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AMENDING THE FEDERAL RULES OF CIVIL PROCEDURE

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Introduction

The Advisory Committee appointed by the United States Supreme Court to draft the Federal Rules of Civil Procedure has suggested a number of amendments to these rules. Necessarily, these proposed amendments are of real practical importance to the legal profession in general and particularly to lawyers who appear in civil cases before the federal courts. This is none the less true though these amendments, at the present writing, have not yet been approved by the Supreme Court.

An endeavor is made in the present article to analyze, and (in a sense) to appraise, the philosophies, the viewpoints, the considerations which have prompted the Committee to formulate these proposed amendments. It is, thus, somewhat in the nature of a study in the why's and wherefore's. Since this author is a member of the Advisory Committee, the approach must be that of one from the inside looking out; but, for any views herein expressed, this author assumes sole responsibility. Free use, though, has been made of the material contained in the Committee's elaborate notes on the proposed amendments without quotes or acknowledgement.

The General Philosophy of the Amendments

The Federal Rules of Civil Procedure, which went into effect on September 16, 1938, have now attained the respectable age of eight years. During these years literally hundreds of cases have been decided by the federal courts, high and low, applying and interpreting the rules. Thus has been built up a formidable array of case-law in the field. In many instances, though this was to be expected, these cases show a regrettable lack of harmony.

When the question of the desirability of amendments arose, as inevitably this question would arise, widely divergent views were prompt-

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ly and forcibly expressed. According to one school of thought, the Rules had worked well in practice, they had been rather generally praised, and any attempt to amend them would be immature and unwise. At the other end of the scale, the contention was voiced that the Rules were largely experimental, that they had worked very well in some respects, very badly in others, and that, accordingly, a thorough revision was highly desirable, or, as the doctors would put it, clearly indicated.

The Committee was unable to agree completely with either of these two extreme views. Accordingly, it took its stand rather on a middle ground. The Committee felt that there should, at this time, be no mere tinkering with the Rules when the original rule seemed clear and workable; no changes of verbiage were made solely for added felicity of expression.

When, however, a rule had not worked well in practice, and a thoroughgoing revision was deemed advisable, the Committee has not hesitated to redraft this rule completely. An example of this will be found in Rule 12, dealing with defenses and objections and how and when these are to be presented. At first the Committee formulated alternative suggestions, but, upon further discussion, it was decided to formulate a definite and concrete new rule.

Not infrequently, under a rule liberalizing common law pleading, practices grew up which on pragmatic criteria were adopted in many federal courts. These practices were carefully considered by the Committee. When such a particular practice was deemed to accomplish a desirable end, the Committee has suggested an addition to the rule authorizing this practice. Thus, in connection with Rule 12(c), Motion for Judgment on the Pleadings, a suggested addition to the rule authorizes a so-called "speaking motion," when matters *outside the pleadings* are presented to and received by the court.

When a procedural rule is drawn in broad, general terms that are seemingly clear, the rule is easily understood and its apparent simplicity commends itself. Yet, when this rule is applied in practice to substantially differing factual situations, some trouble must inevitably arise. On the other hand, if the rule is drawn in many water-tight, separate compartments, each designed to cover (and to cover only) a single specific situation, the rule becomes unduly prolix and immediately necessitates an analysis of each situation in order to determine the particular compartment of the rule into which the situation falls. And no draftsman, however wide his experience and however lively

his imagination, can possibly envisage every situation which can come forth in the abundant lap of the dim future.

When, in the light of the preceding paragraph, ambiguities and obscurities arose (as it was to be expected that some should), the Committee did not hesitate to face these ambiguities and obscurities. If these seemed unlikely to arise again save in very infrequent instances, or if they came up on what appeared to be an obvious distortion of the rule by an individual judge, the disadvantages which would accompany any change were deemed to outweigh the attendant advantages. We often read of, and hear about, fool-proof rules of pleading; but, in reality, they are as mythical as Santa Claus, Jack Frost and universal peace or prosperity.

When, however, such an ambiguity or obscurity was indeed real and more than apt to recur with substantial frequency, the Committee promptly drafted an amendment designed to obviate this evil. A number of illustrative examples might be readily cited. Thus, some doubt arose as to whether the simple, model forms prescribed by the Committee under Rule 84 could be attacked by a motion for more definite statement. A suggested amendment makes it quite clear that these forms are safe from such attacks and that further information, when really needed, can be had by resort to the various processes for discovery set out in the Rules. Again, a doubt on the part of many judges as to the scope of Subsection (b) of Rule 26, Depositions Pending Action, is resolved by the suggested addition to this rule of the following sentence: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Judicial Decisions

Naturally, the Committee could not utterly disregard the host of judicial decisions interpreting and applying the Rules. These were carefully collected, digested and screened by the Committee's group of experts, headed by Professor Moore of the Yale Law School, a recognized authority in the field of federal procedure. Judge Clark, the reporter of the Committee, also made definite recommendations, in the light of these cases, as to desirable amendments.

Of course a decision by the United States Supreme Court interpreting a rule binds all the lower courts. When, in such a case, the original rule thus interpreted reached a result that seemed undesirable to the Committee, an amendment of the rule seemed to be in order. Such

an amendment is in no sense a reflection on the Supreme Court. Thus, the Committee has suggested the addition to Rule 77, District Courts and Clerks, of this sentence:

> "Lack of notice of the entry by the clerk shall not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed by law or by these rules, except as permitted by Rule 73(a)."

This addition was prompted by the decision of the Supreme Court in *Hill v. Hawes,* 320 U. S. 520. Nor has the Committee hesitated to suggest amendments which (in its opinion) would negative the undesirable results of cases decided by the Supreme Court before the Federal Rules of Civil Procedure went in effect. Thus, Rule 50, Motion for a Directed Verdict, has an amendment suggested by the Committee for the express purpose of eliminating the extremely awkward fiction evolved in *Baltimore & Carolina Line v. Redman,* 295 U. S. 654, in order to minimize the evil effects of the Supreme Court's very unfortunate decision in *Slocum v. New York Life Insurance Co.,* 228 U. S. 364.

Probably the clearest case for the propriety of an amendment occurred when there were divergent interpretations of an important rule by different Circuit Courts of Appeals. The Committee, in such a situation, suggested an amendment expressly adopting the interpretation which it thought most clearly carried out the spirit of the rule. Thus, under Rule 41, Dismissal of Actions, there was a wide divergency as to the power of the trial judge, sitting without a jury, to pass on conflicts of evidence and the credibility of witnesses. Compare, for example, *Young v. United States,* (C. C. A. 9) 111 F. (2d) 823, with *Federal Deposit Insurance Corporation v. Mason,* (C. C. A. 3) 115 F. (2d) 548. The Committee here preferred the interpretation of the *Young* case (followed also in the Sixth and Seventh Circuits) and a suggested amendment expressly gives the power in question to the trial judge. Again, the addition of a sentence was suggested at the end of subdivision (b) of Rule 50, Motion for a Directed Verdict, to avoid the unfortunate situation involved in *County of Allegheny v. Maryland Casualty Co.,* (C. C. A. 3) 132 F. (2d) 894 and to adopt the practice followed in *McIlvaine Patent Corporation v. Walgreen Co.,* (C. C. A. 7) 138 F. (2d) 177.

In some instances, when the meaning of a rule was not altogether clear, a strong current of judicial authority has run in favor of a certain interpretation. When reason also seemed to favor such an interpretation, the Committee has recommended an amendment expressly

adopting such an interpretation. Thus, there was some doubt under Rule 50, Motion for a Directed Verdict, whether, when the trial judge had erroneously refused to direct a verdict for the defendant and no motion for judgment *non obstante veredicto* has been made, the Circuit Court of Appeals could terminate the case by ordering the court below to enter final judgment in favor of defendant or whether the power of the appellate court was limited to granting a new (and usually futile) trial. Several Circuit Courts of Appeals held that, under the original rule, the appellate court had power to terminate the case by directing final judgment. *Conway v. O'Brien,* (C. C. A. 2) 111 F. (2d) 611; *Howard University v. Cassell,* (Ct. of App. of Dist. of Columbia) 126 F. (2d) 6; *United States v. Halliday,* (C. C. A. 4) 116 F. (2d) 812. The suggested amendment expressly recognizes the existence of this (seemingly desirable) power.

Common Law Technicalities

The last sentence of Rule 1, Scope of Rules, reads: "They (the Rules) shall be construed to secure the just, speedy and inexpensive determination of every case." The original rules, accordingly, crucified many of the refined subtleties and useless distinctions so dear to the heart of the lovers of common law pleading. To a less marked degree, the same statement might be made as to many technicalities encrusted by judicial decisions on Code Pleading. This same spirit prompted the Committee to suggest several amendments directed to the same purpose.

According to the Committee's notes on the proposed amendments, "Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar." Much of this confusion arose from attempts to distinguish the motion for more definite statement and the motion for a bill of particulars as mutually exclusive remedies for attacking a defective pleading, with the resulting (and often harmful) necessity of resolving correctly this distinction whenever one of these remedies was sought. When a clear cut distinction between the two was made, it was usually held that the motion for more definite statement was proper only for the purposes of pleading, while the motion for a bill of particulars was in order solely for the purposes of trial. The Committee has met these objections squarely. A suggested amendment abolishes the bill of particulars, leaving its former functions (whatever these were) to the adequate discovery

procedure freely available under the Rules. The precise scope of the motion for more definite statement is clearly set out in a suggested amendment providing that this motion lies only "where the pleading (attacked) is so vague or ambiguous that the party cannot reasonably be required to frame a responsive pleading."

Rule 60, Relief from Judgment or Order, as originally drawn, also gave rise to no little trouble. Much of this arose from confusion as to whether three ancient writs *(coram nobis, coram vobis* and *audita querela)* and two old so-called bills (bill of review and bill in the nature of the bill of review) were still in effect as a means of obtaining relief from judgments. Few lawyers (or even judges) were capable of determining the exact functions of, and the precise distinctions between, these restless relics of archaic asininity. Again the Committee (figuratively speaking) took the bull by the horns by suggesting the incorporation of the following new sentence into the rule: "Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action." For an admirable article in this field, see Moore and Rogers, *Federal Relief from Civil Judgments,* 55 Yale L. J. 623.

Outside Suggestions

When the decision was reached that the Advisory Committee should suggest amendments to the Rules, a widely publicized invitation was extended to lawyers, judges, teachers, clerks and Bar Associations to send suggestions to the Committee. This invitation was extended again when the Committee formulated and published its first set of proposed amendments; it was further renewed when the second set of proposed amendments was published. The response has been more than generous, it has been heart-warming and little short of startling. Suggestions flowed in literally by the hundreds, from almost every State in the Union. Every suggestion, though some where necessarily foolish on their faces, was considered by the Reporter and the Committee's Board of Experts. Every suggestion was debated and passed on in meetings of the entire Committee. Any doubting Thomas will find the signs and wonders necessary for belief in the truth of this statement by even a casual reading of the Committee's Notes on the Proposed Amendments.

From these suggestions the Committee derived an immense amount of help. Most of them were decidedly constructive and were based on

actual experience with the working of the Rules in the courts. It was interesting, however, to note how many suggestions were based on what seems to be an inherent trait of lawyers—a preference for the local practice, even in States whose procedure is notoriously archaic.

Special heed was given by the Committee to suggestions from federal judges, not on the score of any superior wisdom possessed by members of this group but because these judges came to almost daily grips with the Rules and were in a peculiarly favorable position to testify as to the practical efficiency, or lack of it, in a particular rule. Many judicial complaints were based on the fact of undue consumption of the judge's time and labor without any compensating advantage to litigants.

Thus, the Committee has suggested the addition to Rule 75, Record on Appeal to a Curcuit Court of Appeals, of this sentence: "Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75." Several federal circuit judges suggested this amendment, which has obvious advantages, as to perfecting the record of appeal, in preventing delay and needless expense. Again, it has been held by some courts that, under Rule 52, Findings by the Court, the requirement of separate findings of fact and conclusions of law by the judge in jury-waived cases was mandatory and that these could not be included in the opinion. *Detective Comics, Inc. v. Bruns Publications,* (S. D., N. Y.) 28 F. Supp. 399; *Pennsylvania Co. v. Cincinnati and Lake Erie Railroad Co.,* (S. D., Ohio) 43 F. Supp. 5. A contrary (and, it is believed, a more reasonable) decision was reached in other cases. *Green Valley Creamery v. United States,* (C. C. A. 1) 108 F. (2d) 342; *Carter Coal Co. v. Litz,* (C. C. A. 4) 140 F. (2d) 934. Some federal judges complained of the useless hardship imposed on them by the necessity of making these separate findings and conclusions, so a suggested amendment permits the incorporation of findings of fact and conclusions of law in an opinion or memorandum of decision. Rule 45, Subpoena, subdivision (d), Subpoena for Taking Depositions, Place of Examination, reads: "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of court." District judges criticized this sentence on the score that in practice is was oppressive and unnecessary. A suggested amendment abolishes the necessity for any court order in this situation by deleting the objectionable sentence.

Verbal Changes

As has been previously indicated in this article, the Committee was quite wary about tinkering with the rules by mere verbal changes. Some such changes, however, seemed desirable for needed clarification; others were essential when an amendment to one rule involved a change in another rule; and some were made to correlate a rule with another rule in the same, or in a related, field. Sometimes a slight change was made to extend or restrict the scope of a rule. In rare instances, a word, erroneously used in the original rule through inadvertence, has been changed.

Thus, a slight change in the wording of Rule 7, Pleadings Allowed, Form of Motions, made it quite clear (as the Committee always intended) that the compulsory reply to a counterclaim in an answer need be a reply *only* to the counterclaim and not a reply to the other allegations in the answer containing the counterclaim. The rather cryptic phrase, "not the subject of a pending action," in Rule 13, Counterclaim and Cross-Claim, gave trouble, so for this the Committee suggested the substitution of these clearer words: "except that such claim need not be so stated if at the time the action was commenced the claim was the subject of another action pending in another court."

An amendment to Rule 26, Depositions Pending Action, required slight verbal changes in Rule 36, Admission of Facts and of Genuineness of Documents; and, in like manner, an amendment to Rule 66, Receivers, necessitated slight changes in Rule 41, Dismissal of Actions.

A sentence is added to Rule 45, Subpoena, to correlate this rule to Rule 26, Depositions Pending Action, so that a person subpoenaed under Rule 45 is afforded the same measure of protection set out in Rule 26. Another addition to Rule 13, Counterclaim and Cross-Claim, subdivision (i), Separate Trials, Separate Judgments, makes much plainer the interrelationship of this subdivision and subdivision (b), Judgment at Various Stages, of Rule 54, Judgments; Costs.

The scope of Rule 52, Findings by the Court, is *restricted* by a slight change in this rule which makes it crystal clear that findings of fact and conclusions of law are *not* required upon the decision of a motion. An example of a change *extending* the scope of a rule is found by the addition to Rule 24, Intervention, subdivision (a), Intervention of Right, of these words: "or subject to the control of or disposition by;" for this addition brings within the operation of the Rule the situation where actual custody of the property in question is lodged in some of-

ficer or agency other than the court in which the instant action is pending, yet the actual power to control and dispose of the property is vested in that court.

Finally, Rule 13, Counterclaim and Cross-Claim, subdivision (a) Compulsory Counterclaims, contains this phrase "at the time of *filing* the pleading." The word "filing," here, was inadvertently used; the proper word is "serving" so an amendment makes this substitution accordingly.

Conclusion

These scattered thoughts, though discussed under separate italicized headings, have been penned with the hope that they may throw some light on the methodology of the Advisory Committee in its task, one of admitted difficulty and danger, in proposing Amendments to the Federal Rules of Civil Procedure. A back-stage visit during a theatrical performance may well lead to a better understanding of the performance. And this is none the less true, even if the play be thereby robbed of some of its foot-light glamor and glory. And this author, admittedly a highly prejudiced witness, may, perhaps, be pardoned for venturing the view that the adoption of these proposed amendments will materially add to the efficiency of the Rules, and, by that same token, may even lessen the necessity for any further amendments in the near future.