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During the last few years the American people have been suddenly awakened to their unpreparedness for war and we are all witnesses to the calamitous consequences thereof. We have spontaneously firmly resolved to prepare for war.

The time has come also for a like awakening by the members of our profession to our unpreparedness to discharge our present day responsibilities, to our unpreparedness for peace and the consequences thereof. A civilization may be destroyed by unpreparedness for peace, as well as for war, and its possibility is indicated by the absence of a satisfactory, peaceful means of settling disputes and the administration of justice.

It is this that in other countries has caused millions of people to choose to go to war and use primitive man's method of settling disputes rather than civilized methods. It is this unpreparedness for peace, evidenced by the absence of enlightened leadership such as our profession has heretofore been able to provide, that has caused many millions of people to voluntarily destroy their long established institutions and voluntarily surrender their liberties. People never give up their liberties but under some delusion, and people never act under a delusion save when enlightened leadership is lacking.

But while the lay citizen owes something to the public, far greater is the obligation of the lawyer, because obligations to the public are to be measured by ability and opportunity to serve, and the public interest has the right to exact services in proportion to meet the exaction just as the government collects taxes in accordance with the ability to pay. Ever since rules of conduct were adopted by communities, the lawyer has been of great and exceptional service to the public. When called upon he has always given of his time and learning, without money and without price. And no member of our profession looks back upon those services, characterized by wisdom and self sacrifice, without a feeling of professional pride.

But the days that have gone carried no greater responsibility than the days that are to come, for the solution of every conceivable problem of moment to the citizen at this time requires a knowledge of the law and the training which enables us to adjust well known legal principles to our new industrial, social and economic conditions.

The members of the bar are under the constant duty of improving the administration of justice as well as the development of the substan-

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tive law in all its branches. The procedural or adjective law deals with the functions of the court and the creation of more or less arbitrary rules or statutes. Any improvement in this department of our jurisprudence is dependent upon the conscientious efforts of courts and lawyers, who are too inclined to be satisfied with any existing system of procedural rules.

The history of our profession offers many examples indicating that we have recognized our duty to bring about reforms designed to adapt the law to new industrial and social conditions.

The adoption of the New Federal Rules of Civil Procedure in 1938 constituted a noteworthy epoch in the history of law reform ranking in importance with the abandonment of common law pleading in England in 1834 and the adoption of a simplified procedure in that country in 1875.

It was the purpose of the drafters of the new rules of procedure to simplify, rather than complicate the proper administration of justice. And, as was stated in *Venn-Severin Machine Company v. John Kiss Sons Textile Mills, Inc.*:[1]

> "The Federal Rules of Civil Procedure are based on the theory of a rather general form of pleading. They employ simplicity, conciseness and directness, and technical forms are eschewed. The requirement of consistency is done away with and inconsistent claims are allowed. All refinements of pleading are subordinated to one aim: the achievement of substantial justice, and courts are charged to interpret pleadings in that spirit."[2]

Anyone who has followed the fortunes of the new rules during these first three years that have elapsed since their adoption must reach the conclusion that both the federal court and the bar have accepted the spirit and purpose of the new procedure. Like all other reforms, however, their path was beset with pitfalls.

First, there was the possibility that the new rules might be destroyed in a bog of technical decisions, of which the New York Code of Civil Procedure stands out as a horrible example of what may eventually happen to a simple practice code. However, disinterested critics agree the courts have not exhibited any tendency of this nature.

The second danger confronted by the new procedure was the possibility that such variations might gradually arise in the determination and application of the rules in eighty-five separate districts, as to cause a departure from the uniformity sought by the framers and eventually lead to eighty-five varieties of procedure. But so far there is no indication of this.

[1] 2 F. R. D. 4 (D. N. J. 1941).
[2] *Ibid.* at 5.

One question that has actually arisen is, whether the Conformity Act is still in effect and may be enforced as auxiliary to the new rules. The act granting power to the Supreme Court to draft rules of civil procedure clearly repeals the Conformity Act and the new rules must be regarded as the sole guide to federal civil procedure, except, of course, as to matters which are excluded from the operation of the rules in express terms.

In order to assist in the attainment of the chief objective; that is, brevity and simplicity of pleading, forms are included in the appendix. A question that early arose was what constitutes a sufficient averment of negligence. Form 9, denominated Complaint for Negligence, is somewhat as follows: First, an allegation of jurisdiction, and second, that on June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff, who was then crossing said highway. Third, as a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars. Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

You will observe the form contains no statement as to the character of any negligent acts or omissions on the part of the defendant and doubt has been expressed as to whether it contains a sufficient statement of a cause of action. This identical form has been the subject of litigation which has resolved all doubts as to its sufficiency. In *Hardin v. Interstate Motor Freight System*,[3] Judge Nevin held a mere general charge of negligence without specification sufficient, and that allegations of a petition in the nature of specifications of negligence, in addition to general allegation of negligence, would be stricken on motion.

A more authoritative interpretation of the rule is found in *Sierocinski v. E. I. Du Pont De Nemours & Co.*:[4]

> "A plaintiff need not plead evidence. He 'sets forth a claim for relief' when he makes 'a short and plain statement of the claim showing that the pleader is entitled to relief. (Rule 8 (a) (2)).' "[5]

Let us next turn to the rule concerning contributory negligence, about which there was considerable doubt as to how to plead it under the new rules. Rule 8, sub-section (c), as you may recall, lists contributory negligence as one of several defenses which must be pleaded affirmatively. It has always been the rule in the federal courts that in a negligence case the burden of pleading and establishing negligence is on

[3] 26 F. Supp. 97 (S. D. Ohio 1939).
[4] 103 F. (2d) 843 (C. C. A. 3rd, 1939).
[5] *Ibid.* at 843.

defendant. In some states, New York and Illinois for example, the absence of contributory negligence must be pleaded by the plaintiff and proved as part of his *prima facie* case.

In April, 1938, a few months after the new rules became effective, the Supreme Court decided *Erie R. R. Company v. Tompkins*,[6] which has become a leading case. It holds, as you all know, that on all questions of substantive law the federal courts are bound to administer the law of the state, irrespective of whether it is statutory or common law. So when the federal courts had this question of contributory negligence to deal with they found in a few states, such as New York and Illinois, for example, the opposite doctrine prevailed and the question was, were the federal courts required to disregard this rule and require the plaintiff to establish the absence of contributory negligence as part of his case. In a well-considered case, *Francis v. Humphrey*,[7] Judge Wham held:

> "Now each federal court must follow the substantive law of the state where the particular court is located or of the state where the action arose, as settled and declared by the courts of that state.
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> "My conclusion is that the absence of contributory negligence is made an essential part of plaintiff's cause of action by the substantive law of Illinois and this substantive rule, declared by the courts of Illinois, must be recognized and followed by the federal courts. Being substantive law, neither the Congress nor the Supreme Court has power to declare it to be other than the courts of Illinois have established it nor to undermine or destroy it by procedural requirements."[8]

Likewise the First Circuit Court of Appeals in *Sampson v. Channel*[9] holds that contributory negligence is a matter of substantive law governed by the applicable state law. This solution is entirely reasonable and consistent with *Erie R. R. Company v. Tompkins*.

Whether the defense of the statute of limitations, laches, contributory negligence and *res adjudicata* should be set forth affirmatively in the answer, or may be raised by motion to dismiss when the defect appears on the face of the pleading, is a disputed question. There are plenty of authorities on both sides.

The new Colorado code has adopted the federal rules almost word for word, including rule 8, sub-division (c), thus affirming what appears to have been the Colorado rule that contributory negligence must be pleaded as a defense.

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[6] 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938).
[7] 25 F. Supp. 1 (E. D. Ill. 1938).
[8] *Ibid.* at 3 and 5.
[9] 110 F. (2d) 754 (C. C. A. 1st, 1940), cert. den. 310 U. S. 650, 60 S. Ct. 1099, 84 L. ed. 1415 (1940).

One of the most revolutionary provisions of the new rules is pre-trial procedure, a device based directly upon what in England has been known as "summons for directions," and introduced in the local courts in Detroit previous to its incorporation in the federal code. Experience with it had also been highly successful in Boston, where it was introduced for the purpose of, and succeeded in breaking the jam and speeding the disposition of a very overcrowded docket. In my court it has been a matter of ordinary routine, adapted to most every type of case, and now being extended to non-jury cases. The object of the rule, of course, is to require the parties before trial to disclose all legal and factual issues which they intend to raise at the trial, except those involving privilege or impeaching matter. This is most graphically illustrated in a recent case in the federal court of Oregon. I refer to *Burton v. Wyerhaeuser Timber Company.*[10]

That was an action to recover damages for a disabling acid burn on the plaintiff's hand. At the trial a witness for the defendant was allowed to demonstrate before the jury that a small amount of muriatic acid placed on his hand and allowed to remain for several minutes could be washed off without any damage. This was held to be error, because neither the court nor opposing counsel was apprized either at the pre-trial hearing or in advance of trial that such a demonstration was contemplated, thus depriving the plaintiff of the opportunity to meet the demonstration by evidence or demonstration to the contrary, and because it deprived opposing counsel and the court of the opportunity to check, or have checked, the acid used for the demonstration to determine whether it was the same in kind, quality, and strength as the acid which the plaintiff contended caused his burn. For this reason the trial court held the plaintiff was prevented from having a fair trial, and on its own initiative, in accordance with rule 59 (d), ordered a new trial. The court also observed that the fact that plaintiff was burned by sulphuric acid, and not muriatic acid, should have been disclosed at the pre-trial hearing, and failure so to do was contrary to the spirit of the new rules that surprise should be eliminated as a trial tactic.

At pre-trial I require counsel to state his facts and theory, name witnesses he will call and make a general statement of what each witness will testify to. All questions in respect to documentary evidence are discussed and agreed to if possible, and physical examination and expert testimony agreed upon. I never attempt to force a settlement. It is not necessary, because the attorney who has a weak case is fully apprized of it, and the case is soon settled. After all this, an order and stipulation is drawn by the court from its notes and submitted to counsel, and if agreed upon becomes an order and part of the record. No stenographer is in attendance. It has been held in *Silvera v. Broadway Department*

[10] 1 F. R. D. 571 (D. Ore. 1941).

Store[11] that under pre-trial procedure the court can dismiss when the admitted facts and proof show no cause of action.

In this district pre-trial conferences have been held in ninety-two cases. Forty were disposed of after pre-trial and the trial of the balance greatly shortened. I have been rather strict in granting motions for bills of particulars, discovery, and so on, and have advised counsel that the information desired will be made fully available to them without trouble at the pre-trial conference, if they will be patient and wait. In *Frank v. Geisy*[12] it was held that limitations of issues at pre-trial conference bars consideration of other questions on appeal.

One outstanding feature of the new rules is the treatment of depositions and discovery. The new practice provides five methods, depositions or examinations before trial, interrogatories, production and inspection of documents and other objects, requests for admissions and physical and mental examinations.[13]

The object of discovery is to afford a means to secure evidence which the moving party needs in support of his case or defense, and also for procuring information which may be inadmissable as such at the trial, but which may be of material help in preparing for trial; consequently, the moving party may take depositions not only for the purpose of obtaining evidence on issues on which he has the burden of proof, but also to inquire into matters relating to the case of his opponent, and the mere fact the matters regarding which discovery is sought happens to be within the knowledge of the moving party is no objection to taking of the deposition of the adverse party, or filing interrogatories in respect thereto.

The rules contemplate a liberal discovery by all parties, and it is held the test of relevancy in a motion for discovery is not as strict as that which governs the admissibility of evidence upon a trial.[14]

The general objection that the interrogatories constitute a fishing expedition is now of no avail.[15] It has also been held that one party should not be allowed to compel another to make research, compilation of data or statistics for him, which he might equally as well make for himself.[16]

On the other hand, these rules may not be used in such a manner as to penalize the diligent and place a premium on laziness. They were not intended to be made the vehicle by which one litigant can make use of his opponent's preparation for trial.

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[11]35 F. Supp. 625 (S. D. Calif. 1940).
[12]117 F. (2d) 122 (C. C. A. 9th, 1941).
[13]Rules 26 to 37, inclusive.
[14]Lewis v. United Air Lines Transportation Co., 27 F. Supp. 946 (D. Conn. 1939).
[15]Laverett v. Continental Briar Pipe Co., 1 F. Supp. 80 (E. D. N. Y. 1938); Boysell Co. v. Hale, 30 F. Supp. 255 (S. D. Tenn. 1939).
[16]Coca Cola Co. v. Dixi-Coco Laboratories, 30 F. Supp. 275, 279 (D. Md. 1939).

The reasons for all this are obvious. Very often it is not sufficient to have knowledge of the facts, but it also may be necessary to transform them into such shape as to render them admissible as evidence. Likewise it is within the spirit of the new rules to diminish the time and expense of trials by ascertaining in advance to what extent facts will be admitted by the opposing party.

Requirements for admissions have a definite object, for if the party on whom the requirement is made is familiar with the facts, or has the means of ascertaining them, there is no reason why he should not admit the truth under the threat of being required to recompense the adverse party for the expense incurred in proving the facts at the trial, the theory being that a lawsuit should not be conducted as a controversy at arm's length, or a game of chess in which the most skillful player wins.

A recent case on this subject is *Walsh v. Connecticut Mutual Life Insurance Company.*[17] This was an action on a life policy for double indemnity for accidental death. The defenses were that the insured had sustained personal injuries and had used alcoholic stimulants to excess and had been treated therefor, contrary to statements made in the applications for the policy, and that death resulted from alcoholism and disorderly conduct. The wife, bringing the suit, was ordered to answer a request for admission as to whether or not her husband suffered a fracture of the jaw, the court holding such an admission was not testimony, was not a confidential communication, and was solely for the purpose of the action; that it did not constitute an admission by her for any other purpose, and might not be used against her in any other proceedings. As the court points out, the case illustrates the wisdom of the new rules, because if the plaintiff answered affirmatively the defendant's request for admissions, the defendant would be entitled to a judgment without delay, and further, that a party should be required to deny or admit the truth of any relevant matters set forth in the pleadings that otherwise would delay the trial and cause the defendant unnecessary expense.

Students have doubtless discovered there is a sharp difference between bills of particulars in code states and bills of particulars under the new rules. Under the codes, bills of particulars are ordered after issue is joined, for the purpose of furnishing information necessary to prepare for trial, while under the new rules an application for a bill of particulars lies only before answer is served, the purpose of such relief being to obtain only such information as is required by the moving party to enable him to plead, while information needed in the preparation for trial is secured by interrogatories.

One of the important innovations in the new rules is the so-called third party practice, which makes it possible to avoid circuity of action

[17] 26 F. Supp. 566 (E. D. N. Y. 1939).

by enabling a defendant to bring in as a third party defendant, either a person who is liable over to him on the plaintiff's claim, or who is originally liable to the plaintiff. In connection with this a vital question arises: Is it necessary that there exist an independent ground of federal jurisdiction for third party complaint; that is, if the original suit is based upon diversity of citizenship, must there be a like diversity between the defendant and the third party defendant. This question turns on whether a third party proceeding is ancillary to the main suit or is to be considered as an independent proceeding.

No court of appeals has passed upon this question as yet. Most of the district courts, however, have adopted the view that a third party proceeding is ancillary to the main action and does not require an independent ground of federal jurisdiction. To illustrate: In *Carter Oil Company v. Wood*[18] a non-resident grantee of an oil lease brought suit to restrain resident defendants from interfering with the grantee's rights. The defendants filed a counterclaim against the grantee and his grantor alleging that the grantor was not the owner of the property and that the grantee's title was held merely to secure the defendants' indebtedness, which they were willing to pay. It was held that the grantor was properly made the defendant in the counterclaim, and that the district court had jurisdiction of the subject matter of the counterclaim, notwithstanding absence of diversity of citizenship between the original defendant and the grantor. Where the jurisdiction attaches on the filing of the original bill, any cross-bill or counterclaim looking to a complete adjudication of the issues presented by the complaint rests on the original jurisdiction and is not affected by the citizenship of the respective parties, even as to third parties brought in by virtue of rules authorizing such action.

Whitmire v. Partin[19] was an action for personal injuries resulting from an automobile accident, jurisdiction being based on diversity of citizenship. There it was held that defendant might bring in the driver of the car in which the plaintiff was riding at the time of the accident as a third-party defendant, although the latter and the plaintiff were citizens of the same state. An independent basis of jurisdiction is not necessary to support a third-party proceeding.[20]

Rule 43, relating to evidence, provides that the federal court shall apply the federal or state law of evidence, whichever happens to be the most liberal at the moment. Rulings on questions of evidence are made in the course of the trial, so very few opinions are rendered on this rule

[18]30 F. Supp. 875 (E. D. Ill. 1940).
[19]5 Fed. Rules Serv. 14a. 513 (E. D. Tenn. 1941).
[20]See also Sklar v. Hayes v. Singer, 1 F. R. D. 594 (E. D. Pa. 1940); Bossard v. McGwinn, 27 F. Supp. 412 (W. D. Pa. 1939); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939); Satink v. Holland Township, 28 F. Supp. 67 (D. N. J. 1939).

by trial courts, and the circuit courts of appeal have not yet been called upon to construe this new rule. It will be observed, however, that the rule merely enlarges the rules as to admissibility of evidence. It does not say what is excluded, but only that which is to be admitted under either the federal decisions or the statute or decisions of the state in which the trial is had.

An interesting question arose in Texas in *Elliott v. United Employers Casualty Company*.[21] The suit against the casualty company was to recover advances made by plaintiff to a third party, which plaintiff claimed the defendant casualty company assumed to repay. Judgment was for the defendant. Plaintiff filed a motion for a new trial and moved to take the depositions of two officers of the defendant company, to be used on the hearing on the motion, alleging that the two officers left the jurisdiction of the court, evaded service of subpoenas, and thus avoided testifying at the trial. The court held the charge that officers of the defendant corporation evaded process was sufficient to require the court in some manner to ascertain what their testimony would have been if present at the trial; that under rule 43 (e), and probably under subdivision 2 of 59 (a), depositions on motion for new trial might be taken.

Except for a few lawyers oblivious to the fact that the function of the courts is to administer justice, rather than to develop an artificial and useless science, the new rules have met with universal approval. In addition to possessing the virtues of uniformity, they constitute the quintessence of simplicity. They have cast into oblivion much abstruse and laborious learning dealing with forms of action, refinement of pleadings, joinder of parties, causes of action, and other similar topics too numerous to mention.

Proof that the new procedure is satisfactory is indicated by the Supreme Court in the new Orders in Bankruptcy, which provide that the rules shall be followed as nearly as may be in proceedings under the bankruptcy act. Later the same court made them applicable to copyright suits. The greatest tribute, however, that has been paid to this reform is that they have been adopted in several states, including Colorado. This last fact was one of the principal causes of the recent receipt by the Colorado Bar Association of the American Bar Association Award of Merit.

It is not too optimistic, I trust, to imagine that in the not too distant future a uniform, simple procedure in all state and federal courts will be adopted. When that consummation is reached, inconsequential controversies over points of pleading, practice and procedure, which delay the solution of substantial rights, and which are of no importance to the litigants, will be largely eliminated.

[21] 35 F. Supp. 781 (S. D. Tex. 1940).