

A MODERN PROCEDURE FOR NEW YORK

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AN OPPORTUNITY to discuss reform of procedure in New York, now made pertinent by the interest therein of the New York Temporary Commission on the Courts,¹ is for me the occasion to revisit old scenes and familiar places. For my study of New York procedure, undertaken originally more or less by chance thirty-five years ago, has been a continuing one and has provided me over the years with an absorbing interest, both as onlooker and as student and teacher. Although only a bystander, I have experienced real excitement in following New York procedural developments, particularly since one never knows what may happen next. A Washington taxi driver, it is said, when asked as to the meaning of the motto on the National Archives Building, "The Past Is Prologue," responded, true to the philosophical bent of his guild, with this free translation: "You ain't seen nothing yet." That, I think, well epitomizes the reactions of at least this observer as the procedural precedents pile up. Let me hasten to say that I do not intend this as a criticism of the individual judges; they do a back-breaking job in trying to serve this vast and teeming and amazingly growing commonwealth with inadequate tools and an outworn judicial organization. But it is intended as a comment on the unusual number and undue diversity of courts, the lack of a businesslike direction, the inordinate congestion, confusion, and delay now so usual a part of the American picture, and—grain for my immediate grist—a resulting plethora of conflicting rulings as to how to do things court-wise.² And it lends emphasis, I trust, to another lack, which I particularly wish to develop in this paper, namely, the absence

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¹ See the Rep. of the Temp. Comm'n on the Courts 20-22 (Feb. 17, 1955), envisaging a "major revision" of civil procedure in the state and announcing its undertaking "to organize an Advisory Committee of some of the outstanding procedural experts in the State."

² For a striking picture of the New York problem, see *Bad Housekeeping: The Administration of the New York Courts*, Report of the Special Committee on Studies and Surveys of the Administration of Justice of the Association of the Bar of the City of New York. For more general discussions, see Vanderbilt, *The Essentials of a Sound Judicial System*, 48 *Nw. U.L. Rev.* 1 (1953); Clark & Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 *Yale L.J.* 1147 (1952); Clark, *The Evershed Report and English Procedural Reform*, 29 *N.Y.U.L. Rev.* 1046 (1954). The confusion in New York pleading precedents, adverted to below, is the mainstay of many procedural courses. Note in passing the cases in Clark, *Cases on Modern Pleading* (1952) and the discussions in Clark, *Code Pleading* (2d ed. 1947).

here of a true philosophy of procedural jurisprudence to give guidance and direction to the lonely harassed trial judge. Under existing conditions there perhaps must be that blithesome disregard of any contrariety of opinion or past troublesome precedent which makes each new decision somewhat of a surprise Christmas package and a joy to the law teacher, whatever it may be to the practicing lawyer or judge.

For it was from the standpoint of law teaching that I initially approached this subject. I started in as a teacher at Yale in 1919 expecting to work in the careful and safe subject of property law. Soon, however, I found myself sidetracked to make way for a more distinguished expositor of that law. But since no professor would so belittle himself as to accept willingly assignment to the field of procedure, and since I was young and defenseless, I inherited the pleading courses by default. So with great misgivings and at least silent protest I began to teach this subject; and I have been at it ever since, as a current pile of examination papers has served to remind me. Among early fruits of my teaching labors—in fact an initial trial of my wings, so to speak—was an article for the *Columbia Law Review* entitled "The Union of Law and Equity," published in January 1925.³ It was an extensive critique of the New York cases, notably the famous case of *Jackson v. Strong*,⁴ with its classic statement, "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored,"⁵ and its ultimate repudiation of the legislative and constitutional mandate for union of a hundred years earlier by its endlessly disputed admonition for the dismissal of a case brought on the supposedly "wrong side" of the court.

Almost immediately after the publication of this article I was gratified to note its republication on the editorial pages of the esteemed *New York Law Journal*, surely a feather in the cap of an inconspicuous legal fledgling. Nevertheless, upon completion of the several installments I was surprised to find that the editor, who, I believe, was then the very able Professor I. M. Wormser, ended the series with a warm editorial on the audacity of so unwarranted an attack upon the great New York Court of Appeals. Thereafter there ensued quite a lively dispute by way of letters. Some distinguished lawyers wrote supporting my viewpoint, some taking that of the editor, while others, perhaps the prevailing ones, concluded that on the specific issue it made little difference, in view of the calendar delays, whether a case was dismissed or retained on the docket for amendment.⁶ Thus encouraged as to the

³ 25 Col. L. Rev. 1 (1925).

⁴ 222 N.Y. 149, 118 N.E. 512 (1917).

⁵ *Id.* at 154, 118 N.E. at 513.

⁶ The publication and resulting dispute continued in that eminent publication, as I recall, for upwards of a month during the winter of 1925.

immediate vitality of the subject, I returned to it with renewed zest, which continues even now as I accept the teaching of pleading as a refreshing pause in judicial duties. At the moment I have just completed a course at the Yale Law School which I entitle *Modern Pleading*, but which may be considered as perhaps a judicious intermixture of federal light and state dusk.⁷ If New York does enter upon a definite program of improvement, I shall lose some of my capital assets of examples of things *not* to be done. But since my teaching days must soon draw to a close because of the onset of age, if not for the press of other circumstances, I shall view with equanimity and indeed much pleasure the dawn of a new day in New York procedure.

At any rate, the New York Temporary Commission on the Courts very wisely has chosen the subject of improvement in "Practice and Procedure" as one of its major activities. While this was listed first in the scope of the Commission's study,⁸ it has, I think, developed as one of the later ones to be tackled. I do not understand that this is more than coincidental or that it indicates any rating as to priority in the field. Nor should I wish to suggest priorities, for all of the Commission's assigned tasks are major and their accomplishment of vital importance to the state. In terms of need one cannot properly place one requirement above another. Thus, what can be more important than the simplification of the court structure and the placing of the hitherto various warring and conflicting elements under one business-like direction? At the same time, what can be more important than the improvement in the orderly procedure of a single court? Each goes to the heart of the problem of administering justice. Each fulfills a demand of modern times. But there is one aspect which may justify a certain measure of priority to reform of practice and procedure in the courts. That is because it is the one matter for which there is needed for its accomplishment a proper philosophy and for which in natural course one will necessarily be developed if improvement is attempted.⁹ Probably, too, the lack thereof represents the greatest defect in New York procedure over the years. Had there been a genuine philosophy of procedure and its appropriate place in litigation, the various diversities in the separate courts would undoubtedly have been less magnified. For want of any such philosophy, individual judges

⁷ See Clark, *Cases on Modern Pleading*.

⁸ Preliminary Rep. of the Temp. Comm'n on the Courts 11 (March 5, 1954). See also the 1955 Report, *supra* note 1.

⁹ Clark, *Code Pleading*, sub nom. *Development of Procedural Jurisprudence* 69-71; Chorley, *Procedural Reform in England*, in *David Dudley Field Centenary Essays* 98, 99-102 (1949); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 *Vand. L. Rev.* 493, 507, 508 (1950); Chorley, *Pleading: A Subject for Scientific Study?*, 12 *Mod. L. Rev.* 319 (1949).

have been necessarily limited to following their own diverse tendencies and trends. But I am encouraged to believe that once a philosophy is developed, all the other reforms on the Commission's natural agenda will fall into place and will follow in almost necessary consequence.

To illustrate what I mean, I need refer only to that most modern procedural device, to wit, discovery. One cannot approach the subject of discovery without developing willy-nilly a philosophy of pleading and procedure, be it good or bad. If one feels, with the settled older view, that discovery leads only to a "fishing expedition," the mere thought of which is distasteful, then one instinctively is viewing a lawsuit as a proper place for the display of tactics or strategy and holding it to be essentially a contest of movement and countermovement between opponents whose equal reserves of skill must be assumed. In this view surprise is a necessary and vital element. The truth is not to be sought by merely obtaining from the opponents or their witnesses advance knowledge of what they are saying about the matter in dispute. It can be developed only as a result of the shock of sudden attack at the actual trial itself. On the other hand, if the modern discovery as set out in the Federal Rules is to be accepted at all, it must be on the theory that the real purpose of modern pleading and its accessory devices, including discovery, is to inform all parties and the court completely and at a very early stage of what the dispute is about, that it may be approached intelligently, a settlement arranged if at all possible, or a trial had as to the actual points at issue.¹⁰

Now if one is going to accept the modern philosophy as exemplified by this approach to discovery, it is surely going to color the approach to the entire system of civil trials. I may add that without doubt it is also going to permeate and shape vitally our approach to criminal trials—though that is not a matter within my immediate assignment.¹¹ The acceptance generally throughout our practice, however, of the philosophy which permeates the discovery procedure can well have most important and substantial consequences. Its thorough adoption necessarily means that mere rules of pleading as such can have no vitality for their own sake, but only as accessories to achieving the objective thus visualized by the discovery process itself. Thus the rules of the game need not be enforced unless they are clearly a part of the process whereby court and litigant alike learn quickly of

¹⁰ *Hickman v. Taylor*, 329 U.S. 495, 500, 501, 507 (1947). See contra: *Hawkins, Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A.J. 1075 (1953), 28 Conn. B.J. 33 (1954); but compare *Holtzoff, The Elimination of Surprise in Federal Practice*, 7 Vand. L. Rev. 576 (1954).

¹¹ For examples of the lessened influence of detailed criminal pleading, see *United States v. McKee*, 220 F.2d 266 (2d Cir. 1955); *United States v. Ahtner*, 144 F.2d 49, 51 (2d Cir. 1944).

the real merits of the dispute. Any rules merely to vindicate the pleading process as such, turning only upon how well principles and practices of pleading alone have been carried out, will no longer have validity.

One is likely to ask at once, What, then, is left of the whole system of practice? or more pointedly, What criteria are actually to be established in carrying out our pleading principles? The answer seems to me clear. It is just so much procedure, no more and no less, as will advance the objectives we have in mind, namely, the conveying of information as to the case involved. This is not, as might be thought, a counsel of despair but is a very worth-while and working principle. As I have endeavored to teach for many years, there are or should be no absolutes in pleading. Pleading is a form of red tape but of desirable red tape, indeed one essential to the orderly processes of justice.¹² It should be resorted to where it leads to orderly, convenient, efficient activity in court litigation; but it should go no further. We must have enough; we shall get hopelessly enmeshed if we have too much.¹³

Now to implement these conclusions, which thus far may seem indefinite, I suggest that in the past we have made the mistake of assuming some ideal system, erected by court, counsel, or scholars, and have not tried the more simple course of asking, What will the individual human protagonist before us be able to give us? My own answer, in substitution for an unreal perfectionism, is that we should require that amount of pleading detail which the bar can normally give us. By this I mean what is habitual and convenient by training, tradition, and experience. It is natural for lawyers who talk in legal terms to describe a lawsuit involving an automobile accident, say, or the breach of a contract, in ways which will be familiar to their immediate readers, who are the opposing lawyers and the judges, and who can, in turn, translate the legal phraseology to their lay clients so far as that may be necessary. Thus I have always regarded the use of the old so-called common counts in pleading *assumpsit* at the common law as a very natural course today. For it is language familiar to the lawyer of any professional training at all. So the words "money had and received" are words of art with a long established meaning for the

¹² Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 *Vand. L. Rev.* 493, 507 (1950).

¹³ "One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves." 2 Holdsworth, *A History of English Law* 251 (4th ed. 1936).

lawyers. Why reject the actual communication of thought it does give to court and opposing counsel for some theoretical striving for perfection in expression which actually may be less sophisticated and hence less expressive?¹⁴

On the other hand, undue emphasis upon the pleading of facts is self-defeating. There comes a time when we simply cannot expect that any lawyer, be he skillful or unskillful, is going to go into the details some judges and some lawyers think necessary, at least from opponents. With the increasing sophistication of the modern age as to modes of intercommunication of ideas, we have come to realize that there is a technique of apparent disclosure which may be utilized to conceal and to prevent the transference of thought. So a requirement that lawyers tell facts beyond what they wish to do or beyond what they can do easily and skillfully is self-defeating. An efficient lawyer knows how to meet any requirement of a bill of particulars or more definite statement and still preserve to himself sufficient generality for eventualities which he must meet, while the unskilled lawyer will reach the same result by not knowing how to fulfill the seemingly drastic requirements. In either event we have not achieved anything except delaying of the process by trying to seek for a kind of mythical ideal in our advance paper work or pretrial shadowboxing.¹⁵

Instead of pressing for more pleading detail we should turn to the modern devices of pretrial, discovery, and summary judgment; for by their processes of reaching at once to the party himself, rather than to his lawyer, they may actually obtain further clarification of what did happen with respect to the concrete issues dividing the parties. Here, too, the process is one of using the means of legal communication for what they can do readily, not one of trying to employ them as ends or requirements in themselves. When they are failing in their objective, then they should be cut short and the case returned to the docket for the ordinary methods of trial.¹⁶

¹⁴ Use of the common counts in modern pleading is discussed, with citations, in Clark, *Code Pleading* 287-96. See also, Cook, "Facts" and "Statements of Fact," 4 *U. of Chi. L. Rev.* 233 (1937); King, *The Use of the Common Counts in California*, 14 *So. Calif. L. Rev.* 288 (1941); Comment, 4 *Calif. L. Rev.* 352 (1916).

¹⁵ "A lawyer, therefore, cannot safely or wisely restrict the case he offers to prove before he knows what the testimony will actually show. And generally speaking, he does not need to; he can evade the rule, if a court tries to enforce it, by saying too much, rather than too little. I recall one lawyer of wide experience who protected himself completely by regularly inserting the same two typewritten pages, not all of which could possibly be apposite, of formal negligence allegations in each automobile accident complaint he drew. After all, no real penalty has been devised for making an excess of allegations." Clark, *Simplified Pleading*, A.B.A. *Judicial Administration Monographs*, Ser. A, No. 18, pp. 5, 6, reprinted in 1942 *Handbook of National Conference of Judicial Councils* 136, 2 *F.R.D.* 456, 457 (1943), 27 *Iowa L. Rev.* 272, 274 (1942).

¹⁶ There is need of more objective studies, such as that conducted under the aus-

This is, therefore, to make of pleading an entirely pragmatic device for use by the courts. If it works, it is desirable; when it ceases to work, it is no longer desirable. Here, I think, is the modern spirit of pleading—a spirit altogether too little emphasized in the days of code pleading, even though that system ideally was one of telling the story of the case merely. Code pleading went astray because of undue emphasis upon pleading the facts—an impossible requirement when made an end objective in itself. It can be reinvigorated by the change in emphasis I have suggested.¹⁷

Where and how is this to be achieved? I make no bones of saying simply and directly that I think it is best to be achieved now in any American state by adoption of the Federal Rules. This is not to say that the Federal Rules are necessarily the best of all conceivable systems or that they must be copied blindly. But it is to say that they represent the best fruits of experience now available of just that kind of court auxiliary aid, assisting, but not dominating, the judicial process, which I have visualized. They are by no means the last word on the subject. Fifty or one hundred years hence we may well have developed better methods, just as these would not have been wise or readily available one hundred years ago. Pleading should always be a process of improving and bringing alive, resharpening, and perfecting the tools by which the result of sound administration of justice is to be achieved. For the present era, however, the Federal Rules are the tested, tried, and effective device as their successful transference to so many state practices is now demonstrating.¹⁸

Evidence to this same effect is indeed provided in your own Civil Practice Act, which is accepting many and an ever-increasing number of the Federal Rules. I have not made a complete study but may refer, by way of example, to the rules of party joinder. Those rules

pices of the Administrative Office of the United States Courts. Speck, *The Use of Discovery in United States District Courts*, 60 *Yale L.J.* 1132 (1951). See also, Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 *F.R.D.* 97 (1952); Comment, *Tactical Use and Abuse of Depositions under the Federal Rules*, 59 *Yale L.J.* 117 (1949).

¹⁷ Note the recent discussion of Fed. R. Civ. P. 8(a)(2) among lawyers of the Ninth Circuit Judicial Conference, *Claim or Cause of Action*, 13 *F.R.D.* 253-79 (1953), and the Advisory Committee's response thereto, *Preliminary Draft of Proposed Amendments* 8, 9 (May 1954).

¹⁸ At the present writing the Federal Rules have been adopted fully in Alaska, Arizona, Colorado, Hawaii, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico, and Utah; also in Delaware, but separately for the courts of law and of chancery, which are not merged; and it is expected that they will be adopted in North Dakota this summer. Substantial portions, such as the discovery or joinder sections, have been adopted in Florida, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas, and Washington, while lesser parts appear in California, Connecticut, Montana, Oregon, and the existing practice of North Dakota. In addition, Fed. R. Civ. P. 16 on pretrial procedure has been very widely copied.

—including not merely joinder of plaintiffs and of defendants generally,¹⁹ but also the auxiliary devices of intervention, third-party impleader, and interpleader²⁰—either are quite literally federal rules or else stem therefrom. So, too, the procedure for reservation of decision on a motion for a directed verdict stems from Federal Rule 50(b).²¹ And so also pretrial and discovery,²² as they develop and expand in this state, tend more and more to follow the federal model. And that, I take it as reformers agree, is the general goal.²³

With so much already accomplished it would be, I think, a matter of but little difficulty for the bench and bar to take over the rest of the rules. Hence, a really complete reform may be achieved without strain, once the objective is understood and accepted. But anything less than this is quite undesirable. As I have elsewhere pointed out, piecemeal reform is often worse than no reform at all. It requires the local lawyers to learn as a new procedure a curious hybrid between state and federal practice; it has all the difficulties of being new and strange so far as the process of learning is concerned but remaining old and tired so far as real results are looked for. The teaching of experience is to abhor such a wasteful and time-serving delay of real reform.²⁴

To illustrate the thesis that hard-won victories from bitter experience, as disclosed in the Federal Rules, should not now be lost, I may refer to one or two examples from current New York procedure. So let us look at the present fortunes of the demurrer. Now the common-law demurrer was often useful as a means of testing the legal right under which a party was suing or defending. It was a short cut modestly effective in those cases where the real issue was one of law and the parties were willing to have it so decided. But often it became an instrumentality of delay when there was no possibility of reaching a final adjudication through its means. Moreover, it had become encrusted with a wealth of formalistic restrictions making it not an efficient method of testing a pleading or ascertaining preliminarily the merits of the action. Hence, one of the most insistent demands of

¹⁹ N.Y. Civ. Prac. Act § 212, as amended in N.Y. Laws 1949, c. 147, in substitution for the former §§ 209, 211, 212. See also, *id.* § 193, and the article by Clark & Wright, *infra* note 32.

²⁰ N.Y. Civ. Prac. Act §§ 193-a, 193-b, and compare §§ 285, 286.

²¹ N.Y. Civ. Prac. Act. § 457-a. Fed. R. Civ. P. 50(b) is found in 28 U.S.C. § 2072 (1952).

²² N.Y. Civ. Prac. Rules 121, 121-a, 122.

²³ N.Y. Jud. Council Rep. 61-66 (1952); N.Y. Jud. Council Rep. 66-69 (1951); Note, 52 Col. L. Rev. 1071 (1952).

²⁴ Clark, Dissatisfaction with Piecemeal Reform, 24 J. Am. Jud. Soc'y 121 (1940); Clark, The Texas and the Federal Rules of Civil Procedure, 20 Texas L. Rev. 4, 5 (1941).

modern reform has been the abolition of the demurrer and the substitution of some more effective device for the pretesting of a case.²⁵

In New York the reform took the form of announcing that the demurrer was abolished and substituting therefor several different types of motions, of which the motion for judgment was the most inclusive. A distinguished commentator (Professor Henry W. Ballantine) has referred to this substitution as "as ludicrous a piece of self-deception as the old fictions in ejectment."²⁶ To a certain extent this criticism was justified, because the motions which had succeeded the demurrer were given separate categorization, so much so that they were not interchangeable one with another, and a special type of motion was still needed for each kind of objection. Thus the new system had little, if any, more flexibility than the old and was about as technical in actual application.²⁷

By the time the Federal Rules were adopted there had been an accumulation of experience in American reform with respect to the demurrer. There was also at hand the English system, wherein the demurrer had been abolished and there was substituted the objection in law, to be raised in the answer and heard at trial along with other defenses at the trial except when the court directed an earlier hearing.²⁸ The original federal rule, Rule 12(b), represented an intermediate step between the more limited American and the more complete English reform. It provided in effect for a motion for a judgment which could be used in place of an answer raising questions of law if the pleader so chose; and on this there would be a preliminary hearing unless the judge should decide to postpone the matter for better disposition at the trial. Thus, while the English procedure tended to push consideration of the objection to the actual trial, the original federal procedure tended in the opposite direction, with, nevertheless, power to the judge to follow the English practice.²⁹

That federal procedure was a very real advance, as experience showed; but it also disclosed confusion between the motion for summary judgment and the motion for judgment on the pleadings. The former is what has come to be called a speaking motion, containing

²⁵ Millar, *The Fortunes of the Demurrer*, 31 *Ill. L. Rev.* 596 (1937); Pike, *Objections to Pleadings under the New Federal Rules of Civil Procedure*, 47 *Yale L.J.* 50 (1937); Clark, *Code Pleading* 535-45.

²⁶ Shipman, *Common-Law Pleading* 294 (3d ed., Ballantine, 1923). See also, Millar, *Civil Procedure of the Trial Court in Historical Perspective* 187-88 (1952).

²⁷ Some modification, although not complete, was made in 1944 on recommendation of the N.Y. Jud. Council Rep. 305-33 (1944). See Prashker, *New York's Rules of Civil Practice Affecting Motions Directed to Pleadings: The Revision of 1944*, 19 *St. John's L. Rev.* 1 (1944).

²⁸ The Supreme Court, Order 25, rules 1, 2 (*The Annual Practice* 1955).

²⁹ See Clark, *supra* note 15.

allegations of fact, and is of course clearly permissible, unlike the speaking demurrer of the common law, whose sin of fact-allegation placed it quite beyond the pale. If, therefore, the motion for judgment is but a modern substitute for the demurrer, it, too, must be so limited—a resulting distinction among motions so narrow as to defy detection, but of decisive, not to say cataclysmic, consequences to the pleader. Little wonder that the majority view was that, since the summary-judgment motion under Rule 56 so clearly was by very essence a speaking motion, it was but a quibble to deny such effect to a motion for judgment under Rule 12(b).³⁰ Some of us thought, therefore, that there ought preferably to be only one inclusive motion, namely, that for a summary judgment, under a proper form of procedure. Nevertheless, when the Advisory Committee came to prepare the 1938 amendments, the objections and lack of professional familiarity with these newer processes suggested that an attempt at oversimplification might seem to leave a confusing hiatus in the practice. So it was decided to retain both motions in form, but to provide for easy, if not imperceptible, transfer from one to the other. Under the amended rule, therefore, and in usual normal course the motion for judgment becomes a motion for summary judgment whenever matter outside the pleadings proper is presented to the court for its consideration.³¹ All this might seem an excess of machinery for a simple result, and it is a solution which would hardly have lent itself to a priori invention. But it works, and works well. Experience has thus forged a highly efficient and working solution which follows the habits and thoughts of lawyers and announces no startling innovations but produces the desirable results. It is this kind of experience which should not be lightly rejected in hope of some new flash of genius for getting rid of the pesky old demurrer.

Another example stems from the subject matter of my old article in the *Columbia Law Review* to which I have adverted above, namely, "The Union of Law and Equity." That is the subject which probably has caused the most confusion and difficulty in New York, where the early resistance to the infant Code led to the resurrecting by the court

³⁰ The cases were summarized in Rep. of Proposed Amendments 11-15 (June 1946), H.R. Doc. No. 473, 80th Cong., 1st Sess. 55-59 (1947) (Advisory Committee's note to the amendment to Fed. R. Civ. P. 12[b]); Clark, Code Pleading 540-45.

³¹ Fed. R. Civ. P. 12(b), as amended, effective March 19, 1948. For the present procedure, see *Gibson v. Security Trust Co.*, 201 F.2d 573 (4th Cir. 1953); *Sardo v. McGrath*, 196 F.2d 20 (D.C. Cir. 1952); *William J. Kelly Co. v. Reconstruction Finance Corp.*, 172 F.2d 865 (1st Cir. 1949); *Mechanical Devices Co. v. General Builders*, 15 N.J. 566, 105 A.2d 673 (1954); Clark, Experience under the Amendments to the Federal Rules of Civil Procedure, in 1953 Federal Rules of Civil Procedure and Title 28, U.S. Code Judiciary and Judicial Procedure 1, 6, 14.

of distinctions or different "sides" of a single court which were quite unnecessary as well as unreal in actual practice. Nevertheless, there have been serious problems raised by various important decisions of the New York courts.³² The two most questionable steps in New York had to do with, first, the matter of what cases could be claimed to a jury and, second, the matter of waiver of jury trial.³³

As to the first, the New York statute attempted to provide certain types of actions which could be thus claimed as of right to a jury, such as claims for a sum of money due, ejectment, and so on.³⁴ The question immediately arose whether the intent of this statute was to provide an entirely new and separate test or whether it was merely declaratory of the constitutional principle.³⁵ From time to time the New York court has announced that this was purely a matter of statutory construction and that the constitutional test would not prevail. The consequence has been a large measure of confusion and chaos. That is quite natural, because thus there is developed an area of conflict between the two. For example, an equitable action for cancellation and reformation of, say, an insurance policy and eventually for the payment of money under it is historically only for the court of chancery but may now seem to be for the jury under the statute as being embodied in a complaint claiming a sum of money due. The code states where the union of law and equity has been most successful have not attempted any such dichotomy or convenient source of error as this attempt to enlarge upon the constitution by means of statutory definitions. The usual test is simply the historical one of what cases were

³² Among extensive recent discussions the following may be cited: Proposals under Consideration by the Judicial Council Relating to Completing the Merger of Legal and Equitable Remedies, N.Y. Jud. Council Rep. 293-314 (1954); Kharas, A Century of Law-Equity Merger in New York, 1 Syracuse L. Rev. 186 (1949); Clark & Wright, The Judicial Council and the Rule-Making Power: A Dissent and a Protest, 1 Syracuse L. Rev. 346, 353-57 (1950); Note, Law and Equity in New York—Still Unmerged, 55 Yale L.J. 826 (1946).

³³ Involved also is the question whether an action brought to the "wrong side" of the court should be dismissed or transferred; on this, compare *Wainwright & Page, Inc. v. Burr & McAuley*, 272 N.Y. 130, 5 N.E.2d 64 (1936), with *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 28 N.E.2d 846 (1940). The lower courts have been in very great confusion and the court of appeals did not take the occasion on its reversal of *April Productions, Inc. v. Schirmer, Inc.*, 283 App. Div. 1037, 284 App. Div. 639, 131 N.Y.S.2d 341 (1st Dep't 1954), to clarify the matter. 308 N.Y. 366, 126 N.E.2d 283 (1955).

³⁴ N.Y. Civ. Prac. Act § 425.

³⁵ *Susquehanna S.S. Co. v. Andersen & Co.*, 239 N.Y. 285, 146 N.E. 381 (1925), is perhaps the leading case rejecting the historical for the statutory test, although the New York cases are not uniform. See criticism, Clark, *Trial of Actions under the Code*, 11 Cornell L.Q. 482, 490 (1926); Clark, *Code Pleading 103-06*; James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L.J. 1022, 1035 (1936), and authorities cited note 32 supra.

historically triable to the jury; obviously those are the ones in which by constitutional intent the right is preserved and protected.³⁶

As to the other major point of jury waiver, the original New York Code worked out a system where a waiver of jury had to be by affirmative act;³⁷ and the consequence was that a litigant might well delay his definitive action until he saw how he was making out before the judge. Here, too, the correct solution of other code states is that waiver occurs by failure to act, namely, to claim trial by jury promptly and decisively. More recently the need of such a decisive test has been perceived here, so that the failure-to-claim provision of the present jury-waiver statute is being constantly extended to provide for its use in increasing areas—county by county—in metropolitan New York City.³⁸ No reason seems apparent why this beneficent result should not be at once available to the entire state.

All this experience to which I have adverted, coming from England and from some 20 or more American states and territories and British Dominions, was available to the framers of the Federal Rules and is indeed cited in the Advisory Committee's original note to Federal Rule 38.³⁹ In view of this knowledge federal law-equity merger, which for years had been viewed with apprehension, has actually been achieved easily and simply and without appreciable friction.⁴⁰ On the other hand, in New York today the Judicial Council has once again set its hand to complete the work started in 1848 and to try now at length to achieve a definitive merger.

This is a wholly praiseworthy endeavor, but the problems attendant upon its execution show the difficulties of piecemeal reform to be achieved only by rigid and formal statutes. Thus, in its comprehensive

³⁶ Among cases see, e.g., *Rocha v. Rocha*, 197 Cal. 396, 240 Pac. 1010 (1925); *Barber v. Baldwin*, 135 Conn. 558, 67 A.2d 1 (1949); *Warner v. Coleman*, 107 Okla. 292, 231 Pac. 1055 (1924); and under federal practice, *Prudential Ins. Co. v. Strickland*, 187 F.2d 67 (6th Cir. 1951); *Ring v. Spina*, 166 F.2d 546 (2d Cir.), cert. denied, 335 U.S. 813 (1948); *Bruckman v. Hollzer*, 152 F.2d 730 (9th Cir. 1946).

³⁷ N.Y. Code of Proc. § 221 (1848).

³⁸ N.Y. Civ. Prac. Act § 426, as amended, with which may be contrasted Fed. R. Civ. P. 38, substantially the English rule, Order 36, rule 1, via Connecticut, Conn. Gen. Stat. § 7936 (1949); for collection of statutes and rules see Report of the Advisory Committee on Rules for Civil Procedure 95 (1936) (note to Fed. R. Civ. P. 38). The difficulties of the New York provision are illustrated by *Jackson v. Strong*, 222 N.Y. 149, 118 N.E. 512 (1917), and its progeny. The opposing rule is illustrated by cases such as *Alcoa S.S. Co. v. Ryan*, 211 F.2d 576 (2d Cir. 1954); *Fidelity & Deposit Co. v. Krout*, 157 F.2d 912, 913 (2d Cir. 1946); *Groome v. Steward*, 142 F.2d 756 (D.C. Cir. 1944); *Hurwitz v. Hurwitz*, 136 F.2d 796, 797 (D.C. Cir. 1943).

³⁹ See note 38 supra. The earlier apprehension is noted in *Clark & Moore, A New Federal Civil Procedure—I. The Background*, 44 *Yale L.J.* 387, 394, 395 (1935); *Clark, Code Pleading* 32 and n.81.

⁴⁰ As the cases cited notes 36, 38 supra help to show.

study in 1954⁴¹ the Council recommended an amendment of New York Civil Practice Act Section 479 to take off the shackles presented by the demand for judgment as locally construed. But then in order thoroughly to negative previous restrictive precedents, it suggested a new section, 111-a, to provide for free amendment between law and equity.⁴² However worthy the objective, this recognition of some need for amendment within the confines of the present unitary court can be made operable only by resurrecting the outmoded separate "sides" of that court. So the Council decided⁴³ (most wisely, in my opinion) to recommend only the amendment to Section 479.⁴⁴

Reform by de-emphasis and gradualism is therefore my thesis, and its prime illustration the Federal Rules. For their innovation is the showing of a complete and integrated system which brings together all existing best practices scattered among jurisdictions rather than the novelty of the separate parts. Just the other day I noted support for this philosophy of gradualism from a high and informed source, namely, the distinguished legal biographer, Catherine Drinker Bowen, in a recent *Atlantic* magazine. Pointing out that her studies have led her to the courtroom and the legislature and thus to a perception of "the extraordinary importance of *procedure*," she records herself as particularly impressed with one thing, thus: "If reform in law is to come at all, it must come slowly or it will not stick. When it comes fast it boomerangs, or else we laymen ignore the new law."⁴⁵ Of course she need not have limited her acute observation to the reaction of laymen; it applies with equal force to lawyers and judges. But the Federal Rules would fit her standards well. They show not undue precipitateness but only a practical and effective response to modern

⁴¹ Note 32 supra.

⁴² N.Y. Jud. Council Rep. 83-85, 298 (1954).

⁴³ N.Y. Jud. Council Rep. 72-73 (1955).

⁴⁴ The amendment passed both houses of the New York legislature but was vetoed by Governor Harriman on April 25, 1955. This proposed revision of N.Y. Civ. Prac. Act § 479 would have brought it in accord with the highly successful Fed. R. Civ. P. 54(c) and thus eliminated the problem of dismissal, note 33 supra, and necessarily tended to a more effective merger of law and equity. See Clark, Code Pleading 265-70. The Committee on State Legislation of the Association of the Bar of the City of New York, in Bull. No. 7, p. 471 (April 21, 1955), had urged a veto in an analysis which seems to the writer signally oblivious to the confusion of the New York cases and the success of the proposed remedial legislation as shown by the more usual code pleading, as well as by the Federal Rules. The limited viewpoint shown in this analysis suggests in itself, it is believed, the desirability of the complete and integrated federal reform, as opposed to attempts at piecemeal improvement. And the rather blithe and imperceptive adoption of a position which is fundamentally at war with the Association's own outstanding leadership in New York court reform discloses the lamentable consequences of that lack of a philosophy of procedural jurisprudence which the writer has so often deplored.

⁴⁵ Bowen, *By Slow Degrees*, 195 *The Atlantic* 53, 55, 56 (Feb. 1955).

court needs, as the experience of a dozen or more important American jurisdictions now shows.⁴⁶

My support of the federal system as a working model for state practice is not limited merely to the contents of the rules but includes also the manner of their adoption and later supervision, namely, through court rule-making. Control of court administration, even to the details of its practice, should be active and continuous; it should be in the hands of those who have both the continuing responsibility and the expert knowledge; it should be done by the courts. Court rule-making is thus as important a part of the ideal court as is its integration into one single, efficient, closely knit structure.⁴⁷

I hope and trust that this is the worthy prospect for the Commission's dreams. Its current proposals for judicial conferences among all the high court judges⁴⁸ may well serve to break the ice, although, as I believe the Commission realizes, these are but beginning and limited steps, lacking dynamic authority. Certainly the warm response which even these somewhat hesitant measures have received from the press and public should give the Commission heart to go forward more boldly. And for the New York State Bar Association there can be no finer task than to help the Commission bring to reality its dreams for the better administration of justice. For this is truly a lawyer's task. We cannot expect laymen to put the house of the law in order; while they may sense that something or a great deal is wrong, theirs is not the knowledge or the experience to know how to do this well and skillfully. We, the lawyers, must do it ourselves. Bar associations tend to overlook this responsibility lying directly before them while they go off on all sorts of strange joy rides ranging from attempted control of governmental foreign policy to definite anticonstitutionalism and emasculation of important provisions of the Bill of Rights. I urge that the lawyer stick to his own last and that he and his duly dedicated organizations accept the public charge to keep the tools of justice keen and bright.

⁴⁶ See note 18 *supra*.

⁴⁷ See Clark & Wright, *op. cit. supra* note 32, and the authorities on the modern integrated court cited note 2 *supra*.

⁴⁸ Rep. of the Temp. Comm'n on the Courts 13-16 (Feb. 17, 1955).