illinois Civil Practice Act Annotated* (1933) Art. VI; cf. Millar, *Pleadings Under the Illinois Civil Practice Act* (1933) 28 ILL. L. REV. 460. For discussion of the general code system see Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; Clark, *Trial of Actions Under the Code* (1926) 11 CORN. L. Q. 482; CLARK, *CODE PLEADING* (1928) 47 et seq.; Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645; Walsh, *Merger of Law and Equity Under Codes and Other Statutes* (1929) 6 N. Y. U. L. REV. 157; WALSH, *EQUITY* (1930) 96-131; (1928) 37 YALE L. J. 654, 661-666.

It is true that occasionally *at the trial* such historical study may be apt and pertinent; but it should be made only when it is of actual importance. So the difference in form of trial between equity and law, so much emphasized by our pleading pundits, may at times engage the court's attention and call for a real determination *after a claim for jury* trial is actually made. There is no occasion to consider this or others of these historical difficulties as forming iron limitations within which the pleadings must be held for fear of the occasional case which at trial may present the question. Too much fear has been expressed of dangers which in most cases will not arise at all and which can be met and disposed of without difficulty when they do arise. Thus the remote danger that a possible litigant may at some time be deprived of his jury trial right by a failure of the court to perceive some of the historical connotations of his case is too unsubstantial a basis to justify ancient formalism in pleading in all cases."⁷

The recently published report of the "Study of the Business of the Federal Courts" shows that the bulk of the federal court litigation is not greatly different in totals than as above indicated. Of all federal civil cases only a few over three per cent reach the stage of a jury verdict, and twenty-seven per cent reach the stage of court decision. The great majority of the cases are terminated before trial is reached. Outside of the prohibition injunction cases (important at the time the Study was made), the law cases are more numerous than the equity cases and of these the suits of negligence (under the Employers' Liability Act and seamen's actions) bulk largest, followed by simple contract actions.⁸ In other words, in the federal courts, as in the state courts, there is a large amount of ordinary litigation, the greater part of which does not go to trial, and for which simple and direct forms of pleading are desirable. The pleading stage of the litigation ought not to be complicated by questions as to the form of trial which are not then at issue and in the great majority of cases may never be at issue. Much of the remaining federal litigation is of a specialized and novel nature due to the new federal acts, where the ancient distinctions are not in point anyhow. In other words, retention of the distinction is no gain but involves much loss in delay and confusion and possible substantial errors of justice.

The complications made necessary by preservation of even the formal distinctions may be recalled by noting the difficulties, listed in our former article, still obtaining in the federal system, notwithstanding the comparatively free transfer of cases from docket to docket permitted after the Law and Equity Act of 1915. Among the matters now in dis-

7. The New Illinois Civil Practice Act (1933) 1 U. OF CHI. L. REV. 209, at 213, 214.

8. Of 9,852 cases studied (for the year 1930) in thirteen districts, 3,919 were law actions (650 being liquor cases); 1,857 were admiralty actions (758 being liquor forfeitures); and 4,076 were equity actions (2,447 or sixty per cent being liquor actions). Cf. the suits at law: 1,286 were for negligence, 100 for other torts, and 867 for contract. A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Part II. Civil Cases (1934) 59, and Detailed Tables 4-9, at 113-122. For the statistics on terminations of the case see *id.* at 65-77.

pute in the lower federal courts are:⁹ the effect of error in bringing the case to the wrong side of the court (whether the error may be waived, whether the point may or should be raised by the court, the manner and extent of formal correction and whether it may be made during trial and the effect on the form of trial); the same problem presented even more acutely when the error is found only after the action has reached the appellate court (whether the point is now waived or is unsubstantial, whether there must be a reversal and order of transfer with new trial, or reversal and dismissal of the action); whether, in default of express provision, legal and equitable claims may be combined in a single suit and the cognate question, upon which the courts have divided, whether the equitable claim may be brought in by way of the plaintiff's replication; how far, in default of express provision, a legal counterclaim may be filed in an equitable action, and, if so, whether the right to a jury trial is lost;¹⁰ the difficulties caused by the fact that the defendant may, but is not required, to plead equitable defenses in actions at law and hence may bring his own separate suit in equity on the same transaction already in litigation at law; the doubt whether third parties may be brought in to answer to an equitable defense in which they are involved or whether separate suits must be required, and so on. Moreover, the prime questions of the form of trial, court or jury, and the form of appellate review—of the facts, as in equity, or only on the law—are still not thoroughly settled as to the various combinations of law and equity now permitted; though the *Liberty Oil* case settled the practice, at least so far as equitable defenses are concerned, in accordance with the better view that these matters were determined by the nature of the issues and not by the "side" of the court to which the action had been brought.¹¹

If this unnecessary and wasteful confusion is to be avoided, nothing short of a provision as extensive as that of the original Field code providing for the single form of civil action and abolishing "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing" will be sufficient. It should be made clear also that all matters of defense or counterclaim, whether legal or equitable, should be pleaded.¹²

9. For documentation of these points, see cases cited and discussed in Clark and Moore, *supra* note 1, at 416-435.

10. The view apparently is that since jury trial is waived, the plaintiff may object to the filing of the counterclaim. Clark and Moore, *supra* note 1, at 426. Under the codes the counterclaim may be filed as matter of right and the trial is to the court. See citations note 6, *supra*.

11. *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (1922); and see Clark and Moore, *supra* note 1, at 428, 429. The question referred to in note 10, *supra*, indicates the type of problems still unsettled.

12. N. Y. LAWS 1848, c. 379, § 62; FIRST REP. OF COM'RS ON PRAC. AND PLEADING (N. Y. 1848) 67-88, 131-147; cf. N. Y. C. P. A. §§ 8, 262; and the statutes of other states cited in CLARK, CODE PLEADING 46, 47, 390, 491, 492.

When this is done, the next important point concerns jury trial and waiver. Here the original New York code has caused difficulties. It listed the *kinds* of actions in which jury trial might be had, and thereby raised the question, troublesome ever since, as to whether the statute was merely declaratory of the constitutional right of jury trial or *added* to it; it also provided in effect for jury waiver by affirmative action and thus raised troublesome questions as to when a waiver had occurred.

Now the better construction of the New York statute on jury trials¹³ is that it is declaratory only, and that when, for example, it gives the right of a jury trial in "an action in which the complaint demands judgment for a sum of money only," it does not include claims for balances due on an accounting; and when it grants a jury trial in an action "for a nuisance," it refers to the old common law action of nuisance and not a suit to enjoin a nuisance.¹⁴ But the New York courts have not been wholly consistent and notably in the pleading of equitable defenses or counterclaims have allowed not the *issue*, but the form of complaint to govern. In ultimate analysis the difference between a defense and a counterclaim is illusory; and yet the right to a jury trial is rested upon this unsubstantial basis.¹⁵ The right should not depend on matters essentially of nomenclature only, but on the historical method of trying the particular issue.¹⁶ That is the right safeguarded by the Constitution, no more and no less.

The statute should therefore declare this historical test in unambiguous terms. This is achieved, for example, in the Connecticut statute giving the right of trial by jury in "civil actions involving such an issue as, prior to January 1, 1880 (the effective date of the code), would not

13. N. Y. C. P. A. § 425, providing for a jury trial (unless waived or a reference is directed) of issues of fact "in each of the following actions": "1. An action in which the complaint demands judgment for a sum of money only. 2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel." The usual code provision (taken from the original New York code) designates the jury actions as those "for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries." CAL. CODE CIV. PROC. § 592 and statutes cited in Clark, Code Pleading 56.

14. Clark, *Trial of Actions under the Code* (1926) 11 CORN. L. Q. 482, 487, 488; Clark, Code Pleading 58, 59, also citing cases from other jurisdictions; cf. 35 C. J. 159 et seq.

15. *Susquehanna S. S. Co. v. A. O. Anderson & Co.*, 239 N. Y. 285, 146 N. E. 381 (1925). This decision is criticized by Clark, *supra* note 14, at 490-498; and in CODE PLEADING at 63, 64, 430, 431; (1926) 11 CORN. L. Q. 496; (1926) 26 COL. L. REV. 33 et seq. But see (1925) 25 COL. L. REV. 630. The decisions in the other states are contrary. *Ibid.*; cf. *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119 (1891); (1925) 13 CALIF. L. REV. 345; *Norris v. Brotherhood of Ry. Clerks' Nat. Bk.*, 43 Ohio App. 396, 183 N. E. 92 (1932).

16. In the *Susquehanna* case the court reserved to itself the right to determine whether the matter pleaded was a defense or counterclaim; but so illusory was the test that in the long run the mere form or name of the pleading is likely to be determinative. See articles cited note 15, *supra*.

present a question properly cognizable in equity."¹⁷ Provisions similar in form and purpose should be drafted for the new federal procedure.¹⁸

Finally, to make the procedure completely workable, there should be adequate provisions for waiver of trial by jury. Parties really desirous of their constitutional right and seasonably asserting it should of course be entitled to it; but the matter should not be left in doubt until the trial is had. Particularly should it not be possible for a party to gamble on the result and, by keeping his position ambiguous, be able to assert his claim for a jury after he has lost out on trial to the judge. This has happened under the original code provisions in New York. Under this code, waiver in effect is only by express affirmative action or by going to trial to the court.¹⁹ This statute, narrowly construed as it has been, has enabled a defendant who knew what the issue was from the beginning to obtain a reversal and new trial, if not dismissal of the case after it had gone against him. The plaintiff had set forth his facts and erroneously claimed equitable relief; the defendant had answered, without claim of jury trial, but alleging facts which showed the action to be legal; then after his liability to damages had been shown at trial, he obtained a reversal because of the wrong form of trial.²⁰

To avoid such opportunity to speculate on the outcome, the right to jury trial should be held waived unless claimed in writing within a speci-

17. CONN. GEN. STAT. (1930) § 5624; cf. CONN. PRAC. BK. (1934) § 39: "All matters which, prior to January 1, 1880, were within the jurisdiction of a court of equity, whether directly or as an incident to other matters before it, unless otherwise ordered, shall be heard and decided by the court without a jury, in the manner theretofore practiced in courts of equity." Section 5624 is a lengthy statute which directs the court clerk to keep a docket wherein he shall enter as "jury cases" all actions within the provisions quoted and certain other specified actions such as probate appeals affecting the validity of the wills, provided written request for jury trial has been made to the clerk within thirty days after the return day of the case or ten days after an issue of fact is joined or upon written consent of all parties or by order of court; other cases shall be entered on the docket as "court cases" and shall be tried to the court. Rules of court also carry out the system, e.g., CONN. PRAC. BK. (1934) §§ 130, 132, 136, 148, 149, 152, 153.

18. See also IND. ANN. STAT. (Burns, 1926) § 437: "Issues of law and issues of fact in causes that prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court," etc.; cf. KY. CODES (Carroll, 1919) §§ 6, 11, 12, "actions of which courts of chancery had jurisdiction before the first day of August, 1851," etc.; and ENGLISH RULES OF THE SUPREME COURT, O. 36, r. 3 an 4. And for the statutes see Clark, Code Pleading 56, 57.

19. N. Y. C. P. A. § 426, providing for waiver by four modes: (1) failing to appear at trial; (2) filing with the clerk a written waiver; (3) oral consent in open court; (4) going to trial. For similar statutes see Clark, Code Pleading 68, 69. See note 22, *infra*.

20. *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917) (action for breach of contract claimed by the plaintiff to be one of partnership and by the defendant to be one of employment only; the judgment entered below upon the report of a referee finding no partnership and awarding damages for breach of contract was reversed). *Contra*: *Williams v. Slote*, 70 N. Y. 601 (1877); *Dotsko v. Szymaniak*, 133 Misc. 657, 233 N. Y. Supp. 167 (Sup. Ct. 1929).

fied time after the action is brought or issue joined. This is already the rule in many states,²¹ and has recently been made the rule in the New York counties which comprise the City of New York.²² It satisfies the constitutional requirement.²³ It clarifies the situation long before trial, and makes unlikely rulings such as that just cited wherein the pleader's theory of the action, rather than the issues raised upon the facts, is permitted to determine this important right.²⁴

Under provisions such as these a workable union of law and equity is effected. The pleading stage of the trial is used to develop the respective stories of the parties as to the past events out of which the lawsuit has grown. It is not hampered by worry and confusion about the form of trial. (That is being taken care of by an entirely separate written claim or by the rule of automatic waiver of jury trial.) There is no question, in any event, as to the form of trial unless a party seasonably makes definite written claim for it; otherwise the case goes automatically on the judge's calendar for trial without jury. There are no separate "sides" of the court and no separation of law and equity cases. For convenience in dispatch of court business, the jury cases may be heard successively, and then the court cases. That is the only division of business.²⁵ In practice, the case will go automatically on the jury calendar if there is a timely demand, unless the opposing party objects. If objection is made, then and then only will the issue of the form of trial

21. For the Connecticut Statute, see note 17, *supra*. See also MASS. GEN. LAWS (1921) c. 231, § 60; OHIO GEN. CODE (1926) § 11466 (applying to Hamilton and Cuyahoga counties only); R. I. GEN. LAWS (1923) c. 336, §§ 7, 8 [*Mandeville, Brooks & Chaffee v. Fritz*, 50 R. I. 513, 149 Atl. 859 (1930)]; English Rules under JUD. ACT, O. 36, r. 2 and 6, and other statutes cited in Clark, *Code Pleading* 68, 69. See further ALBERTA, RULES OF CT. (1914) §§ 172, 184; BRIT. COL. SUP. CT. RULES (1925) O. 56, r. 2 and 6; NEW BRUNSWICK, JUD. ACT (1927) O. 36, r. 2 and 5; ONTARIO, JUD. ACT (1927) § 57 (1); AUSTRALIA HIGH COURT PROCEDURE ACT, 1903, § 12, RULES, O. 30, r. 2 [*QUICK AND GROOM, HIGH COURT PRACTICE* (1904) 219, 336].

22. N. Y. LAWS 1927, c. 696, and 1929, c. 196, amending C. P. A. § 426 (note 19, *supra*) by providing for waiver in New York, Bronx, Richmond, Kings and Queens counties where there is failure to make written demand therefor and pay the jury fee at the time of serving notice of trial, or within twenty days thereafter, where the notice is served by the opponent. For the effect of this provision in relieving the congestion of jury cases, see Clark, *Fact Research in Law Administration* (1928) 2 CONN. BAR J. 211, 226, 227; Clark and Shulman, *Jury Trial in Civil Cases* (1934) 43 YALE L. J. 867, 873; CLARK, *CODE PLEADING* 54.

23. *McKay v. Fair Haven & W. R. Co.*, 75 Conn. 608, 54 Atl. 923 (1903); *Craig v. City of New York*, 228 App. Div. 275, 239 N. Y. Supp. 328 (1st Dep't, 1930).

24. To insure this construction, however, the provisions with respect to the complaint should make clear that the demand for judgment is no part of the cause and has operative effect only when the defendant makes default of appearance, and that a "theory of the pleadings" is not rigidly required. Cf. note 44, *infra*; and for discussion see Clark, *The Complaint in Code Pleading* (1926) 35 YALE L. J. 259.

25. Cf. the "court" and "jury dockets" under the Connecticut practice, note 17, *supra*.

become important, and it will be settled by an examination of the historical precedents.²⁶ This simple system has made possible the smooth operation of the most successful Anglo-Saxon pleading systems, as in England and her colonies, and in Connecticut, California and other Western states.²⁷

II. THE PLEADINGS

In providing for the pleadings of the parties in the new federal civil action, advantage may be taken of the model furnished by the Uniform Equity Rules. In general, these rules (notably rules 18-21, 24, 25, 29-35)²⁸ set forth not merely the best thought in English and American procedure of the date when they were adopted, but even of the present time. Of course they deserve careful examination, first, to make sure of wording, so that they are made applicable not merely to suits in equity but to all civil proceedings, second, to see if the form of expression can be improved upon, having in mind, however, that the words used may have a value merely because they are familiar to the profession, and, third, to see whether details can be improved, and desirable additions of newer devices (e. g., motion for summary judgments) made. Without attempting final judgments on all these details, we now consider the framework supplied by the existing equity practice and the law practice under the Conformity Act.

a) *Pleading objectives; liberal construction; amendment*

Under the present system the Conformity Act controls actions at law so that the federal attitude toward the pleadings in law actions is determined by that of the state where the federal district court is sitting. Thus pleadings have been construed strictly in some states and liberally in others;²⁹ and amendments have been refused, permitted, or deemed

26. As in *Roy v. Moore*, 85 Conn. 159, 82 Atl. 233 (1912).

27. Cf. authorities cited in notes 17, 18, 21, *supra*.

28. Rule 18 abolishes technical forms of pleadings; Rules 19 and 28 provide for liberal amendments and for the disregarding of unsubstantial error; Rule 20 provides for further and better statements of the nature of claim or defense; Rule 21 deals with scandal and impertinence and Rule 24 states the effect of counsel's signature to a pleading; Rule 25 sets forth the requirements for a bill of complaint; Rule 29 deals with defenses and abolishes the demurrer; Rule 30 with answers and counterclaims; Rule 31 with the reply; and Rules 32 to 35 deal with answers to amended bills, testing sufficiency of defenses and supplemental pleadings.

29. *At the pleading stage, strict construction*: *Lyons v. Reinecke*, 10 F. (2d) 3 (C. C. A. 7th, 1926); see *Old Colony Trust Co. v. Atlanta, B. & A. R. Co.*, 264 Fed. 355 (N. D. Ga. 1920). *Liberal construction*: *Bryson v. Gallo*, 180 Fed. 70 (C. C. A. 6th, 1910) (trial stage); *United States v. Skinner & Eddy Corp.*, 5 F. (2d) 708 (W. D. Wash. 1925); *Walker v. Traylor Engineering Co.*, 12 F. (2d) 382 (C. C. A. 8th, 1926).

Recovery was permitted on a different theory than that alleged in *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142 (C. C. A. 8th, 1903); *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784 (C. C. A. 4th, 1910); *N. P. Pratt Laboratory v. Buffalo Forge Co.*,

immaterial when not made, in general accord with the attitude of the applicable state practice toward variance and failure of proof.³⁰ The most important problem arises at the trial and may be thus stated: Can the pleadings be now amended to let in proffered proof or to cover proof already in without injustice to the adverse party, either by way of misleading him, or by depriving him of the form of trial to which he is rightfully entitled, as where the litigation was begun as an "equity" suit and is about to be terminated by an award of "legal" relief, or vice versa?³¹ In either situation, however, amendment should be freely had, for nothing is to be gained under a unified procedure in forcing the parties to start over. Where the parties have been really deprived of the trial to which they are rightfully entitled, it may be necessary that a new trial be ordered; but more often, the parties should be held to knowledge of all possible rights which might flow from the facts alleged and thus to have waived a right of trial which they had not promptly claimed. If the parties have fairly litigated the transaction giving rise to the dispute, and on the proof one of them is entitled to substantive relief, then variance or failure of proof is usually only a peg upon which counsel may hang an argument, occasionally to sustain an erroneous decision,³² but more often to reverse an obviously sound result.³³

Uniform Equity Rules 19 and 28 provide for liberal amendments and

184 Fed. 287 (C. C. A. 2d, 1911); but not in *Ward v. Morrow*, 15 F. (2d) 660 (C. C. A. 8th, 1926); and see *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (C. C. A. 2d, 1919) (there can be no recovery for fraud and deceit in an action of negligence).

30. Thus, under Virginia practice, proof that the accident causing injury to the plaintiff was due to the moving of one of the two cars of the defendant involved in the accident, rather than the other, was reversible error under an allegation naming the other as the moving car; though apparently an amendment at the trial would have cured the defect. *Norfolk & A. Terminal Co. v. Rotolo*, 179 Fed. 639 (C. C. A. 4th, 1910); cf., however, *Norfolk & Portsmouth Traction Co. v. Rephan*, 188 Fed. 276 (C. C. A. 4th, 1911). On the other hand, a federal court in Ohio applied the code test of immaterial variance and held that, since the defendant had not actually been surprised, even an amendment was not necessary. *Bryson v. Gallo*, 180 Fed. 70 (C. C. A. 6th, 1910). See also *Atlantic Coast Line R. Co. v. Raulerson*, 267 Fed. 694 (C. C. A. 5th, 1920), cert. denied, 254 U. S. 646 (1920), for a realistic approach to variance; and *E. I. Du Pont De Nemours & Co. v. McCullen*, 260 Fed. 607 (C. C. A. 4th, 1919) (where there probably was surprise).

As to the effect of present federal legislation on amendments, see *Clark and Moore*, *supra* note 1, at 409-410, n. 105.

31. See *Bryson v. Gallo*, 180 Fed. 70 (C. C. A. 6th, 1910); *Clark and Moore*, *supra* note 1, at 417-423.

32. *Covington Cotton Oil Co. v. Bickmore Nitrating Cotton Co.*, 271 Fed. 80 (C. C. A. 5th, 1921).

33. *Bryson v. Gallo*, 180 Fed. 70 (C. C. A. 6th, 1910); *Atlantic Coast Line R. Co. v. Raulerson*, 267 Fed. 694 (C. C. A. 5th, 1920), cert. denied, 254 U. S. 646 (1920); *U. S. F. & G. Co. v. Whittaker*, 8 F. (2d) 455 (C. C. A. 9th, 1925) (here judgment was reversed because the complaint did not state a cause of action, and hence could not be aided by a general finding, although both parties had disregarded their pleadings to a great extent; the lack of amendment seems a purely formal matter).

command that error not affecting the substantial rights of the parties be disregarded at every stage of the proceeding. The practice under these rules has been quite in the spirit in which they were drawn.³⁴ Since it accords with the best state practice and that now followed on the law side of the federal courts in these states, these rules indicate a desirable form for the new procedure.

b) *The Complaint*

Since the state practice is followed on the law side, pursuant to the Conformity principle, we find in the federal cases at law the same difficulties as to the sufficiency of the plaintiff's allegations as in the states. Common law pleading was devoted to the development of an issue; with the development of code pleading and other modern systems, less emphasis was placed upon the issues and more on presenting the facts. The reason for this was in the main the endeavor to avoid the necessity arising under the common law forms of the moving party deciding at his peril on the correct legal theory applicable to his case. Typically under modern pleading, therefore, the plaintiff states what happened and the court is called upon to apply the law to it. But too great insistence upon pleadings alone was made by the early code courts, and fine distinctions between "facts" on the one hand, and "law" or "evidence" on the other, were drawn. Now it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader.³⁵

The federal practice, which has also reflected this dispute, has like the states held that stricter rules of specific allegation are required only if particularity is seasonably demanded, and objections of this kind raised at or after trial are not to be met with favor.³⁶ So, in an action

34. "No variance between the pleadings and the proofs is material unless of a character to mislead the opposite party." 2 FOSTER, FEDERAL PRACTICE (1920) 1165 (citing cases); see also SIMKINS, FEDERAL PRACTICE (1934) 576-580.

35. For extensive discussion of the problem see Cook, *Statement of Fact in Pleading Under the Codes* (1921) 21 COL. L. REV. 416 [criticizing the "dry, naked, actual facts" of POMEROY, CODE REMEDIES (4th ed.) 560]; Clark, *The Complaint in Code Pleading* (1926) 35 YALE L. J. 259; Wheaton, *Manner of Stating Cause of Action* (1935) 20 CONN. L. Q. 185; ROSS, *Minnesota Pleading as Fact Pleading* (1929) 13 MINN. L. REV. 348; Dowdall, *Pleading Material Facts* (1929) 77 U. OF PA. L. REV. 945; 1 CLARK, CASES ON PLEADING AND PROCEDURE (1930) 91-124.

36. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 (1933) (tax refund claim which is indefinite and does not comply with the Treasury requirement may be corrected by amendment where the Department was not prejudiced by the claim, but acted upon it); *Glaspie v. Keator*, 56 Fed. 203 (C. C. A. 8th, 1893) (a general averment of damages sustained by deceit is cured by verdict); *Rush v. Newman*, 58 Fed. 158 (C. C. A. 8th, 1893); *Norfolk & Portsmouth Traction Co. v. Rephan*, 188 Fed. 276 (C. C. A. 4th, 1911) (after verdict the entire declaration may be looked to in determining whether defendant was sufficiently informed to enable it to defend intelligently, although the state practice treats each count as a distinct cause of action).

for damages under the Sherman Act a petition which alleged little more than a combination and conspiracy by the defendants to the plaintiff's damage, without setting forth the manner or extent of his injuries, was stricken from the files on motion.³⁷ And in an action by the government to recover overpayments made to an army-camp contractor, it was held that the petition must contain such reasonable particularization as will indicate upon what matters evidence is to be given, and that a general allegation of fraud, of waste, and the purchasing and reselling of materials and equipment at a profit was too indefinite.³⁸ Thus, a statement by the plaintiff to the effect that he feels himself generally aggrieved is not sufficient. But the generalized statement offered by the "common counts," so-called, employed in the common law action of assumpsit, and generally under the codes, in spite of the criticism of writers, offers a simple and effective means of stating common, recurring business situations.³⁹ Even in the infrequent type of case such as one to recover penalties under the Safety Appliance Act, an allegation that the violation occurred "on or about" a particular date will be good against an objection in law.⁴⁰ In all these cases the court is demanding what is under the circumstances an adequate statement of the fact transaction to identify it with reasonable certainty, not to set forth all its details.

Under the new federal civil procedure there need be no material change in these principles: good and bad craftsmanship in pleading will remain as before. Equity Rule 18, which abolishes technical forms of pleadings, and Rule 25, which specifies the contents of a bill of complaint, may be utilized by making them no longer applicable solely to suits in equity, but to all civil actions. It is true that, like the codes, Rule 25 provides for "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence," and that the problem of "ultimate facts," "evidence," or "legal conclusions" has caused difficulties similar to that experienced under

37. *Jack v. Armour & Co.*, 291 Fed. 741 (C. C. A. 8th, 1923).

38. *United States v. Bentley & Sons Co.*, 293 Fed. 229 (S. D. Ohio 1923), *aff'd*, 16 F. (2d) 895 (C. C. A. 6th, 1927).

39. See *Myers v. Hurley Motor Company*, 273 U. S. 18 (1927); *Millett v. Omaha Nat. Bank*, 30 F. (2d) 665 (C. C. A. 8th, 1929). For discussion of the use of the "common counts" under code practice, compare (1917) 4 CALIF. L. REV. 352; Clark, *supra* note 35; POMEROY, CODE REMEDIES (4th ed.) §§ 436-438.

40. *United States v. Atlantic Coast Line R. Co.*, 168 Fed. 175 (C. C. A. 4th, 1909) (defendant's remedy is a bill of particulars if the declaration is too vague). Where the state practice has recognized such use, a plaintiff has been enabled to make use of exhibits, not only as a particularization of his allegations, but to preclude a technical attack at trial upon the admissibility in evidence of the originals. *Alexander v. Gordon*, 101 Fed. 91 (C. C. A. 8th, 1900). For the practice of striking out an exhibit as impertinent see *Gulf, C. & S. F. Ry. Co. v. Cities Service Co.*, 270 Fed. 994 (D. Del. 1920).

state code practice.⁴¹ Perhaps an improvement in phrasing can be made.⁴² But the expression is familiar, has been given content by many decisions, and possibly will serve our purpose better than a new verbal formula, if we understand the necessity of giving meaning to it by judicial exposition and trial expediency.

Equity Rule 25 also provides that the prayer for relief may be stated in the alternative form. While the plaintiff cannot now claim equitable and legal relief alternatively,⁴³ if the rule were expanded to cover all civil actions, a plaintiff could, for example, sue for specific performance and seek alternative relief by way of damages as under state code practice. It should be made clear, however, in accordance with the spirit of the unified procedure as pointed out above, that the demand for judgment is no part of the cause of action and limits the type of relief to be granted only in case the defendant *defaults of appearance*.⁴⁴

c) *Defendant's pleadings.*

1. *Pleas in abatement and bar.*

Equity Rule 29 requires defenses "heretofore presentable by plea in bar or abatement" to be made in the answer. A similar practice is found

41. *Southern Ry. Co. v. King*, 217 U. S. 524 (1910) (An answer alleging that the "blow post and checking act" violated the Constitution, the grounds being that it is in violation of the commerce clause and a direct burden upon and impedes interstate traffic, impairs the usefulness of defendant's facilities for that purpose and is impossible to observe in carrying mails and in interstate commerce, is insufficient, since it states mere conclusions of law. But see Justice Holmes' dissent); cf. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194 (1934); noted in (1935) 35 *Col. L. Rev.* 285 (A distributor of milk having a "well advertised trade name" sought to enjoin the enforcement of that section of the NEW YORK MILK CONTROL LAW which authorized dealers not within that class to undersell it in New York City. A motion to dismiss should not be sustained, because the complaint, read in the light of the novelty of the measure assailed and of facts of which the court may take judicial notice, stated valid constitutional grounds of attack, since no rational basis for the law is apparent from facts of common knowledge, and if it rests on particular trade conditions in a given locality, these cannot be judicially noticed and are properly the subject of findings based on evidence after trial, in accordance with EQUITY RULE 70½).

42. For a recently suggested substitute see Wheaton, *supra* note 35, at 209.

43. *Rushing v. Mayfield Co.*, 62 F. (2d) 318 (C. C. A. 5th, 1932), cert. denied, 289 U. S. 750 (1933). As to the desirability of alternative pleading generally see Hankin, *Alternative and Hypothetical Pleading* (1924) 33 *YALE L. J.* 365; (1924) 34 *id.* 103; (1919) 33 *HARV. L. REV.* 244; (1926) 10 *MENN. L. REV.* 356; Clark, *supra* note 35.

44. For a discussion of this problem see Clark, *supra* note 35, and CLARK, *CODE PLEADING* 179-187. As there pointed out, confusion occurs under many of the codes which limit the type of relief only "where there is no answer," thus raising a problem whether a technical answer or only default of appearance is meant. Of this form is N. Y. C. P. A. § 479; for a better form see OHIO GEN. CODE (Page, 1926) §§ 11281; OKLA. COMP. STATS. ANN. (1931) § 166. For arguments for more extensive scope to the demand for judgment, see McCaskill, *Actions and Causes of Action* (1925) 34 *YALE L. J.* 614, 634-636; McCASKILL, JENNER AND SCHAEFER, *ILLINOIS CIVIL PRACTICE ACT ANNOTATED* (1933) 73.

on the law side of the federal courts in states which have provisions, common among the codes, for such compulsory union of defenses.⁴⁵ The practice has caused difficulty on the law side, for the code general denial may then put in issue the allegation of diversity of citizenship as the ground of federal jurisdiction—matter which under the common law practice would not have been in issue on pleading to the merits.⁴⁶ This tends to force the plaintiff to a trial of the jurisdictional issue in practically all such cases; though, unless there is a real contest on the point, the plaintiff should not be put to the trouble and inconvenience of the proof.⁴⁷ Equity Rule 30 tends to prevent such an abuse by requiring the defendant to state his defense to each claim, "avoiding general denials, but specifically admitting, denying or explaining the facts upon which the plaintiff relies, unless he is without knowledge, in which event he shall so state, and this shall be treated as a denial."⁴⁸ And Rule 29,

45. *Roberts v. Lewis*, 144 U. S. 653 (1892); *Leonard v. Merchants' Coal Co.*, 162 Fed. 885 (C. C. A. 2d, 1908). Formal attacks upon pleadings denominated pleas in abatement, however, have not been sustained where the only fault was that they should have been entitled answers. *Jones v. Rowley*, 73 Fed. 286 (C. C. S. D. Cal. 1896); *Whelan v. Rio Grande Western Ry. Co.*, 111 Fed. 326 (C. C. D. Mont. 1901). Compulsory joinder of abatement and bar is found in all the code states, except three. *Clark*, CODE PLEADING 410-412. See also *Morris & Co. v. Skandinavia Insurance Co.*, 279 U. S. 405 (1929) (plea to the jurisdiction for lack of service conjoined with plea in abatement as authorized by state practice).

46. Since, under the common law practice, if the defendant wanted to contest the grounds of diversity he was obliged to raise it by a plea in abatement, which, of course, was waived by a plea in bar, it often happened that, although it developed at trial that there was no diversity, the courts nevertheless felt themselves powerless to dismiss at that stage, since such matter in abatement had been waived. To correct that, the Act of 1875, 18 STAT. 472 (1875), 28 U. S. C. A. § 80 (1926), was passed laying upon the courts the duty to dismiss at any stage upon discovering the lack of jurisdiction. This adequately safeguards the courts against collusive or unwarranted attempts to found jurisdiction. See *Hill v. Walker*, 167 Fed. 241 (C. C. A. 8th, 1909), cert. denied, 214 U. S. 517 (1909), for a good analysis of the problem.

47. *Roberts v. Lewis*, 144 U. S. 653 (1892); *Cole v. Carson*, 153 Fed. 278 (C. C. A. 8th, 1907); *Lindsay-Bitton Live Stock Co. v. Justice*, 191 Fed. 163 (C. C. A. 8th, 1911). The harsh result has led courts to seek escape when possible. *Emmke v. De Silva*, 293 Fed. 17, 19 (C. C. A. 8th, 1923) (The inference being plain that diversity existed, the court said: "The Inn Co. made no claim below, nor does it make any here, that it is a citizen and resident of any State other than Missouri. . . . No one knew as well as the Inn Co. the State to which it owed its corporate life. Not having raised the question in the court below, we think, under the circumstances, it is now too late to raise it for the first time here."); *Hill v. Walker*, 167 Fed. 241 (C. C. A. 8th, 1908), cert. denied, 214 U. S. 517 (1909) (the requisite proof was discovered amidst the evidence—see the *Lindsay-Bitton* case, *supra*, for this explanation); and see *City of Detroit, Mich. v. Blanchfield*, 13 F. (2d) 13 (C. C. A. 6th, 1926).

48. Under code practice, attempts to eliminate general denials have not been successful, as they (like the "common counts," note 39, *supra*) are convenient pleading shorthand, which the profession is unwilling to give up. *CLARK*, CODE PLEADING 392-396. It is therefore doubtful whether the new rules should prohibit their use. This, however, is not inconsistent with rules requiring the defendant, if he wishes to raise certain issues, to do so by specific

giving the court discretion to hear and dispose of the matter in abatement before the trial of the principal case, is the analogue of the better practice on the law side of the federal courts today.⁴⁹ Thus issue-forming is speeded up by compelling matter in abatement and bar to be set forth at one time; yet there are safeguards against possible inconvenience that might arise by conjoining such matter.

As to pleading to the merits, the state practice has been followed on the law side of the federal courts in construing an answer to determine whether it puts in issue certain allegations of the complaint.⁵⁰ It has been held that the following defenses must be specially pleaded: title that has accrued to the defendant subsequent to the commencement of the ejectment action;⁵¹ *res judicata*,⁵² release,⁵³ truth in a slander or libel action,⁵⁴ unconstitutionality of the statute sued upon where facts are needed to demonstrate its invalidity,⁵⁵ and illegality;⁵⁶ and that non-performance of a particular condition precedent could be put in issue only by a special defense, and not by a general denial.⁵⁷ And although

pleading; and the issue of federal jurisdiction is certainly one where such obligation can properly be placed on the defendant. EQUITY RULE 25 requires in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends," and it would be appropriate to require this allegation to be pleaded to specially.

49. Compare *City of Detroit, Mich. v. Blanchfield*, 13 F. (2d) 13 (C. C. A. 6th, 1926), requiring such matter as lack of diversity to be heard before trial on the merits, if at all, with *Leonard v. Merchants' Coal Co.*, 162 Fed. 885 (C. C. A. 2d, 1903), postponing the hearing on the matter of venue to the trial stage of the principal litigation. And see *Philadelphia & Reading Coal & Iron Co. v. Keever*, 260 Fed. 534 (C. C. A. 2d, 1919), cert. denied, 250 U. S. 665 (1919), where the defendant utilized matter in abatement in the most dilatory fashion, and where at common law he would have had a judgment *quod recuperet* entered against him. See also discussion of "Objections in Point of Law," text accompanying notes 74-77, *infra*.

50. *Robertson v. Perkins*, 129 U. S. 233 (1889).

51. *Hardy v. Johnson*, 1 Wall. 371 (U. S. 1863) (state practice, with slight modifications, had been adopted by rule of the federal court).

52. *Preferred Acc. Ins. Co. v. Barker*, 93 Fed. 158 (C. C. A. 5th, 1899) (Louisiana practice); cf. *Southern Pacific Railroad Company v. United States*, 168 U. S. 1 (1897) (holding that in equity the plaintiff might avail itself of a former judgment without specially pleading it), see Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299, 332-334, for a discussion of pleading *res judicata*, arguing that the policy underlying the doctrine should not be made to turn on pleading.

53. *Kalloch v. Hoagland*, 239 Fed. 252 (C. C. A. 6th, 1917).

54. *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712 (C. C. A. 6th, 1918).

55. *Southern Ry. Co. v. King*, 217 U. S. 524 (1910); see note 41, *supra*.

56. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.*, 182 Fed. 590 (C. C. A. 8th, 1910). If, of course, the illegality appears on the face of the contract, or from the opening statement of plaintiff's counsel or from plaintiff's proof, then it becomes the duty of the court itself, if necessary, to raise the objection in the due administration of justice. *Oscanyan v. Arms Co.*, 103 U. S. 261 (1880).

57. *Halferty v. Wilmering*, 112 U. S. 713 (1885) (applying the Iowa statute—a not unusual statute under code practice); CLARK, CODE PLEADING 192, 425.

matter constituting a definitive defense could be raised under a general denial, a federal court has permitted it to be pleaded specially.⁵⁸ It is believed that pleading such matters specially affords more adequate notice than a practice which would permit defenses of this type to be raised under a denial, and is in accord with the theory of pleading under Equity Rule 30. A rule defining the practice as to these ordinary and oft recurring issues would be helpful.⁵⁹

Whether a defendant could plead inconsistent defenses at law has varied with the state practice.⁶⁰ Equity Rule 30 permits the defendant to "state as many defenses, in the alternative, regardless of consistency," as he deems essential, and this would seem to be the better rule for the new procedure.⁶¹

2. Counterclaims

On the law side this matter has been governed by the state practice,⁶² which is often technical and confusing.⁶³ On the other hand, Equity Rule 30, if extended to apply to all civil actions, furnishes a simple and satisfactory guide in general accord with the modern notions on counterclaims: the defendant *must* set up any counterclaim arising out of the transaction sued on, and *may* set up any set-off or counterclaim which could be the subject of an independent suit; and parties may be brought in when necessary, if they are subject to the court's jurisdiction.⁶⁴

58. *English v. Ralston*, 112 Fed. 272 (C. C. E. D. Pa. 1901). On the other hand, under some practices a defendant has not been required to plead contributory negligence, although the burden of establishing such a defense in the federal courts is upon him. *Canadian Pac. Ry. Co. v. Clark*, 73 Fed. 76 (C. C. A. 2d, 1896) (for reasons why a system of pleading should permit such a defense under the general issue see the concurring opinion of Lacombe, J., 74 Fed. 362); *Long Island R. Co. v. Darnell*, 221 Fed. 191 (C. C. A. 2d, 1915). But a defendant may have to verify a general denial to put in issue facts which are part of plaintiff's *prima facie* case, such as execution of the instrument sued on. *Bell v. The Mayor and Council of the City of Vicksburg*, 23 How. 443 (U. S. 1859); *County of Ralls v. Douglass*, 105 U. S. 728 (1881); *St. Louis, Iron Mountain and Southern Ry. Co. v. Knight*, 122 U. S. 79 (1887). And a general denial may be qualified by admissions contained in other defenses. *School Dist. No. 11, Dakota County, Neb. v. Chapman*, 152 Fed. 887 (C. C. A. 8th, 1907), cert. denied, 205 U. S. 545 (1907).

59. As in *English* O. 19, r. 15; CONN. PRAC. BK. (1934) § 104, p. 46; N. Y. C. P. A. § 242; *Am. Jud. Soc. Rules of Civ. Proc. Bulletin* 14 (1919) art. 15, § 27.

60. *Hummel, Adm'r v. Moore*, 25 Fed. 380 (C. C. D. Col. 1885) (permitted). *Contra: Tompkins v. Paterson*, 239 Fed. 402 (W. D. Wash. 1917).

61. CLARK, CODE PLEADING 432-435.

62. *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784 (C. C. A. 4th, 1910).

63. See cases and materials in 2 CLARK, CASES ON PLEADING AND PROCEDURE (1933) 511-535.

64. See *American Mills Co. v. American Surety Co.*, 260 U. S. 360 (1922), for an authoritative exposition of the rule. It was subsequently amended in 1925 to permit the bringing in of third parties. For materials on the modern developments affecting counterclaims, see 2 Clark, op. cit. *supra* note 63, at 511-512.

d) *Reply and Rejoinder*

Equity Rule 31 does away with the necessity of a reply or of further pleadings after the answer is filed, except that a set-off or counterclaim must be pleaded to; yet permits the court to order a reply in its discretion. On the other hand, at law the question whether a reply is needed to controvert new matter in the answer, not constituting a set-off or counterclaim, has varied with the state practice,⁶⁵ which has even been followed where it deprives the judge of the discretionary power to order a replication.⁶⁶ Confusion can be avoided under the above rule, and yet flexibility can be retained by the discretionary power left with the court.⁶⁷

e) *Objections in Point of Law*

Since the methods of raising legal objections to pleadings on the law side has depended upon the particular state practice in point, there has been considerable diversity in the methods employed. Thus in some federal courts the demurrer has been used to raise the statute of limitations, even without specifying what particular limitation statute is meant; while in others it cannot be so used.⁶⁸ It has also been employed to attack an unverified plea.⁶⁹ Where the general demurrer for substance has been abolished, a demurrer on the ground that the plea is insufficient in law is defective in form;⁷⁰ and a demurrer specifying causes will be

65. *Burlington Ins. Co. v. Miller*, 60 Fed. 254 (C. C. A. 8th, 1894); *Hartley v. Lapidus & Holub Co.*, 216 Fed. 92 (C. C. A. 8th, 1914); see *Walker v. Traylor Engineering & Mfg. Co.*, 12 F. (2d) 382, 386 (C. C. A. 8th, 1926). It has also determined whether matter to avoid the statute of limitations should be set up in the complaint or pleaded in the reply by way of avoidance. *Boatman's Bank of St. Louis, Mo. v. Fritzlen*, 221 Fed. 145 (C. C. A. 8th, 1915), cert. denied, 238 U. S. 641 (1915) (properly pleaded in replication). For a discussion of this problem and the view that the equity practice, requiring the pleader to set forth his position immediately, is preferable, see *Clark*, *supra* note 35, at 275-277.

66. *Pringle v. Storrow*, 9 F. (2d) 464 (D. Mass. 1925). Here the defendant pleaded a sealed release. If the plaintiff is to rely on fraud in the execution to avoid the release, then it can be proved in the law trial; but if the fraud relied upon is in the inducement, then the issue is to be tried to the judge, usually before the law action, and it is to the interests of all parties and the court that the plaintiff be compelled to state his defense. Actually he was obliged to set forth his objections to the release by a bill of particulars.

67. See *Kentonia Coal Co. v. Tyree*, 4 F. (2d) 512 (C. C. A. 6th, 1925), where the plaintiff was contending that there should have been a rejoinder, although in effect the affirmative matter of the reply was nothing more than an affirmative traverse of defensive matter in the answer; and cf. *Pringle v. Storrow*, 9 F. (2d) 464 (D. Mass. 1925), cited note 66, *supra*, illustrating the need for discretionary power in the court.

68. Compare *Chemung Canal Bank v. Lowery*, 93 U. S. 72 (1876), *Davis v. Mills*, 121 Fed. 703 (C. C. A. 2d, 1903), and *Young v. California State Board of Pharmacy*, 273 Fed. 30 (C. C. A. 9th, 1921), with *Barnes v. Union Pacific Railway Co.*, 54 Fed. 87 (C. C. A. 8th, 1893).

69. *Bell v. The Mayor and Council of the City of Vicksburg*, 23 How. 443 (U. S. 1859).

70. *Brown v. Cumberland Telephone & Telegraph Co.*, 181 Fed. 246 (C. C. W. D. Tenn. 1909); *Randolph v. Craig*, 267 Fed. 993 (M. D. Tenn. 1920).

limited to those specified.⁷¹ There has also arisen in some federal courts the problem so troublesome and confusing in state practice of differentiating between demurrers and various forms of motions to strike or expunge.⁷² But in others the demurrer has been abolished and a motion may be used to raise all legal objections.⁷³ This represents some advance in simplicity of procedure, but may be limited in practical effect mainly to a change of name only. A more desirable change is that adopted by the equity rules, following the English practice, by which objections in law can be raised by motion or incorporated in the answer and may be heard in advance of trial in the discretion of the court.⁷⁴ In fact discretion as to the time of hearing objections in law has already been asserted on the law side.⁷⁵ Even more effective than the Equity Rule might be the adoption of the complete English plan whereby points of law are normally heard at the trial and are only heard in advance of trial by consent of the parties or order of the court, thus limiting the wasteful preliminary hearing, so susceptible of use for purposes of delay, to cases where the decision on the point of law substantially disposes of the whole case.⁷⁶ Such provisions should also be supplemented by rules for the summary disposition of cases by motions with supporting affidavits.⁷⁷

71. *Van Doren v. Pennsylvania Railroad Co.*, 93 Fed. 260 (C. C. A. 3d, 1899).

72. *United States v. Forbes*, 259 Fed. 585 (M. D. Ala. 1919), *aff'd*, 268 Fed. 273 (C. C. A. 5th, 1920).

73. *Jack v. Armour & Co.*, 291 Fed. 741 (C. C. A. 8th, 1923); *Ebsary v. Raymond & Whitcomb Co.*, 300 Fed. 685 (W. D. N. Y. 1924) [notwithstanding U. S. Rev. Stat. 954 (1878), 28 U. S. C. A. § 777 (1926) which was said not to require expressly the preservation of demurrers, but was merely a recognition of such forms of attack].

74. EQUITY RULES 29 and 33.

75. *Townsend v. Jemison*, 7 How. 706, 716 (U. S. 1849) (when the decision is to be made is "a matter of sound discretion in the court rather than of fixed or inflexible right"); *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. 7 (C. C. N. D. Ia. 1888); *Kent v. Bay State Gas Co.*, 93 Fed. 887 (C. C. D. Del. 1899); *McCarty v. Neilson*, 239 Fed. 151 (E.D. Pa. 1917). It seems that the federal courts may also exercise their discretion in permitting the losing party on a demurrer to plead over, although the state practice will usually be followed. *Green v. Underwood*, 86 Fed. 427 (C. C. A. 8th, 1898); *Boulbee v. International Paper Co.*, 229 Fed. 951 (C. C. A. 1st, 1916); *United States v. Oregon-Washington Rr. & Navigation Co.*, 251 Fed. 211 (C. C. A. 2d, 1918); cf. EQUITY RULES 29 (answer to be filed within 5 days after motion to dismiss the bill is denied), and 33 (the court may allow an amendment upon terms where an affirmative defense, set-off, or counterclaim is found insufficient).

76. ENG. JUD. ACT, O. 25, r. 1-4; *Worthington & Co., Ltd. v. Belton*, 18 T. L. R. 438 (C. A. 1902); CLARK, CODE PLEADING 371-373. Judicial statistics indicate that comparatively few cases are disposed of by decision of preliminary issues. Clark, *Fact Research in Law Administration* (1928) 2 CONN. BAR J. 211; A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Part II, Civil Cases (1934) c. V and VI.

77. Supporting affidavits to bring forth extrinsic matter have been used, for instance, to show that pleas were sham and frivolous. *United States v. Forbes*, 259 Fed. 585 (M.D. Ala. 1919), *aff'd*, 268 Fed. 273 (C. C. A. 5th, 1920); cf. *Conrad Rubber Co. v.*

f) *Miscellaneous pleading rules*

Under the practice in some states, and hence under the conformity principle in federal cases at law, a distinction is drawn between a motion to make more definite and certain and a motion for bill of particulars,⁷³ and it has been thought that Equity Rule 20 establishes the same distinction.⁷⁹ But since the purpose of securing more accurate information about the case in advance of trial is the same in both, the form of motion should not be important.⁸⁰ Such motions no doubt have been useful in securing information which would lessen surprise,⁸¹ but since they result in supplementary pleading, and are hedged about by conditions,⁸²

Goodyear Tire & Rubber Co., Inc., 15 F. (2d) 193 (C. C. A. 6th, 1926) (holding that the state practice did not warrant striking out sham pleadings). For the view that the equity practice does not warrant a "speaking" motion see SIMKINS, *FEDERAL PRACTICE* (1934) 616-618. A new procedure should also include not only provisions for summary judgment, one of the most important new procedural remedies (not here discussed for limitations of space), but the New York provision whereby a defendant by affidavit and motion can raise for summary disposition issues of defense of an oft recurring nature, such as the statute of frauds, the statute of limitations, and payment and release. N. Y. C. P. RULES 107, 108, 110, 111; CLARK, *CODE PLEADING* 386, 387; cf. Ball, *The New Procedure Rules of 1932* (1932); Millar, *The "New Procedure" of the English Rules* (1932) 27 ILL. L. REV. 363; Davies, *The English New Procedure* (1933) 42 YALE L. J. 377.

78. For instance in Wisconsin no distinction is drawn, while it is in New York. 2 FOSTER, *FEDERAL PRACTICE* (1920) 1245. Under the Conformity Act the state rule on bill of particulars has been applied. SIMKINS, *FEDERAL PRACTICE* (1934) 46.

79. Ashton Valve Co. v. Bailey, 6 F. (2d) 235 (N. D. Cal. 1925) (motion to make more definite and certain will not be treated as a motion for bill of particulars), criticized in (1926) 24 MICH. L. REV. 315. See also 2 Foster, loc. cit. *supra* note 78.

80. United States v. A. Bentley & Sons Co., 293 Fed. 229 (S. D. Ohio, 1923), *aff'd*, 16 F. (2d) 895 (C. C. A. 6th, 1927).

81. Illustrative cases where bills of particulars have been granted are: trade slander case where the defendant was uncertain whether the derogatory statements had been made by an authorized representative, O-So-Ezy Mop Co. v. Channel Chemical Co., 230 Fed. 468 (S. D. N. Y. 1915); where the defendant to a suit for commissions counterclaims for nonperformance he must assign the acts upon which he predicates misconduct, John F. Walsh & Co., Inc. v. Kurzkasch Co., 4 F. (2d) 746 (E. D. N. Y. 1925); plaintiff has been compelled to state his defense to a sealed release, Pringle v. Storrow, 9 F. (2d) 454 (D. Mass. 1925).

Denied: in an alienation of affections case, Harper v. Harper, 252 Fed. 39 (C. C. A. 4th, 1918); in a trade libel suit founded upon circulars widely sent out and where the number of people to whom the libel was communicated is peculiarly within the knowledge of the defendant, Shryock v. S. P. Calkins & Co., 248 Fed. 649 (C. C. A. 4th, 1918); where the object was to secure evidence, Alaska S. S. Co. v. Katzeek, 16 F. (2d) 210 (C. C. A. 9th, 1926); defendant has not been required to divulge the acts relied on as constituting contributory negligence, Bowker v. Donnell, 226 Fed. 359 (S. D. N. Y. 1915); cf. Havholm v. Whale Creek Iron Works, 159 App. Div. 578, 144 N. Y. Supp. 333 (2d Dep't, 1913).

The grant or denial of a bill of particulars rests in the sound discretion of the trial court. Harper v. Harper, 252 Fed. 39 (C. C. A. 4th, 1918); Alaska S. S. Co. v. Katzeek, 16 F. (2d) 210 (C. C. A. 9th, 1926).

82. A motion for bill of particulars will be granted only in so far as it seeks "facts" which could have been pleaded, and not "evidence," since it is a part of, or an amendment

they are at best inefficient methods of securing accurate pre-trial information. They need to be supplemented by modern methods of discovery.⁸³

III. PARTIES

a) *Party Plaintiff—Real Party in Interest*

The substantive law must determine who is the holder of a right sought to be enforced, but the manner of the enforcement and the formal party plaintiff may be considered a procedural question.⁸⁴ Thus on the equity side the practice has been that he who has the right is the real party in interest, the person to pursue the remedy,⁸⁵ while on the law side by virtue of the Conformity Act the rule has depended entirely on the applicable state practice.⁸⁶ But inasmuch as the equity practice has

to, the pleading which it amplifies. *Universal Oil Products Co. v. Skelly Oil Co.*, 12 F. (2d) 271 (D. Del. 1926). Such a motion must not be a mere fishing expedition, or seek information available to the party applicant. *SIMKINS, FEDERAL PRACTICE* (1934) 46.

83. See *RAGLAND, DISCOVERY* (1932). Compare *EQUITY RULE 58*. Treatment of this subject will be considered in an article dealing with proof. *EQUITY RULES 34, 21, and 24* on supplemental pleadings, scandal, and impertinence, and signature of counsel may well be adapted to the new procedure; and the equity rule omitting verification of the pleadings except in certain special cases seems desirable. See *EQUITY RULES 25 and 27*; *SIMKINS, FEDERAL PRACTICE* (1934) 512; cf. *CLARK, CODE PLEADING 522-525, 378, 142-146*. For the present practice at law following state systems on verification, see *Bell v. The Mayor and Council of the City of Vicksburg*, 23 How. 443 (U. S. 1859); *County of Ralls v. Douglass*, 105 U. S. 728 (1881); *St. Louis, Iron Mountain and Southern Ry. Co. v. Knight*, 122 U. S. 79 (1887); *S. M. Hamilton Coal Co. v. Watts*, 232 Fed. 832 (C. C. A. 2d, 1916).

84. *Edmunds v. Illinois Central Ry. Co.*, 80 Fed. 78 (C. C. N. D. Ia. 1897); *Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co.*, 284 Fed. 377, 383 (S. D. Ohio, 1920), aff'd, 284 Fed. 386 (C. C. A. 6th, 1922); Clark and Hutchins, *The Real Party in Interest* (1925) 34 *YALE L. J.* 258, 261-262, 276.

85. *EQUITY RULE 37*. "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. . . ." This is substantially the original New York Code provision, and is but declaratory of the equity practice which the framers of the code adopted. *CLARK, CODE PLEADING 93-97*.

86. Where the common law prevailed an assignee could not sue at law. *Nederland Life Ins. Co. v. Hall*, 84 Fed. 278 (C. C. A. 7th, 1898). But where this rule has been changed by a "real party in interest" statute, the assignee, or partial assignee where timely objection is not made to nonjoinder of the assignor, may maintain the action in his own name. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379 (1888); *Delaware County Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473 (1890) (suit by partial assignee); *N. & G. Taylor Co. v. Anderson*, 275 U. S. 431 (1928).

See *American Surety Co. v. Scott*, 63 F. (2d) 961 (C. C. A. 10th, 1933), applying the Colorado practice which apparently distinguishes a legal and equitable assignee, regarding the former but not the latter as a real party in interest. Since the real-party-in-interest provision is an adoption of the equity practice, and the equitable right of a subrogee to sue has been recognized, *Turk v. Illinois Cent. Rr. Co.*, 218 Fed. 315 (C. C. A. 6th, 1914), it is believed that in the interests of a unified procedure such a distinction is unsound, and that difficulty can be avoided by not making it.

been quite generally adopted in the states, the prevailing rule at law is in harmony with that on the equity side,⁸⁷ and hence without causing substantial change in federal practice that part of Equity Rule 37 which deals with the real party in interest may serve as a model for a unified procedure.⁸⁸

The phrase, "the real party in interest," used in the equity rules, is one made current by code pleading. It was not a fortunate choice of expression, for it led courts to assume that some "real," in the sense of beneficial, interest was required of a party plaintiff with resulting havoc to various rules of substantive law. But it is now well settled that the phrase refers only to the one given the right of action by substantive law. Thus, for example, a trustee not only may sue, but often may be the only real party in interest to sue on a particular cause of action affecting the trust res. Possibly the phrase has now assumed too familiar and consecrated an aspect to justify attempts at improvement in expression.⁸⁹

Since the holder of the bare legal title is regarded as a real party in interest and may sue in his own name, and as it is his citizenship which is looked to for jurisdiction, a problem often posed along with the one under discussion is the jurisdictional one raised by the assignment of a claim or the appointment of a particular individual as administrator or guardian to defeat or found federal jurisdiction. The assignment of a

87. Under the applicable state practice the federal courts have held the following to be proper plaintiffs: administrator suing under a wrongful death statute, *Mecom v. Fitzsimmons Drilling Co., Inc.*, 284 U. S. 183 (1931) (Oklahoma); guardian suing for the ward, *Mexican Central Railway Co. v. Eckman*, 187 U. S. 429 (1903) (Texas), *City of Detroit, Mich. v. Blanchfield*, 13 F. (2d) 13 (C. C. A. 6th, 1926) (Michigan) [but cf. *Voss v. Neineber*, 68 Fed. 947 (S. D. Ohio, 1895) (infant, not the next friend, is the real party in interest)]; subrogee, *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426 (C. C. A. 6th, 1911) (Ohio) [cf. *Aetna Life Insurance Co. v. Moses*, 287 U. S. 530 (1933)]; assignor where assignment was equitable, *American Surety Co. v. Scott*, 63 F. (2d) 961 (C. C. A. 10th, 1933) (Colorado); assignee for security purposes, *Dexter, Horton & Co. v. Sayward*, 51 Fed. 729 (C. C. D. Wash. 1892); assignor for an assignee pendente lite, *City of Greensboro v. Southern Paving & Construction Co.*, 168 Fed. 880 (C. C. A. 4th, 1909), cert. denied, 217 U. S. 602 (1910) (North Carolina) [cf. *Sternberger v. Continental Mines, Power & Reduction Co.*, 259 Fed. 293 (D. Colo. 1919) (in equity plaintiff's assignee was ordered substituted, but it was held that his citizenship would not defeat jurisdiction)]; but not an agent and attorney in fact appointed to sue, *Denman v. Richardson*, 284 Fed. 592 (W. D. Wash. 1921), aff'd, 292 Fed. 191 (C. C. A. 9th, 1923) [but see *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451 (1887), applying the New York rule of *Considerant v. Brisbane*, 22 N. Y. 389 (1860); and CLARK, CODE PLEADING 96].

88. Adding to the real-party-in-interest clause the statement that an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name tended to confuse the subject at the outset; but in the main the courts have evolved a broad, liberal conception of the real party in interest. CLARK, CODE PLEADING 117-130. Therefore since the provision has received specific construction that is satisfactory it may be well to adopt Equity Rule 37 without substantial change.

89. Clark and Hutchins, loc. cit. *supra* note 84; CLARK, CODE PLEADING 93-130.

chose in action to found jurisdiction is now precluded by legislation;⁹⁰ but apparently resort may be had to the device for the purpose of defeating jurisdiction.⁹¹ And perhaps a policy has been judicially worked out in favor of defeating, rather than in founding, jurisdiction in the guardian and administrator cases.⁹² Here the problem is essentially a broad one of general policy: Should the diversity jurisdiction be curtailed, and if so, shall it be done by virtue of the terms of a procedural rule determining the party plaintiff in an action?⁹³

b) *Capacity*

On the whole the federal courts at law have followed the state rule as to the capacity of an individual, a foreign executor, administrator, or state officer to sue or to be sued,⁹⁴ but have not been wholly consistent

90. U. S. REV. STAT. § 629 (1878), 28 U. S. C. A. § 41 (1) (1926) is generally preclusive.

91. *Oakley v. Goodnow*, 118 U. S. 43 (1886) (resort can only be had to state courts for protection against such a device); *Bernblum v. Travelers Ins. Co.*, 9 F. Supp. 34 (W. D. Mo. 1934), discussed in (1935) 35 COL. L. REV. 450.

92. The Supreme Court has permitted the *avoidance* of federal jurisdiction by the selection of a particular person as administrator. *Mecom v. Fitzsimmons Drilling Co., Inc.*, 284 U. S. 183 (1931), noted in (1932) 45 HARV. L. REV. 743; (1932) 41 YALE L. J. 639; (1932) 30 MICH. L. REV. 1341; (1932) 2 IDAHO L. J. 149. But in the converse situation where the appointment was arranged solely to *found* jurisdiction the attempt was unsuccessful. *Cerri v. Akron-People's Telephone Co.*, 219 Fed. 285 (N. D. Ohio, 1914). But cf. *City of Detroit, Mich. v. Blanchfield*, 13 F. (2d) 13 (C. C. A. 6th, 1926). The principles of the *Mecom* and *Cerri* cases are not in conflict because 18 STAT. 472 (1875), 28 U. S. C. A. § 80 (1926) directs the dismissal or remand of a suit where jurisdiction is collusively founded, while there is no express legislative policy against the avoidance of jurisdiction.

93. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499; cf. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States* (1933) 19 A. B. A. J. 71, 149; (1932) 45 HARV. L. REV. 743 (on the matter of general policy).

94. The state rule recognizing capacity followed: *Texas & Pacific Railway Co. v. Humble*, 181 U. S. 57 (1901) (married woman); *Morning Journal Ass'n. v. Smith*, 56 Fed. 141 (C. C. A. 2d, 1892) (married woman); *Public Service Electric Co. v. Post*, 257 Fed. 933 (C. C. A. 3d, 1919) (foreign administrator). See also *Hayes v. Pratt*, 147 U. S. 557 (1893); and *Provident Life & Trust Co. v. Fletcher*, 258 Fed. 583 (C. C. A. 2d, 1919) (both suits in equity following the state rule recognizing foreign executors).

For the common law rule, and cases following the state rule denying capacity see: *Dixon's Executors v. Ramsay's Executors*, 3 Cranch 319 (U. S. 1806) (foreign executor—rule recognized as often inconvenient); *Vaughan v. Nerthup*, 15 Pet. 1 (U. S. 1841) (foreign administrator could not be sued in equity; the case recognizes that as early as 1812 Congress had, however, authorized foreign executors and administrators to sue in the District of Columbia); *Gasquet v. Fenner*, 247 U. S. 16 (1918) (incompetent); *Moore v. Mitchell*, 281 U. S. 18 (1930) (county treasurer of Indiana did not have capacity to sue in a federal court in New York); *New York Evening Post Co. v. Chaloner*, 265 Fed. 204 (C. C. A. 2d, 1920) (incompetent), cf. *Coppedge v. Clinton*, 72 F. (2d) 531 (C. C. A. 10th, 1934); *Burrowes v. Goodman*, 50 F. (2d) 92 (C. C. A. 2d, 1931), cert. denied, 284 U. S. 650 (1931) (suit against a foreign executor will not be sustained even if he puts in a general appearance). But if a foreign administrator appears and contests the case a valid judgment can be rendered against him. *Lawrence v. Nelson*, 143 U. S. 215 (1892).

The state rule on foreign chancery receiver is not followed, however. See *infra* notes 99, 102, and accompanying text.

as to whether it was applied because of the Conformity Act or the Rules of Decision Act.⁹⁵ We suggest that the law of the domicile should settle the capacity to sue and defend, and that such capacity should then be recognized by all federal courts.⁹⁶ The principle of the rule has already received some recognition.⁹⁷ Further, for a good many purposes the federal courts have regarded themselves as an independent forum, and if they are to have a procedure distinctly their own there would seem to be no theoretical reason why the rule governing capacity to sue or defend should not be uniform—a uniformity settled by the domiciliary law.⁹⁸

Such a rule also is extremely important in dealing with receivers. The present federal rule relative to a foreign chancery receiver who has

95. Rules of Decision Act relied on: *Texas & Pacific Railway Co. v. Humble*, 181 U. S. 57 (1901); *Morning Journal Ass'n v. Smith*, 56 Fed. 141 (C. C. A. 2d, 1892). The Conformity Act was relied on in holding that one adjudged incompetent in New York could not sue in a federal court in that state, though he had acquired a domicile elsewhere and had there been adjudged sane. *New York Evening Post Co. v. Chaloner*, 265 Fed. 204 (C. C. A. 2d, 1920). But see *Coppedge v. Clinton*, 72 F. (2d) 531 (C. C. A. 10th, 1934), holding that if the incompetent's reason is sufficient to understand the nature and effect of his act he may become domiciled in another state, *B*, despite any law to the contrary of state *A* which adjudged him incompetent, and having created the requisite diversity by the change of domicile may sue by guardian ad litem in a federal court sitting in state *A*.

96. Such recognition would not affect substantive rights. A case will illustrate. When a county treasurer of Indiana attempted to sue in a federal court sitting in New York to collect state revenues he was denied the right on the ground that he lacked capacity to sue. *Moore v. Mitchell*, 281 U. S. 18 (1930). Under the rule suggested he would have the procedural right or capacity to sue. But if the state of New York has a policy which refuses to enforce the revenue laws of another sovereign, a federal court sitting in that state might follow that rule. *Moore v. Mitchell*, 30 F. (2d) 600 (C. C. A. 2d, 1929), *aff'd* on other grounds, 281 U. S. 18 (1930). Or conceivably it might feel free to apply its own notions concerning the wisdom of non-enforcement. (For a general discussion of the substantive problem, and a criticism of non-enforcement, see Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193; Note (1935) 48 HARV. L. REV. 828.) However, it would recognize that the matter was one to be decided on grounds other than procedural.

The suggested rule would not subject fiduciaries, such as executors and administrators, to suit in a foreign state merely because they were there served with process. See *Thorburn v. Gates*, 225 Fed. 613 (S. D. N. Y. 1915). By analogy to service upon a foreign corporation more than the mere presence of the fiduciary would be necessary to secure a judgment binding the estate. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1914).

97. By a shift in emphasis from "capacity" as established by the law of the forum to "domicile" the Tenth Circuit has in effect recognized the suggested rule. *Coppedge v. Clinton*, 72 F. (2d) 531 (C. C. A. 10th, 1934).

98. In suits under foreign death damage statutes which provide that the action is to be brought by the personal representative for the benefit of certain persons, it might be well to recognize any fiduciary properly qualified and accountable, since the right vests in him purely as a formal party. Cf. *Dennick v. Railroad Co.*, 103 U. S. 11 (1880); *Stewart v. Baltimore & Ohio Rr. Co.*, 168 U. S. 445 (1897); *Teti v. Consolidated Coal Co.*, 217 Fed. 443 (N. D. N. Y. 1914).

no other authority than that which arises from his appointment is rigidly one of nonrecognition.⁹⁹ But if a receiver is by statute made a "quasi-assignee" he may sue in any federal or state court.¹⁰⁰ And the Supreme Court has held most recently in *Clark v. Williard*¹⁰¹ that any title that he has must be recognized by a state, although it may apply its own law in dealing with him and local creditors. On the other hand, the states have quite generally worked out a more flexible method of dealing with the receiver who cannot claim as a "quasi-assignee." A Tennessee court has said:

"The privilege of suing in jurisdictions other than that of their appointment is almost universally conceded to receivers now, as a matter of comity or courtesy, unless such a suit is inimical to the interest of local creditors, or to the interest of those who have acquired rights under a local statute, or unless such a suit is in contravention of the policy of the forum."¹⁰²

But applying the technique of *Clark v. Williard* the right to sue could well be recognized in all cases, and yet the policy of the forum could be effected, without making the privilege of suit turn upon matters of policy.

Able and eminent criticism has been directed toward the law curtailing the extraterritorial powers of receivers who cannot claim as quasi-assignees.¹⁰³ But the Supreme Court had said:

99. *Booth v. Clark*, 17 How. 322 (U. S. 1854); *Great Western Mining Co. v. Harris*, 198 U. S. 561 (1905); *Sterrett v. Second National Bank*, 248 U. S. 73 (1918); Laughlin, *The Extraterritorial Powers of Receivers* (1932) 45 HARV. L. REV. 429, 431-438. But where the primary receiver is appointed ancillary receiver in another jurisdiction, *although on an ex parte application*, and brings suit, the objection to his capacity to sue may not be taken for the first time in the appellate court. *McCandless v. Furlaud*, 55 S. Ct. 42 (1934). See Jud. Code §§ 55, 56, 28 U. S. C. A. §§ 116, 117 (1926) for legislative extension of receiver's authority; *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77 (1923).

100. *Bernheimer v. Converse*, 206 U. S. 516 (1907) (statute authorizing collection construed to make the receiver a quasi-assignee, and thus permit suit in the federal court); *Converse v. Hamilton*, 224 U. S. 243 (1912) (his right to sue in another state court is protected by the full faith and credit clause of the Federal Constitution); Laughlin, *supra* note 99, at 452-460.

101. 54 Sup. Ct. 615 (1934), 55 Sup. Ct. 356 (1935), discussed in Note (1935) 48 HARV. L. REV. 835.

102. *Hardee v. Wilson*, 129 Tenn. 511, 518-19, 167 S. W. 475, 477 (1914); cf. *Irwin v. Granite State Provident Ass'n*, 56 N. J. Eq. 244, 246, 38 Atl. 680, 681 (1897). For discussion of the state law see Laughlin, *supra* note 99, at 438 et seq. Petitioner in *McCandless v. Furlaud*, 55 Sup. Ct. 42, 43 (1934), stated "that a foreign equity receiver is permitted to sue in 21 states; and that the highest courts of 7 other states have indicated approval of that view."

103. Laughlin, loc. cit. *supra* note 99; First, *Extraterritorial Powers of Receivers* (1932) 27 ILL. L. REV. 271; Rose, *Extraterritorial Actions by Receivers* (1933) 17 MINN. L. REV. 704; Annual Report of Special Committee on Equity Receiverships for 1926-27, Association of the Bar of the City of New York, Year Book (1927) 299; Notes (1930) 43 HARV. L. REV. 805, (1932) 30 MICH. L. REV. 1322. Since it is similar to an original proceeding ancillary receivership requires almost the same time and expense as the original receivership. See 1 CLARK, RECEIVERS (2d ed. 1929) § 319. On the problem of the courts of what state or

"The system established in *Booth v. Clark* has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action."¹⁰⁴

The opportunity is now afforded the Court in the new rules to modernize this procedure along the lines here suggested.¹⁰⁵

With regard to suits by and against partnerships and unincorporated associations, the federal courts at law have in general followed the state practice.¹⁰⁶ But in the *Coronado* case¹⁰⁷ when it appeared to the Supreme

states have jurisdiction to administer the affairs of a corporation in receivership see Wickersham, *Primary and Ancillary Receiverships* (1928) 14 VA. L. REV. 599; Note (1931) 44 HARV. L. REV. 437; 2 CLARK, RECEIVERS (2d ed. 1929) §§ 717, 755.

104. *Sterrett v. Second National Bank*, 248 U. S. 73, 77 (1918). For a criticism of the *Booth* case see Note (1932) 30 MICH. L. REV. 1322, 1323 n. 2, to the effect that it followed an obsolete English practice, and that that part of the opinion which has formed the basis for the federal rule was dicta.

105. It should be noted, however, that the pressure for modernizing equity receivership procedure has been greatly lessened by recent legislation permitting corporate reorganization through bankruptcy. 47 Stat. 1474 (1933), 11 U. S. C. A. § 205 (1934) (reorganization of railroads engaged in interstate commerce); 48 Stat. 912 (1934), 11 U. S. C. A. § 207 (1934) (corporate reorganizations). For discussion of this legislation see Dodd, Jr., *Reorganization Through Bankruptcy: A Remedy for What?* (1935) 48 HARV. L. REV. 1160; Foster, *Conflicting Ideals for Reorganization* (1935) 44 YALE L. J. 923 and authorities cited in n. 1; Wehle, *Railroad Reorganization Under Section 77 of the Bankruptcy Act: New Legislation Suggested* (1934) 44 YALE L. J. 197; Weinstein, *Corporations Amenable to Section 77B* (1935) 83 U. PA. L. REV. 853.

106. *Johnson v. City of St. Louis*, 172 Fed. 31 (C. C. A. 8th, 1909); *Esteve Bros. & Co. v. Harrell*, 272 Fed. 382 (C. C. A. 5th, 1921); *John L. Walker Co. v. National Underwriters' Co.*, 3 F. (2d) 102 (C. C. A. 7th, 1924); *Hawthorne v. Austin Organ Co.*, 71 F. (2d) 945 (C. C. A. 4th, 1934), cert. denied, 293 U. S. 623 (1934); *Empire Rice Mill Co. v. K. & E. Neumond*, 199 Fed. 800 (E. D. La. 1912). The trustee in bankruptcy of an unincorporated association has been permitted to sue a member at law. *Coyle v. Morristdale Coal Co.*, 284 Fed. 294 (S. D. N. Y. 1922), aff'd, 289 Fed. 429 (C. C. A. 2d, 1923). A judgment obtained against a partnership as an entity in a state court has been recovered on in a federal court sitting in another jurisdiction. *East Denver Municipal Irr. Dist. v. Doherty*, 293 Fed. 804 (S. D. N. Y. 1923), extensively discussed in Magruder and Foster, *Jurisdiction Over Partnerships* (1924) 37 HARV. L. REV. 793. But a restrictive state rule concerning unincorporated associations will not be allowed to impair a federal statutory right. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922); *Pirnie Simons & Co. v. New York Stock Exchange*, 89 N. Y. L. J. 189 (S. D. N. Y. 1933). It had been thought that the *Coronado* case established a general rule that unincorporated associations could sue and be sued as an entity. *Hansel v. Purnell*, 1 F. (2d) 266 (C. C. A. 6th, 1924), cert. denied, 266 U. S. 617 (1924) (equity); *Russell v. Central Labor Union*, 1 F. (2d) 412 (E. D. Ill. 1924) (law). But *Moffat Tunnel League v. United States*, 289 U. S. 113 (1933), held that a voluntary association, unless authorized by statute, had no capacity to sue to set aside an order of the Interstate Commerce Commission.

107. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 390 (1922). "Though such a conclusion as to the suability of trade unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities

Court that a federal substantive right would otherwise be impaired, it treated a defendant unincorporated association as an entity, though the state court of the forum had earlier refused to recognize the association as such. The rule of this case and of state procedural statutes which recognize as an entity those groups which act as units seems desirable.¹⁰⁸ To be generally effective in cases where jurisdiction must be founded upon diversity of citizenship the new procedure should modify the present federal rule¹⁰⁹ which refuses to endow such a unit with citizenship, but requires the citizenship of its members to be looked to. And there is evidence that the rule is undergoing change, for the Supreme Court recently treated a *sociedad en comandita* organized under Porto Rican law as a citizen and resident of Porto Rico for purposes of federal jurisdiction.¹¹⁰ Such treatment might well be accorded to associations acting

as trade unions, it is after all in essence and principle merely a procedural matter." For a discussion of this case and the general problem involved see Sturges, *Unincorporated Associations as Parties to an Action* (1924) 33 YALE L. J. 383; and see Magill, *The Suitability of Labor Unions* (1922) 1 N. C. L. REV. 81; Roberts, *Labor Unions, Corporations—The Coronado Case* (1923) 5 ILL. L. Q. 200; Comment (1922) 32 YALE L. J. 59; Comment (1923) 5 ILL. L. Q. 126; WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* (1929) 648-669.

108. Substantive rights are not altered. *Sugg v. Thornton*, 132 U. S. 524 (1889); *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922); Magruder and Foster, *Jurisdiction Over Partnerships* (1924) 37 HARV. L. REV. 793, 796-798: "... it is purely a matter of expediency whether the law shall deal with a particular group of natural persons as a unit distinct from the members, or as an aggregation of individuals, an important consideration being the extent to which the associates, as a group, enter into relationships with the outside world . . . the frank and consistent treatment of the firm as a legal entity would not produce any profound modification in the substantive law of partnership as it has actually developed in many jurisdictions, though it would give the subject a logical coherence in place of its too frequent aspect of makeshift and patchwork."

See also Sturges *supra* note 107; Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977; cf. WARREN, *op. cit. supra* note 107, Bk. I c. 1, 2, 3; Bk. II c. 1, 6.

109. *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207 (1904) (while recognizing that the board was a distinct legal entity capable of suing and being sued, it was held that the federal courts had no jurisdiction based upon diversity of citizenship unless it appeared that the citizenship of the individual members was diverse from that of the opposing party); *Levering & Garrigues Co. v. Morrin*, 61 F. (2d) 115 (C. C. A. 2d, 1932), cert. granted on another ground, and case aff'd, 289 U. S. 103 (1933); *Russell v. Central Labor Union*, 1 F. (2d) 412 (E. D. Ill. 1924).

The class suit offered an avenue of escape at times, for in such a suit only the citizenship of the representatives is looked to. Jurisdiction is not ousted by failure of diversity as to members of the class represented but not made parties. See (1933) 33 COL. L. REV. 363-365; 1 FOSTER, *FEDERAL PRACTICE* (1920) 703, 705-706.

As to venue it has been held that a partnership doing business in Nebraska and there recognized as a legal entity is nevertheless not an inhabitant thereof within the meaning of the venue statutes, where the partners are citizens and inhabitants of Missouri. *Sutherland v. United States*, 74 F. (2d) 89 (C. C. A. 8th, 1934).

110. *Puerto Rico v. Russell & Co.*, 288 U. S. 476 (1933), discussed in (1933) 33 COL. L. REV. 540, 541, wherein it is observed: "The present case thus appears to represent not merely the overruling of a long course of decision in the lower federal courts but carries with it the germ of the overturn of basic Supreme Court doctrine."

under American law. Citizenship, for jurisdictional purposes, could be worked out along lines developed in the corporate field.¹¹¹

c) *Substitution*

A liberal policy as to substitution of parties plaintiff or defendant may be hampered by a state rule against amendments stating a new cause of action, coupled with a legalistic view of the "cause of action." The problem may be presented by suit on a policy of life insurance wrongly brought by the administrator of the insured's wife, although she had predeceased the insured, and the policy was, in that event, payable to the insured's heirs. States with a liberal and desirable policy will permit the necessary substitution, since the insurance company from the first has been apprised of the real claim. The state cases have been in conflict on the principle involved;¹¹² but a federal court at law, torn between the duty of following an illiberal state practice and the federal legislation on amendments, has permitted the substitution.¹¹³ This is

111. In *Bank of the United States v. Deveaux*, 5 Cranch 61 (U. S. 1809), Chief Justice Marshall decided that a corporation could not come into the federal courts except through the actual citizenship of its members. This is the position now taken toward unincorporated groups. But in *Louisville Ry. Co. v. Letson*, 2 How. 497 (U. S. 1844), it was held that a corporation was a citizen of the state which created it. This position was abandoned in *Marshall v. Baltimore and Ohio Rr. Co.*, 16 How. 314 (U. S. 1853), but it was held that the right to sue in the federal courts under the diversity of citizenship rule must be based on the citizenship of its members, but that such citizenship was conclusively presumed to be that of the state of its incorporation. See Henderson, *Position of Foreign Corporation in American Constitutional Law* (1918) 54-64. The policy underlying this development, so long as we have a diversity jurisdiction, applies with equal force to groups which act as a unit. See *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530 (C. C. N. D. Ia. 1900) (holding that when a partnership is sued as an entity it cannot remove); and see *McLaughlin v. Hallowell*, 228 U. S. 278 (1913) (where the partners were unsuccessful in seeking to have themselves substituted for the partnership so that they could remove. See also *Russell v. Central Labor Union*, 1 F. (2d) 412, 414 (E. D. Ill. 1924) (recognizing that the development which took place in the corporate field might well be applied to unincorporated associations). An association could be regarded as a citizen and inhabitant of the state and district wherein it carries on its principal business for purposes of jurisdiction and venue. See dissent of Manton, J., in *Ex parte Edelstein*, 30 F. (2d) 636, 638 (C. C. A. 2d, 1929), cert. denied, 279 U. S. 851 (1929), approved in (1929) 78 U. PA. L. REV. 102; but cf. (1929) 42 HARV. L. REV. 1079.

112. *Wood v. Circuit Judge*, 84 Mich. 521, 47 N. W. 1103 (1891) (amendment compelled by mandamus). *Contra*: *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777 (1897); *Shaw v. Cock*, 78 N. Y. 194 (1879); *Spence v. Griswold*, 23 Abb. N. C. 239 (N. Y. 1859); *Pelzer v. United Dredging Co.*, 200 App. Div. 646, 193 N. Y. Supp. 676 (1st Dep't, 1922); cf. *People ex rel. Durham Realty Corp. v. Cantor*, 234 N. Y. 507, 138 N. E. 425 (1922), permitting the substitution of a party petitioner in certiorari proceedings to review tax assessments on the theory that jurisdiction attached by the filing of the application for reduction of the assessment, which was made in the name of the proper party.

113. *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260 (C. C. A. 3d, 1899) (widow in her individual capacity substituted for herself as administratrix). For the federal legislation see U. S. REV. STAT. § 954 (1878), 28 U. S. C. A. § 777 (1926), discussed by Clark and Moore, *supra* note 1, at 410, n. 105.

eminently proper. Courts should freely permit parties to be added, substituted, or dropped. Hence the equity rules and practice taking this view should be utilized for the new procedure.¹¹⁴

114. See EQUITY RULE 19 on amendments; RULE 37 ". . . Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause . . ."; RULE 45, DEATH OF PARTY—REVIVOR ON NOTICE; RULE 35, BILLS OF REVIVOR. That the equity practice is liberal see 2 FOSTER, FEDERAL PRACTICE (1920) § 211. Cf. N. Y. C. P. A. § 192, which is new and was derived from the New Jersey practice (1912) § 9: "No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the court at any state of the cause as the ends of justice may require." For the English practice see BALL, THE ANNUAL PRACTICE (1935) o. 16, r. 11.

There is supplementary federal legislation providing for the substitution of the proper party where suit is brought by or against a public officer who dies, resigns, or is detached from office during the pendency of the suit, 43 STAT. 941 (1925), 28 U. S. C. A. § 780 (1926); and also for the substitution of the executor or administrator of a plaintiff, petitioner, or defendant who dies before final judgment where the cause of action survives. 42 STAT. 352 (1921), 28 U. S. C. A. § 778 (1926). Prior to 1921 when the statute was amended, it had been held that a suit could not be revived against the foreign executors of a deceased defendant, who are not authorized by the laws of the state of their appointment to be sued beyond its jurisdiction. *C. F. Stromeyer Co. v. Aldrich*, 227 Fed. 960 (S. D. N. Y. 1915); see *Filer & Stowell Co. v. Rainey*, 120 Fed. 718, 719 (C. C. N. D. Ill. 1903); *Lawrence v. Southern Pac. Co.*, 177 Fed. 547, 550 (C. C. E. D. N. Y. 1910). But the legislative amplification of that year clearly provides for the substitution of an executor or administrator "appointed under the laws of any State or Territory of the United States," for service of the scire facias in any judicial district, and that the provisions apply to admiralty, equity, and law. With the federal situation compare that of New York. *McMaster v. Gould*, 240 N. Y. 379, 148 N. E. 556 (1925), criticized in (1926) 35 YALE L. J. 371.

See also U. S. REV. STAT. (1878) § 956, 28 U. S. C. A. § 779 (1926); *McArthur v. Williamson*, 45 Fed. 154 (C. C. S. D. Ohio, 1891).

See *Clinton v. Coppedge*, 2 F. Supp. 935 (N. D. Okla. 1933) (presenting the problem of corporate dissolution pending suit); and Ballantine, *Manual of Corporation Law and Practice* (1930) 806-807. Under the rule on capacity heretofore urged, the representative of the defunct corporation, domestic or foreign, whether having title or not, would have capacity to be substituted as plaintiff or defendant. And even if he was without the jurisdiction of the court and did not voluntarily appear probably he could be substituted without personal service of process upon him, for there is a valid distinction between founding original jurisdiction and continuing a suit well founded. *Clarke v. Mathewson*, 12 Pet. 164 (U. S. 1838); *Collin County National Bank v. Hughes*, 152 Fed. 414 (C. C. A. 8th, 1907), on rehearing, 155 Fed. 389 (C. C. A. 8th, 1907); cf. *Marion Phosphate Co. v. Perry*, 74 Fed. 425 (C. C. A. 5th, 1896). At the present time the appointment of a receiver for a plaintiff or defendant corporation does not abate the suit, but it may proceed in the corporation's name. 2 FOSTER, FEDERAL PRACTICE (1920) 1194. But if the capacity of a receiver is recognized as heretofore urged it might be well to substitute him in the corporation's stead.

For the problem of substituting a party who is liable to the one sued, see *Hardenbergh v. Ray*, 151 U. S. 112 (1894) (landlord substituted for his tenants in an ejectment action); *Harris v. Hess*, 10 Fed. 263 (C. C. S. D. N. Y. 1882) (by substitution the defendant achieved the objective of interpleader).

IV. JOINDER OF CAUSES OF ACTION AND PARTIES

At common law the rules on joinder of actions were governed chiefly by the forms of action and not by principles of trial convenience.¹¹⁵ Similarly, joinder of parties depended upon what were considered to be their substantive rights, and not on the simplest and quickest ways of getting disputes litigated. Plaintiffs and defendants had to sue and be sued in the same capacity; permissive joinder of parties having a several right or duty, or affected by a common question of law or fact was not tolerated.¹¹⁶ On the other hand, in equity the test was largely one of trial convenience with a view to settling the entire controversy in one suit. It is true that the objection of multifariousness could be raised either where there was joinder of two or more equitable causes of action, or of parties complainant or defendant who did not possess a common interest or right in the subject-matter in controversy, and that the rule often prevented the joinder of actions or parties to the sacrifice of an efficient dispatch of business.¹¹⁷ But the concept of an equitable cause of action was in general sufficiently broad to embrace all operative facts dealing with a transaction; and complainants and defendants were often said to have a community of interest when that interest was nothing more than one in a common question of law or fact and a multiplicity of suits would otherwise result.¹¹⁸ And, fortunately, no rules of thumb on multifariousness developed, for the question was generally said to be one for the court in the exercise of its discretion. Thus the matter stood when the Equity Rules of 1912 were adopted.

Rule 37 adopted the standard code provision for permissive joinder of parties.¹¹⁹ It provided that "all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. . . ." And Rule 26 on the joinder of causes of action authorized unlimited joinder of equitable causes of action where there was one plaintiff, and one defendant, or if more than one plaintiff when they jointly possessed the causes of action, and where, if there was more than one defendant, the liability was asserted against all of the material defendants. Thus it will be seen that notions con-

115. Sunderland, *Joinder of Actions* (1920) 18 MICH. L. REV. 571; SHIPMAN, *COMMON LAW PLEADING* (1923) 201-203.

116. SHIPMAN, *id.* at 393-399; Hinton, *An American Experiment with the English Rules of Court* (1926) 20 ILL. L. REV. 533, 535; Jones and Carlin, *Nonjoinder and Misjoinder of Parties in Common Law Actions* (1922) 28 W. VA. L. Q. 197, 266.

117. See 1 FOSTER, *FEDERAL PRACTICE* (1920) 780-804; SHIPMAN, *EQUITY PLEADING* (1897) 337-348.

118. See *Gaines v. Chew*, 2 How. 619 (U. S. 1844), and *Bolles v. Bolles*, 44 N. J. Eq. 385, 14 Atl. 593 (1888), on subject-matter; and cases and materials in 2 CLARK, *CASES ON PLEADING AND PROCEDURE* (1933) 536-566; 1 FOSTER, *FEDERAL PRACTICE* (1920) 782-798; Chafee, *Bills of Peace with Multiple Parties* (1932) 45 HARV. L. REV. 1297, on parties.

119. CLARK, *CODE PLEADING* 252-255.

cerning joinder of parties produced what limitations exist on joinder of causes. But even in the qualified situations the rule did not arbitrarily prohibit the joinder, but authorized it when administrative grounds appeared therefor. The rule has been said to prohibit nothing which was permissible in chancery practice before its adoption, but to go further and make the whole question merely one of convenience in the administration of justice.¹²⁰ The matter is recognized as a trial problem, and the court is given the authority to order separate trials.

If these rules were extended to govern the new unified procedure, it would still be more liberal than that obtaining in most of the states. This is true because, while the provisions relative to joinder of parties are not essentially different from those of most states, yet the rule as to joinder of actions has entirely swept away the artificialities of the common law forms of action and of the classifications of joinable actions of most of the codes.¹²¹ Recent legislation in New York, New Jersey, California, and Illinois,¹²² following the English practice, may, however, furnish the model for a yet more desirable federal system of party joinder. This legislation generally sanctions permissive joinder of plaintiffs where there is a common question of law or fact; joinder of plaintiffs in the alternative; joinder of defendants "against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative," with the proviso that each defendant need not be "interested as to all the relief prayed for, or as to every cause of action included in the proceeding against him"; and authorizes third parties to be brought in, who were or would be liable to any party to an action. Now these provisions have proved feasible and desirable both in the state courts and on the law side in the federal courts, as notably in those sitting in New York.¹²³ But the old restrictive code section on joinder of causes

120. *International Organization, etc. v. Red Jacket C. C. & Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927) (316 complainants brought 12 suits, which were consolidated, to restrain union interference with their businesses); *Lion Laboratories v. Campbell*, 34 F. (2d) 642, 644 (C. C. A. 2d, 1929) ("The 26th rule has made the whole question merely one of convenience in the administration of justice"); *Low v. McMaster*, 255 Fed. 235, 236-237 (E. D. Pa. 1919) ("... rule 26 is not ... prohibitive of anything which was before its adoption permissible in chancery practice in the direction of reaching desirable results").

121. For the code classifications see CLARK, CODE PLEADING 298-300.

122. See CLARK, CODE PLEADING 255-256, 270-276, for a discussion of the New York, New Jersey, and California party joinder provisions; also Comment (1935) 23 CALIF. L. REV. 320; for Illinois see Magill, *The New Illinois Civil Practice Act: Pleading* (1933) 1 U. CHIC. L. REV. 171, 172-180. For a comparison with European systems see Millar, *The Joinder of Actions in Continental Civil Procedure* (1933) 28 ILL. L. REV. 26, 177.

123. *Klugman's Sons v. Oceanic Steam Nav. Co.*, 42 F. (2d) 461 (S. D. N. Y. 1930) (joinder of defendants in the alternative); *Benton v. Deininger*, 21 F. (2d) 657 (W. D. N. Y. 1927) (23 plaintiffs joined to enforce rights given them by the National Bank Act against 21 defendants, who at various times over a period of many years had been directors of the bank and had made false reports. 57 causes of action were alleged, and each cause did not affect all of the defendants); see *Brown v. Kinnicutt*, 2 F. (2d) 263 (S. D.

of action was retained in New York and California. The anticipated trouble developed, and after fifteen years of confusion in New York the legislature has now repealed that section and substituted one authorizing unlimited joinder of actions, and giving the court discretion to direct a severance of the action or separate trials.¹²⁴ In the recent Illinois Act, profiting by the New York experience, this difficulty had been avoided from the beginning.¹²⁵

In dealing with the problem of intervention, it might be advisable that the new procedure be of broader scope than Equity Rule 37 which requires the intervention to "be in subordination to, and in recognition of, the propriety of the main proceeding."¹²⁶ With respect to representative actions, Equity Rule 38 can be extended and applied to all actions whenever a few individuals can be truly said to represent a class.¹²⁷ Where a number of persons have been injured by fraud or by breach of shippers' contracts, it has been thought that there is properly no class suit, for each claim is of a personal nature.¹²⁸ And it has been strongly doubted whether any representative suit can be maintained at law;¹²⁹ but the contrary has been held.¹³⁰ It is believed that the

N. Y. 1924) (34 plaintiffs joined in a fraud and deceit action). For illustrative English and state cases see *Universities of Oxford and Cambridge v. Gill & Sons*, 1 Ch. D. 55 (1899); *Payne v. British Time Recorder Co.*, [1921] 2 K. B. 1; *Akeley v. Kinnicutt*, 238 N. Y. 466, 144 N. E. 682 (1924). See also Bennett, *Alternative Parties and the Common Law Hangover* (1933) 32 MICH. L. REV. 36.

124. On the difficulty caused by the joinder of actions provision see *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925), reprinted in 2 CLARK, *CASES ON PLEADING AND PROCEDURE* (1933) 496, and the authorities there collected. For the recent legislation in New York see Ch. 339 Sess. Laws of 1935.

125. See Magill, *supra* note 122, at 185-186.

126. For statement of the problem and the varying rules on intervention see CLARK, *CODE PLEADING* 287-290; *Intervention in Federal Equity Cases* (1931) 31 COL. L. REV. 1312; (1933) 43 YALE L. J. 127.

127. For a suggested detailed rule see Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399, 441; also Blume, *Jurisdictional Amount in Representative Suits* (1931) 15 MINN. L. REV. 502; *Id.*, *The "Common Questions" Principle in the Code Provision for Representative Suits* (1932) 30 MICH. L. REV. 878; (1922) 36 HARV. L. REV. 89; (1932) 30 MICH. L. REV. 624 (discussing the federal rule that a common question of law is sufficient); Note (1934) 34 COL. L. REV. 118.

128. *Fletcher v. Burt*, 126 Fed. 619 (C. C. A. 6th, 1903); *Cherry v. Hollowell*, 4 F. Supp. 597 (E. D. N. Y. 1931); *Brown v. Werblin*, 138 Misc. 29, 244 N. Y. Supp. 209 (Sup. Ct. 1930); *Markt & Co., Ltd. v. Knight S. S. Co.*, [1910] 2 K. B. 1021.

129. *McNary v. Guaranty Trust Co.*, 6 F. Supp. 616 (N. D. Ohio 1934), criticized in (1934) 19 CORN. L. Q. 614; cf. (1934) 20 VA. L. REV. 564 [discussing *Cherry v. Hollowell*, 4 F. Supp. 597 (E. D. N. Y. 1931), and concluding that a true class action is in its nature equitable].

130. *Penny v. Central Coal and Coke Co.*, 138 Fed. 769 (C. C. A. 8th, 1905) (trespass for injury to freehold of a religious society); *Stearns Coal & Lumber Co. v. Van Winkle*, 221 Fed. 590 (C. C. A. 6th, 1915) (ejectment brought by shareholders of a dissolved corporation); *Colt v. Hicks*, 97 Ind. App. 177, 179 N. E. 335 (1932) (suit against an association).

problem is to determine whether there can be adequate representation in the type of action and not whether it is a "legal" or "equitable" action.

Third party practice, a relatively recent development, has received considerable attention from commentators, and its utility has been pointed out.¹³¹ But the federal procedure raises one problem that is peculiar to it. That is the problem presented by *Strawbridge v. Curtis*.¹³² If we assume a case between *A* and *B* properly brought in federal court, under the doctrine of that case, shall we require diversity between *B* and *C*, where *B* wishes to bring *C* in as a third party? Tentatively, it seems to us unwise to extend the rule of that early case to cover a procedural device which is just developing and which affords to litigants and courts an opportunity of disposing of a litigious situation in one action; and furthermore, such an extension would deprive *B* of a valuable procedural remedy which he would enjoy if *A* had chosen the state forum, assuming that there is a third party practice in the state.¹³³

131. Bennett, *Bringing in Third Parties by the Defendant* (1935) 19 MINN. L. REV. 163; Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties* (1933) 33 COL. L. REV. 1147; Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action* (1933) 47 HARV. L. REV. 209; *Id.*, Tort Contribution Practice in New York (1935) 20 CORN. L. Q. 269.

132. 3 Cranch 267 (U. S. 1806) (there must be complete diversity of citizenship between the parties plaintiff on one side and the parties defendant on the other).

133. The Supreme Court has appreciated that litigation involving third party practice deserves treatment peculiar to it, that the litigation should not be dismembered. For when *A* sued *B* in tort in the state court, and *B* brought in *C* to recoup against the latter under an insurance contract and there was diversity between *B* and *C* it was assumed that this presented a separable controversy and thus the *entire* suit would go into federal court on removal, instead of just the *B-C* litigation which would have been the case had this been regarded as a separate action. See *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U. S. 140 (1934). There was diversity between *A* and *C*, but this is immaterial, for there is no litigation between them. *Lowry & Co., Inc. v. National City Bank of New York*, 28 F. (2d) 895 (S. D. N. Y. 1928).

It has been held that there must be diversity between *B* and *C* or that some other jurisdictional ground exist before third party practice can be invoked in federal court. *Wilson v. United American Lines*, 21 F. (2d) 872 (S. D. N. Y. 1927); *Sperry v. Keeler Transportation Line*, 28 F. (2d) 897 (S. D. N. Y. 1928). Assuming that these cases have not improperly interpreted the implications of *Strawbridge v. Curtis*, still it would seem that the Supreme Court might by rule restrict the doctrine of the case to prevent impairing the utility of the device. The Court has restricted the doctrine in situations where it was thought advisable to dispose of an entire situation. Judge Blatchford permitted a defendant to bring in and substitute a third party for himself, although there was no diversity between them. *Harris v. Hess*, 10 Fed. 263 (C. C. S. D. N. Y. 1882) (jurisdictional point assumed). And it is well settled that where the substitution is made, the original jurisdiction is not defeated. *Phelps v. Oaks*, 117 U. S. 236 (1886); *Hardenbergh v. Ray*, 151 U. S. 112 (1894) (in these cases the third party came in voluntarily). Diversity is not required for intervention, the converse of third party practice, *SMCKINS*, op. cit. *supra* note 34, at 684; nor for cross suits between defendants, *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166 (C. C. D. Mont. 1906) (in a water right suit defendants could litigate among themselves their priorities); *SMCKINS*, id. at 667. If there is diversity between a

In concluding this résumé of the more important problems affecting pleadings and parties which the new federal civil procedure must face, we would again emphasize the tentative nature of our suggestions of details. It is obvious that considerable variation in detail is possible and still the essentials of the reform will be secured. In fact if the vital provisions for a completely united procedure with clear specifications as to jury trials and waiver thereof are adopted, and if flexible rules as to pleadings and parties, leaving much to the discretion of the trial court, are drafted, we shall feel that the reform is assured of success, whatever the detailed provisions may be. It is clear, too, that with the considerable research and interest in procedural reform which has developed in recent years, there is very close to unanimity of opinion on many, perhaps most of the objectives to be sought in these points of detail. This is an auspicious time for the new procedure and, thanks to the decisive leadership now assumed by the Supreme Court, its promise is most bright.¹³⁴

stakeholder and the claimants, the court may proceed to a decree though the real controversy is between the claimants and there is no diversity between them. *Turman Oil Co. v. Lathrop*, 8 F. Supp. 870 (N. D. Okla. 1934). Thus, if the third-party litigation is regarded as auxiliary to the main suit the jurisdictional amount and grounds become immaterial.

134. Since this article went to press and on June 3, 1935, the Supreme Court promulgated an order appointing its Advisory Committee on the new rules with the Honorable William D. Mitchell as Chairman and the senior author hereof as member of and Reporter to the Committee. The warning given in the text as to the tentative nature of the conclusions here set forth should be reiterated, and it should, of course, be clear that these are but the private and unofficial views of the authors.