UNIVERSITY OF NEWARK
LAW REVIEW

VOLUME IV MAY, 1939 NUMBER 3

SOME ASPECTS OF THE NEW FEDERAL RULES AND NEW JERSEY PRACTICE.*

The problem of reform in procedure is not new to New Jersey notwithstanding the fact that the State is considered to be one of the last adherents to the common law system of pleading. Since the Practice Act of 1903,[1] its amendment in 1912[2] and its counter-part, the Chancery Act of 1915,[3] the practice of law in New Jersey, both in the law and equity courts, is a far cry from the old common law procedure. When the Legislature adopted the Practice Acts and the Chancery Act they were greeted with the acclaim which meets all desired reforms. It was thought that the straitjacket of common law pleading both at law and in equity had been removed and that we had modernized ourselves instead of lagging behind the pace of even our English ancestor. The new spirit was declared in the provision of the statute that the Practice Act "shall be liberally construed to the end that legal controversies may be speedily and finally determined according to the substantive rights of the parties."[4] The millenium had arrived.

It is fair before discussing the new Federal Rules to survey briefly the results of the reform in New Jersey practice. The

* This paper was presented by Mr. Kaufman at the Institute on Federal Rules of Civil Procedure held in Newark, New Jersey, on February 16 and 17, 1939. It has been edited for the purpose of this publication.

1. P.L. 1903, c. 247.
2. P.L. 1912, c. 231.
3. P.L. 1915, c. 116.
4. *Supra*, note 2.

design of the rules does not vary substantially from the plan of the several New Jersey statutes. Consequently some measure of their success may be gathered from our own experience. Many years have elapsed since the adoption of our reformed pleading system. One beneficial result has been accomplished: a judgment is rarely entered without a trial on the merits; clearly an improvement over the rigors of the common law pleading. On the other hand, lawyers became in the main a race of sloppy pleaders. A lawyer who was retained in the case had no longer need to study it as he did prior to 1912. Pleading a wrong cause of action was not fatal because liberal amendments were permitted and thus, year after year, with slight exception, pleading in New Jersey became a lost art.

Entitling all actions under New Jersey practice "At Law" does not affect the vital distinctions between a contract action and one of trespass. Replevin differs from covenant; and trover and conversion differs from ejectment. It is still necessary to plead the essentials of a common law action—in plain English and, perhaps, layman's English, it is true, but the essentials must still be there. "Action at Law" is nothing but a label on a packake. The package is just the same as it was many years ago, stripped of only a few of the "whereases".

It is still important to study pleading from its common law aspect. It contains within its scope a golden treasury of knowledge, and in the hands of a skillful lawyer can be a formidable weapon. Unless law schools give the art its proper place it is apt to sink into a "Serbonian Bog" to be rediscovered some hundred years hence by daring explorers of the type of the late Professors Ames and Langdell.

We must hope, also, that the interpretation of the new Rules will meet with more success than the Uniform Laws, for in some respects their uniformity is only in the title.[5] It is

5. *E.g.* Uniform Fraudulent Conveyance Act, sec. 10; Fisher v. Brehm, 100 N.J.L. 341 (Uniform Negotiable Instruments Law).

already apparent how confusing the interpretation of some of the Rules will be[6] until, of course, a final decision is obtained from the Supreme Court of the United States. But it will be rare indeed that a case will go to the highest court on an issue of pleading. These questions will be merely interlocutory during the course of the case and as such are not appealable.[7] An additional impediment to the creation of a uniform law of pleading results from the adoption by the Federal Rules of the principle of harmless error.[8] Application of both of these doctrines in New Jersey has resulted in an almost complete absence of decisions by the high courts on pleading questions.[9] The result will be that in the Federal District Courts there may be as much diversity in the law of pleading as there are districts.

Whether or not the lack of a uniform pleading law is important resolves itself into a question of approach, and the same problem is presented in treating many of the Federal Rules. It is true of the basic issue of procedural reform in the original pleading, for whether or not it should be required to contain the essential allegations of a common law cause of action is a problem of a particular legal philosophy. Some would have it that the lawyer be required to plead exactly all those elements of an action which were necessary at Common Law. On the other hand the new Federal Rules go to another extreme. It is probable that the efficient administration of the rules will require the courts to discover a happy hunting ground between the two poles.

---

6. *Cf.* cases cited in notes 38-42 *infra.*

7. *Cf.* Leader v. Apex Hosiery Co., 25 A.B.A.J. 157 C.C.A. 3rd (1939) where the Court held that an order of the District Court under Rule 34 for the discovery and production of documents for inspection, etc., was an interlocutory order and therefore not appealable.

8. Rule 61.

9. Rev. St. 1937, 2:27-363 (no reversal for non-prejudicial error) Hoffman Associates, Inc. v. Snook, 112 N.J.L. 68 (E. & A. 1934) (necessity of final judgment as to issues and parties in Actions at Law).

This discussion of the rules will govern a limited field of pre-trial practice only. Comparable issues can be raised in many of the other rules. Of primary concern, however, is the purpose and scope of the Federal Rules as they may be reflected in similar rules and case made law in New Jersey practice and procedure. Recent decisions of the United States Supreme Court[10] in many fields require a re-examination of the vast body of state law which to Federal Court practitioners had become relatively unimportant. Methods of procedure once used were those devised by the law of the State in which the Federal Court was sitting and the substantive law was taken from that body of law which had been created by the Federal Courts, *sui generis,* as it were. The shift is now pronounced. We now are to use the procedural rules of the Federal Courts and the substantive law of the States. Instead of looking to New Jersey practice, therefore, we must examine New Jersey substantive law, bearing in mind always that the Federal Court and the State Court, each in its sphere, is supreme. The Federal Court determines the method of procedure, but what the substantive law of the State is, is determined conclusively by the courts of the State whose law is presented for application.

RULE 3: COMMENCEMENT OF ACTION[11]

This Rule provides that a civil action is commenced by filing a complaint with the court. Of course, in view of Rule 2, which combines what were formerly equity and law actions into one form of action, Rule 3 applies to every action instituted

10. Note 46 *infra.*

11. No attempt is made to cover all phases of all of the rules in the pre-trial practice group. Rule 1 deals with the scope of the rules. Rule 2 is concerned with the merger of law and equity actions and provides that there shall be one form of action. This latter rule is particularly important in connection with jury trials under Rules 38 and 39 but the subject is beyond the scope of this discussion.

in the court which is subject to the application of the rules of the district courts.

Rule 3, though brief and simple in its language raises a question which must necessarily be the subject of some controversy and will be particularly important to New Jersey lawyers. Under the Rule, the first step in an action is the filing of the complaint, and the action is thereby commenced. In New Jersey on the law side, however, an action at law is commenced when the summons is signed and sealed in the name of the judge in good faith with the purpose of making immediate service.[12] A suit in Chancery is commenced by the filing of a bill, issuance of process and a bona fide attempt to serve.[13]

Generally related to the problem of the commencement of the action is the question of the effect of filing a *lis pendens*. Under the New Jersey rule a *lis pendens* begins to take effect from the service of the subpoena and not from the time of filing the bill or issuing the subpoena.[14] The problem of *lis pendens* is left untouched by the Federal Rules. Under the Federal cases *lis pendens* is a matter of substantive law and is to be regulated by State rules.[15]

This conflict between the rule and the New Jersey practice will be particularly important when a question of the statute of limitations is raised. The New Jersey statute of limitations provides with respect to a contract action, for example, that it shall be commenced within six years after the accrual of the cause of action.[16] It is obvious, therefore, that the time of the commencement of the action may be of vital importance and

12. County Adm'x v. Pacific Coast Borax Co., 68 N.J.L. 273 (E.& A. 1933).

13. Delaware River Quarry & Construction Co. v. Board of Chosen Freeholders, 88 N.J.Eq. 506 (Ch. 1918).

14. Haughwout v. Murphy, 21 N.J.Eq. 118, *aff'd*, 22 N.J.Eq. 531 (E. & A. 1871); Delaware River Q. & C. Co. v. Mercer Freeholders, note 13, *supra*.

15. U. S. v. Calasieu Lumber Co., 236 Fed. 196, C.C.A. 5th (1916).

16. Rev. St. 1937 2:24-1.

that that time may differ depending upon whether the suit is brought in the Federal courts or in the State courts.

The statute of limitations applied in the Federal Court has been that of the state in which the court is sitting, a feature of substantive law,[17] and if that procedure continues the New Jersey practice will not be affected by the Federal Rule.[18] It is possible, however, that although the statute of limitations may be treated as substantive law the question of whether or not an action is actually commenced may be one of procedure. In that posture the issue would be controlled by the law of the forum and the Federal Rule of procedure would apply.

If the action is brought in the Federal Court and the Federal Rule is applied, the statute of limitations is modified to the extent that the time between the filing of the complaint and the taking of the other steps made necessary by the New Jersey statute is avoided. Under Rule 4, however, an attempt has been made to eliminate the difficulties which have just been discussed. Whether or not, however, the removal of the conflict will be actually accomplished will depend in a great measure upon the administration of the clerk's office in performing the ministerial acts required in connection with issuing the summons.

RULE 4: PROCESS

Rule 4 is divided into eight sections and deals with the various incidents to process, its issuance, form, service, return and amendment. For the most part no difficulties are presented, since in several instances the rule specifically provides that the

17. Michigan Insurance Bank v. Eldred, 130 U.S. 693, 9 S. Ct. 690, 32 L. Ed. 1080 (1889). For purposes of conflicts of laws, statutes of limitation are procedural. McClellan v. North, 14 N.J.Misc. 760, *aff'd*, 118 N.J.L. 168 (E. & A. 1937); Summerside Bank v. Ramsey, 55 N.J.L. 383 (S. Ct. 1893).

18. See discussion under Erie R.R. Co. v. Thompkins, *infra*.

summons and complaint may be served in the manner prescribed by the law of the state in which the service is made for similar service upon a defendant in an action brought in the courts of general jurisdiction of that state [19]

The Rule first provides for the issuance of summons and here the attempt is made to avoid the conflict which may be created by Rule 3. The Rule states that upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specifically appointed to serve it. This requirement that the clerk issue the summons forthwith upon the filing of the complaint is felt will solve the problem of the statute of limitations, because as a practical matter the clerk will be required to take those steps which are also prescribed by the New Jersey cases. In theory at least, however, the problem remains.

Section b of Rule 4 provides for the form of summons. It is a form similar to that which is used in our courts

Section c of Rule 4 provides that the service of process shall be by a United States marshal, his deputy, or by some person specially appointed by the court for that purpose, and such special appointments are to be made freely when substantial savings and travel fees would result. In New Jersey, of course, the original process is served by the sheriff in all cases except in courts of inferior jurisdiction [20]

In a recent case decided under this Rule,[21] the court refused to permit service to be made by the county sheriff or any of his deputies because the motion failed to designate a particular individual, his qualifications and the distance which he would have to travel in order to make the service These facts should be set out in the application.

---

19. Rule 4 (d) (2) (7).

20. Rev. St. 1937 2:27-61; Rev. St. 1937 2:20-18.

21. Modric v. Oregon & Northwestern R.R. Co., 25 F. Supp. 79 (D.C.D. Ore. 1938).

Section d of Rule 4 provides for the method of service and requires that the summons and complaint be served together and that a personal service be made. With respect to service upon an individual other than an infant or incompetent person the Rule varies substantially from the New Jersey practice. Under the New Jersey rule service in an action at law is to be made personally or by leaving a copy at the usual place of abode of the defendant.[22] In the district courts of the state service is made personally on the defendant or by leaving a copy at his dwelling house or place of abode in the presence of some person of his family of the age of fourteen years who shall be informed of its contents.[23] A third form of service has been devised in a suit in equity in this State. The process is served on the defendant personally or by leaving a copy at his dwelling house or usual place of abode.[24] The practice has also been that if the summons is left at the usual place of abode of the defendant, it is delivered "to some person thereat".[25] The uniformity which is the object of the Federal Court rules might well be taken under consideration by the Statute Commission which has been proposed for this State.

With respect to service upon an individual, Rule 4 (d) differs from the practice in each of the three New Jersey Courts which have been referred to. The Rule provides that service shall be made upon an individual personally or by leaving copies of the summons and complaint at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. The New Jersey case made rule[26] requiring the summons to be left with a person has been adopted in the Federal Rule. The Rule also provides, however, that service

22. Rev. St. 1937 2:27-59.
23. Rev. St. 1937 2:32-27.
24. Rev. St. 1937 2:29-23.
25. Heilemann v. Clowney, 90 N.J.L. 87 (S. C. 1917).
26. *Supra*, note 24.

upon an individual may also be made in the manner prescribed by any statute of the United States or by the law of the state in which the service is made. Provision is also made for service upon an agent authorized by appointment or by law to receive the service of process.

Service upon an infant or an incompetent is to be made in the manner prescribed by the law of the state in which the service is made and of course under the New Jersey law the service would be made personally in the presence of a competent person.[27]

Service upon a domestic or foreign corporation or a partnership or other unincorporated association may also be made in the manner prescribed by the state law or by delivering a copy of the summons and complaint to an officer, a manager or general agent, or to any other agent authorized by appointment or by law to receive service of process. If the statute requires mailing a copy to a defendant, it must be complied with. Under the New Jersey law the service would be made on the President or other officer for the time being or the agent, manager or person in charge of the business of the organization or association [28]

Provision is also made for service upon the United States where it is a party or upon an officer or agency of the United States. With respect to service upon a state or municipal corporation or other governmental organization thereof subject to suit, there is a slight difference from the New Jersey practice. The Rule provides that service shall be made by delivering a copy of the summons and complaint to the chief executive officer. Under the New Jersey law, when an action is commenced against a county or municipality, the summons is to be served upon the director or clerk of the board of chosen freeholders or

27. *In re* Martin, 86 N.J.Eq. 265 (Ch. 1916); Latue v. Gearhart, 11 Misc. 117, *aff'd*, 112 N.J.L. 382 (E. & A. 1933).

28. Rev. St. 1937 2:78-2.

the presiding officer or clerk of the municipality, as the case may be.[29] Here again the Federal Rule provides that service may also be made in the manner prescribed by the law of the State

Rule 5: Service and Filing of Pleadings and Other Papers

Rule 5 deals with the service and filing of pleadings and other papers and indicates the method by which this shall be done. Generally, the rules are similar to those which prevail in New Jersey. It is provided that all papers subsequent to the original complaint are to be served upon each of the parties affected thereby unless the court orders otherwise, except that no service need be made on parties who are in default unless new or additional claims for relief are asserted. Service is to be made upon the attorney unless service upon the party himself is ordered by the court. Service may be made by delivering a copy to the attorney or party or, if no address is known, it may be left at the office of the clerk of the court. It is sufficient delivery if the copy is left at the office of the attorney with his clerk or the person in charge thereof, or if no one is in charge, by leaving it in a conspicuous place. Service by mail is complete upon the mailing.

Rule 5 (c) provides that if there is an unusually large number of defendants the court may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim or matter constituting an avoidance or affirmative defense shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service

29. Rev. St. 1937 2:26-59.

thereof upon the plaintiff constitutes due notice of it to the parties.

The rule also provides that all papers after the complaint required to be served shall be filed with the clerk either before service or within a reasonable time thereafter, and filing with the court is defined as filing with the clerk except that the judge may permit the filing with him. This last provision was inserted so that notwithstanding the fact that it was after hours and the office of the clerk was closed certain types of relief could still be obtained by filing the papers with a judge. The obvious example is a restraining order which could be secured from the judge after the complaint had been filed with him.

RULE 6: TIME

Rule 6 refers to time. Subdivision (a) which deals with computation states what is the rule in New Jersey, that in computing time the day of the act, event or default after which the designated period of time begins to run is not to be included. Under our Rule the *terminus a quo* is excluded whether the terminus is a day or event.[30]

Subdivision (b) relates to the enlargement of the time period and if the enlargement is sought before the time has expired the court may extend the time with or without notice. If it sought after the time has expired it may be done on motion where the failure to act was the result of excusable neglect, except that there can be no enlargement of the time for a motion for a new trial under Rule 59 and the period for the taking of an appeal. The latter, of course, is regulated by statute.

Subdivision (c) changes the old Federal rule so that the period of time is now not affected or limited by the expiration of a term of court.[31]

---

30. McCulloch v. Hopper, 47 N.J.L. 189 (S. C. 1885); Metropolitan Life Insurance Co. v. Lodzinski, 122 N.J.Eq. 404 (E. & A. 1937).

31. Delaware L. & W. R. Co. v. Rellstab, 276 U.S. 1, 49 Sup. Ct. 203, 72

With respect to motions and affidavits, subdivision (d) provides that five days' notice of hearing shall be given unless a different period is fixed by the rules or order of the court. This of course does not apply to *ex parte* motions. When there are affidavits in support of the motion they are to be served with the motion papers and opposing affidavits are to be served not later than one day before the hearing unless the court permits service at a different time.

Subdivision (e) may present some difficulty. It provides that whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail three days shall be added to the prescribed period. This might mean that eight days' notice of motion is required when the notice is mailed. Under Rule 5 (b)[32] however, service by mail is complete upon the mailing and it is possible that the two rules are inconsistent and that the three days should not apply. Of course 6 (e) applies only when the party upon whom the service is made is required to do some act, but since that party must appear upon the return date he should be given the extra three days' notice. This possible conflict will have to wait for judicial construction. In the meantime, however, it would be well to allow for eight days' notice when the service of motion papers is made by depositing them in the mail.

Rule 7: Pleadings Allowed; Form of Motions

Under Section (a) of Rule 7 the pleadings are cut short at the answer unless a counterclaim is filed in the answer and

---

L. Ed. 439 (1928); Zimmern v. United States, 298 U.S. 167, 56 Sup. Ct. 706, 80 L. Ed. 1118 (1936).

32. *Infra*, page 12.

denominated as such and then a reply must be filed. No other pleadings are allowed unless the court orders a reply to an answer or a third party answer. This is in sharp contrast to the procedure in actions at law in New Jersey where specific provision is made for pleadings through the reply and for such other necessary pleadings until issue is joined.[33] In equity provision is made in the Chancery rules for the bill of complaint, answer, replication, special replication and even rejoinder and perhaps other pleadings may be filed, if necessary.[34]

The practice for motions and other papers is substantially similar to that in New Jersey.[35] The application must be in writing and state with particularity the grounds therefor. Demurrers, pleas and exceptions for insufficiency of a pleading are abolished. This has already been done in New Jersey.[36]

Rule 8: General Rules of Pleading

Section (a) of Rule 8 prescribes the requirements of the original pleading which need be only a claim for relief. It is clear that the Rules do not intend that pleadings should be the means to secure evidence or narrow the issues.[37] It is for this reason that the scope of the discovery procedure has been extended and the subject elaborated.[38] The claim for relief is to be a short and plain statement showing jurisdiction, unless the court already has jurisdiction, a short and plain statement showing that the pleader is entitled to relief and a demand for judgment for the relief. The pleader may also seek relief of different types or in the alternative.

---

33. Supreme Court Rule 30.
34. Chancery Rule 76.
35. *Cf.* Supreme Court Rules 41-43, inclusive.
36. Supreme Court Rule 40; Chancery Rule 69.
37. Lost Trail, Inc. v. Allied Mills, Inc., 26 F. Supp. 98, D.C., E.D. Ill. (1938).
38. Rules 26 *et seq.*

It is one thing, however, to prescribe simple rules for pleading and another to obtain uniformity in the judicial construction of the rule. In the recent case of *Washburn v. Moorman Manufacturing Co.*[39] the simple complaint, after alleging jurisdictional facts and the relation of the parties, stated

> "that defendant became indebted to plaintiff upon an implied contract for the exclusive use of the photograph and name of plaintiff's steer 'Big Jim' in the advertising of defendant's animal food and products, in the sum of Fifty Thousand ($50,000.00) Dollars, the reasonable value thereof, all of which is due and unpaid."

The defendant's motion to dismiss the complaint was granted. The plaintiff claimed that he copied in effect one of the forms which is appended to the rules but the court said that these forms were merely to indicate the simplicity and brevity of the statement which the rules contemplate. The conclusion of implied contract was not supported by facts and, therefore, the complaint was insufficient.[40]

In *Sierocinski v. E. I. Du Pont De Nemours & Co.*[41] the plaintiff instituted a tresspass action to recover for injuries which he suffered when a dynamite cap manufactured and distributed by the defendant exploded while the defendant was crimping it. The defendant moved to require the plaintiff to file a more definite statement of claim, asserting that the allega-

---

39. 25 F. Supp. 546, D.C., S.D. Cal. C.D. (1938).

40. *Cf.* Bobrecher v. Devebein, 25 F. Supp. 208, D.C., W.D. Mo. (1938) where an action was brought upon an alleged infringement of a label. Although the case involved a copyright and was therefore not within the application of the Federal Rules, the Court referred to Rule 8 to indicate the requirements of the bill for relief. The bill filed by the plaintiff stated that he was the owner and proprietor of a registered label and that it had been infringed by the defendants. This, said the Court, stated a cause of action.

41. 25 F. Supp. 706, D.C. E.D. Pa. (1938).

tions of negligence were not specific. With respect to negligence the plaintiff had alleged as follows:

> "The said explosion and the injuries to the plaintiff resulting therefrom were caused solely by the carelessness and negligence of the defendant in manufacturing and distributing a dynamite cap which, when handled in the usual and proper manner, exploded."

The court said that these allegations of negligence while not fatal to the validity of the statement of claim if not attacked preliminarily, nevertheless were so lacking in exposition of facts and particularization as to fail to meet the usual requirements of proper pleading.[42] It held that the necessity for specific averments of facts forming the basis for the general allegation of negligence cannot be dispensed with and that the statement of claim should be made more definite. Of course, this takes us back to pre-Federal Rule days and the requirement of accurately pleading the cause of action which is the basis of the claim. Of greater significance, however, is the glaring evidence that for sometime the Judiciary will be groping in a maze, and the first question to be determined will be as one judge expressed it, the classic one of "Where are we at".[43] It is not likely that the answer will be uniform or consistent.

Sub-division (c) deals with affirmative defenses. It specifies certain matters which are to be set up affirmatively in pleading to a preceding pleading. They include among others accord and satisfaction, arbitration and award, assumption of risk, contri-

42. The diversity in construction goes even further. In Hardin v. Interstate Motor Freight System, 26 F. Supp. 97, D.C. S.D. Ohio, W.D. (1939) the Court held that under Rule 8 (a) a general allegation of negligence was sufficient, without further specification. The Court struck from the petition allegations which were in the nature of specifications of the negligence.

43. Dickinson, J. in O'Brien v. Calmar D.S. Corp., 25 F. Supp 752, D.C. E.D. Pa. (1938).

butory negligence, release, payment, illegality, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, statute of limitations, statute of frauds and any other matter constituting an avoidance or affirmative defense. In this respect the rule is similar to New Jersey Supreme Court Rule[44] which requires that the answer must specially state any matter which would raise issues not arising out of the complaint.[45] The Federal Rule has already created conflict in two jurisdictions and it may result in difficulty here.

Rule 8 and several of the other Federal Rules have already been affected by the decision of the United States Supreme Court in *Erie R. R. v. Tompkins*[46] which was decided before the Federal Rules were made effective. Under the Erie case, it has now become a constitutional requirement that in actions at law the Federal Court must apply the substantive law both of statute and decision of the State in which it is sitting. Although the Erie case deals with a law action the scope of the doctrine which it invoked has been extended to equity suits.[47]

These decisions leave untrammeled the field of procedural law which may still be regulated by Federal Rules.[48] It may be of some significance that the Supreme Court has not recalled any of its rules and perhaps its silence may be construed as an indication that no irreconcilable conflict between the application of the doctrines of the Erie case and Federal Rules will arise. Some difficulties have already become evident, however, and as the rules become more frequently interpreted in light

44. Supreme Court Rule 58.

45. Statute of Frauds, Statute of Limitations, release, payment, performance, or facts showing fraud, illegality or contributory negligence.

46. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

47. Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290 (1938).

48. *Cf.* F. M. Skirt Co. v. A. Wimpfheimer & Bros., 25 F. Supp. 890, D.C.D. Mass. (1939) where the Court rejected the defendant's contention that the construction of the rules for discovery was to be governed by the State Law.

of state law there is no doubt that more problems will be created.

The basic conflict arises because of the absence of a clear line of demarcation between substantive and procedural law. The Enabling Act[49] under which the Rules were promulgated forbade interference with the substantive rights of litigants and, of course, there would be constitutional restrictions which would prevent such interference even if the Enabling Act failed so to provide. Insofar, therefore, as the Federal Rules of procedure infringe upon the substantive law in what were formerly law or equity cases a new field of conflict has arisen.

Section 8 (c) presents a good example of this and although decisions are not many there are sufficient to note that the Utopia of uniformity is still a dream. As stated above, this section prescribes certain affirmative defenses to be raised in response to a preceding pleading. Contributory negligence is one of them. In some jurisdictions, although not in New Jersey, the plaintiff must plead and prove freedom from contributory negligence. This is the rule in Illinois and New York, for example.[50] In both jurisdictions the problem has already arisen. In the case arising in the Federal District for New York,[51] decided without reference to the new Federal Court Rule, the Court held that the decision in the Erie case required a change in the then existing Federal Court Law[52] that the burden of proving plaintiff's contributory negligence rested with the defendant. The Court held that since the substantive law that was to be applied was that of New York that the burden was on the plaintiff to plead and prove freedom from contributory negligence.

In the Illinois case the same conclusion was reached by

49. 48 Stat 104; 28 U.S C A. 723 (b).

50. Dee v. City of Peru, 343 Ill. 36, 174 N.E. 901 (1931); Hartman v. Lowenstein, 154 N.Y.S. 205 (S. C. 1915).

51. Schopp v. Muller Dairies, Inc., 25 F. Supp. 50, D.C., E D. N.Y. (1938).

52. Pokora v. Wabash R. Co., 292 U.S. 98, 54 Sup. Ct. 172, 78 L. Ed. 1149

the Federal Court in that District. There the plaintiff urged that because the suit was brought in the Federal Court, Rule 8 (c) required the defendant to plead contributory negligence as an affirmative defense and that he, the plaintiff, was therefore not bound by the Illinois Rule which required the plaintiff to plead and prove freedom from contributory negligence. The Illinois Rule, he said, was a matter of procedure and not substantive law. This contention, however, was disregarded and the complaint dismissed because of its failure to contain the necessary allegations under Illinois law. Both decisions are supported by a decision of the Supreme Court[54] which held that the burden of proof as to contributory negligence was a matter of substantive law since, where it was imposed upon the plaintiff, it was like any other requirement that he establish all the facts necessary to make out his cause of action.[55]

Had the courts considered the requirements of pleading and burden of proof to be separable, however, they might . . . have applied Rule 8 (c) without affecting such substantive rights as may exist in the burden of proof. In view of these decisions a careful examination of those affirmative defenses which are designated as such by the Federal Court Rules must be made with a view to comparing them with the affirmative defenses which exist under New Jersey law.[56] Of course, any

53. Francis v. Humphrey, 25 F. Supp. 1, D.C.E.D. (1938). (1934).

54. Central-Vermont Railroad Co. v. White, 238 U.S. 507, 35 Sup. Ct. 865 L. Ed. (1915).

55. In Sierocinski v. E. I. DuPont DeNemours & Co., *op. cit.* 42, the defendant also urged that the plaintiff had failed to plead lack of contributory negligence on his part. The decision of the court that such an allegation was unnecessary is found in this statement: "In the Federal Courts the rule is that freedom from contributory negligence on the part of the plaintiff in a personal injury case need not be negatived or disproved by him." In view of Erie R.R. v. Tompkins, however, this approach is unsound, unless a distinction is made between negativing contributory negligence in the pleading and disproving it at the trial, a distinction which the court fails to mention.

56. The specific conflict on contributory negligence will not apply in New

difficulty may be obviated if the courts will distinguish between pleading, which is purely a question of adjective law, and burden of proof which may or may not be substantive law. In any case where the requirement of pleading is not accompanied by burden of proof or burden of proof is not accompanied by pleading, the court may properly apply both the Federal Rule and the doctrine of *Erie v. Tompkins.*

Both the Illinois and New York cases proceed on the theory that the requirement of pleading and the burden of proving contributory negligence or the freedom therefrom are linked inseparably and that the court therefore could not properly apply both the Federal Rule requiring the defendant to plead contributory negligence and the State Rule placing the burden of proof of freedom from contributory negligence on the plaintiff. While the burden of proof is generally placed upon the party who makes the allegation, it is not uncommon that the two are distinct. For example, a plaintiff suing in New Jersey need not allege compliance with the statute of frauds. If, however, the defendant sets up the statute of frauds affirmatively or enters a general denial of the existence of the contract which is pleaded and thereby also raises the statute of frauds, the plaintiff must then prove the existence of a valid contract and of course that he complied with the statute of frauds.[57] In this situation at least the burden of proof is different from the requirement of pleading[58] and if the same principle can be applied

---

Jersey since the plaintiff need not plead or prove freedom from contributory negligence as part of his cause of action. Warshawsky v. Raritan Traction Co., 68 N.J.L. 241 (S. C. 1902); Smith v. Delaware River Amusement Co., 69 Atl. 970 (S. C. 1908).

57. Barnes v. P. D. Manufacturing Co., Inc., 117 N.J.L. 156 (E. & A. 1936); Ziegener & Lane v. Daeche, 91 N.J.L. 634 (E. & A. 1918); Degheri v. Carobine, 100 N.J.Eq. 493 (Ch. 1926); Douma v. Powers, 92 N.J.Eq. 25 (Ch. 1920).

58. Another field of possible conflict is the New Jersey requirement that if the plaintiff plead generally the performance of conditions, the defendant must specify in his pleading the condition precedent the performance of which he intends to contest. Rev. St. 1937 2:27-113. Here the plaintiff would have the burden of

to other cases then the Federal Rules can secure a uniform interpretation in all jurisdictions. The Federal Rule relates only to pleading. It says nothing about burden of proof. It seems stretching things a little too far to hold that because of the Erie decision the State Rule on burden of proof must necessarily regulate the pleading requirement as well, although the latter may be placed by the Federal Rule on the party who is absolved from sustaining the burden of proof. Of course the Illinois and New York cases do not go this far, but if the decisions are followed in every instance of affirmative defenses then this must be the result.

Rule 8 (c) does make one definite change in requiring that the statute of frauds be pleaded affirmatively. Although the New Jersey Supreme Court Rule contains the same provision, the courts have held that a general denial of the existence of the contract pleaded in the complaint is sufficient to permit the defense of statute of frauds to be raised.[59] In any case, therefore, where the Federal Rule requires a defense to be set up affirmatively which under the New Jersey practice can be taken advantage of by a general denial, this difference in procedure must be carefully noted.

Rule 9: Pleading Special Matters

This Rule makes no change in the practice except that which may result from Section (8) which deals with time and place and which provides that for the purpose of testing the sufficiency of a pleading, the averments of time and place are material and shall be considered as all other averments of material matter.

Under the Common Law rule averments of time and place were not material and generally no advantage could be taken

proving performance although the burden of pleading is on the defendant

59. Barnes v. P. & D. Manufacturing Co., Inc., *op. cit.* 57.

of discrepancies which existed in such allegations. This is still the rule in New Jersey.[60] The statute of limitations, for example, must be raised by affirmative defensive pleading, the allegation of time in the complaint not being considered as binding. Under this Rule, however, if the allegation of time is material, the defendant, it would seem, may move to strike the complaint on the ground that it is barred by the statute of limitations, if on its face the complaint showed a cause of action which was outlawed. If this approach is correct then the plaintiff may be required to allege all facts which would take the case out of the statute of limitations and it would certainly be inconsistent with Rule 8 (c), which provides that the statute of limitations shall be raised as an affirmative defense. In one case decided under this Rule, the court required the plaintiff to make his complaint more definite and certain so that it would set forth pertinent dates from which it could be determined whether or not his claim was barred by the statute of limitations.[61] A ruling of that nature places the burden upon the plaintiff to plead his cause of action within the statute of limitations instead of requiring the defendant to raise the defense affirmatively. The proper procedure under the rule is to raise the defense in the answer and then move for summary judgment under Rule 56. This has already received judicial sanction.[62] Under the New Jersey law the statute of limitations is likewise a matter of affirmative defense and cannot be raised by motion.[63] Of course, in a suit in the Federal Court, the pleading element will be governed by the Federal Court Rules.

---

60. Rygiel v. Kanengieser, 114 N.J.L. 311 (E. & A. 1934).

61. Mendola v. The Carborundum Company, 25 A.B.A.J. 154, D.C. W. D. N.Y. (1938).

62. Means v. MacFadden Publications, 25 F. Supp. 993, D.C.S.D. N.Y (1939).

63. Bentley v. Colgate, 10 Misc. 1222 (S. C. 1932); Callan v. Bodine, 81 N.J.L. 240 (S. C. 1911).

RULE 10: FORM OF PLEADING

Rule 10 deals with the caption of the pleading, its paragraphing and various exhibits which may be contained therein. Under Section (c) a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes and it is, therefore, now unnecessary to allege, as has been customary in the past, that the schedule annexed to the pleading is made a part thereof. Under New Jersey practice a copy of a document annexed to a pleading cannot be availed of unless there be a reference to it in the body of the pleading as made a part thereof.[64] The Federal rule is definitely the more practical.

The Rule also provides that claims founded on separate transactions or occurrences and defenses other than denials are to be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth. This is comparable to New Jersey Supreme Court Rules.[65]

RULE 11: SIGNING OF PLEADINGS

Under Rule 11, a verification of pleadings is not generally needed but if a preliminary restraining order is sought Rule 65 (b) requires that there be a verified complaint or affidavit.[66] Signing by the attorney has substantially the same effect in all other cases. The rule requires that every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name.

In *U. S. v. American Surety Co. of New York*[67] a law firm had made a motion for relief on behalf of its client. At the end

64. Carter Lumber Co. v. Shupe Term. Corp., 101 N.J.L. 349 (E. & A. 1925).

65. Supreme Court Rules 52 and 57.

66. Thermex Co. v. Lawson, 25 F. Supp. 414 D.C. E.D. Ill. (1938).

67. 25 F. Supp. 225, D.C. E.D. N.Y. (1938).

of the prayers for relief, the firm name was typewritten and below it was written the signature of one of the members of the firm as a member of the firm. The court held that since the member of the firm had signed his name it was not necessary that he again sign as an individual as would seem to be required by the Rule.

This question of signature is important for all papers, including motions under Rule 7 (b) (2), and the rule adopted in the American Surety case applies to other papers as well.[68] One written signature of an attorney is sufficient and if a lawyer signs as a member of his firm, he need not again sign in his individual capacity.

Provision is also made in the Rule for disciplinary action against an attorney who wilfully violates the Rule or who inserts scandalous or indecent matter. This seems to be an unnecessary provision since the court always has control over the counsel who appear before it. What is scandalous or indecent may depend on the particular judge—the words themselves defy a consistent definition.

Rule 12: Defenses and Objections

Rule 12 deals with the manner of raising defenses and objections, whether by pleading or motion, and it also provides for judgment on the pleadings. For all answering pleadings twenty days time is provided, except where the United States or an officer or agency thereof is involved and in that case the period for answering is extended to sixty days.[69] Service of a motion suspends the time for answer and instead of having merely the balance of twenty days left if the motion is denied,

68. *Op. cit.* 67.

69. Similar statutory provisions exist. *Cf.* 28 U.S.C.A. sections 901, 902, giving the United States 60 days to answer when it is made a party defendant in foreclosure suits.

as is the rule in New Jersey,[70] the Federal Rules provide for a ten day period after the notice has been received of the court's action. The same time is also given to serve a responsive pleading if the court orders a bill of particulars or a more definite statement of the pleading and the ten days begins to run when the bill of particulars or more definite statement is received. If, however, there were more than ten days left before the motion was served then the greater period still remains.

Section (b) deals with the manner of presenting defenses. All defenses are to be asserted in a responsive pleading to the claim for relief except the following six, which at the option of the pleader may be raised by motion:

(1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted.

This section prevents dilatory tactics and also serves to expediate the trial of a cause on its merits. It is to be noted that as in New Jersey,[71] if a motion is to be made, it must be made before pleading if a further pleading is permitted. It is to be noted also that the six motions which are permitted attack the jurisdiction of the court and apparently have the same effect as the old special appearance. The appearance which is made by filing the motion is apparently such only for the purpose of the motion itself. If, however, instead of making a motion, the pleader raised a question of jurisdiction in an answer which contained other defenses directed to the merits of the cause of action, he might run the risk of having entered a general appearance. It has already been held, however, that the joinder of a motion to dismiss for lack of jurisdiction over the person with a motion to dismiss for want of equity and for

70. Dixon v. Swenson, 101 N.J.L. 22 (S. C. 1925); *Cf.* Morris Plan Co. v. Lorber, 11 Misc. 67 (S. C. 1933).

71. Apfelbaum v. Pierce, 2 Misc. 1150 (S. C. 1924).

failure to join indispensable parties defendant, does not waive the jurisdictional defense.[72]

Section (c) provides for a motion for judgment on the pleadings which may be made by any party after the pleadings are closed. This is similar to the motion on complaint and answer on the law side and bill and answer on the equity side under New Jersey practice[73] and is not the motion for summary judgment. Provision for the latter is made in Rule 56 and although it is outside the scope of this discussion, it should be pointed out that under the Federal Rules a motion for summary judgment may be made in any kind of an action. There is no restriction to contract actions as in New Jersey practice.[74]

Under Section (d) the defenses enumerated in (b) and the motion for judgment on the pleadings are to be heard and determined before the trial unless the court orders that the hearing thereon be deferred until the trial.

Provision is also made for a motion for a more definite statement or for a bill of particulars to be used in order to prepare a responsive pleading or to prepare for trial. These motions are to be made before responding to a pleading or, if no responsive pleading is permitted, within twenty days after the service of the pleading. Unlike the New Jersey rule,[75] the bill of particulars becomes a part of the pleading.

Rule 12 (f) is comparable to the New Jersey Supreme Court Rule[76] and permits the striking of redundant, immaterial, impertinent or scandalous matter from a pleading.

Another important Section of Rule 2 deals with the waiver of defenses. There are two defenses that are never waived, lack

72. American-Mexican Claims Bureau, Inc. v. Morgenthau, Secretary of Treasury, 25 A.B.A.J. 154, Dist. Col. (1939).

73. Rev. Stat. 1937, 2:27-47.

74. Supreme Court Rules 80-84.

75. Jones v. City Limit Cab, Inc., 112 N.J.L. 482 (E. & A. 1934).

76. Supreme Court Rule 39.

of jurisdiction over the subject matter and a failure to state a cause of action. All other defenses and objections are waived unless presented by motion or in the answer.

RULE 13: COUNTERCLAIM AND CROSS-CLAIM

Rule 13 deals with the counterclaim and cross-claim and covers in general a field which has received substantial judicial treatment in New Jersey. The Federal Rule divides counterclaim into two classes—compulsory and permissive. Any cause of action arising out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of the third parties outside of the court's jurisdiction, must be filed. The pleader may also file as a counterclaim a claim against an opposing party not arising out of the subject matter of the opposing party's claim. This is a permissive counterclaim.

The comparable court rules in this State likewise allow great latitude in pleading counterclaims but judicial interpretation has completely limited the scope of what may be raised in this form of pleading. The Chancery Rule is, of course, well settled. A counterclaim in Chancery must be germane to the complainant's cause of action, and despite the provisions of Chancery Rule 28 which permits a defendant to counterclaim or set off any cause of action against a complainant, the courts have held that the rule does not permit the raising by counterclaim of issues which are alien to those presented in the bill of complaint.[77] The counterclaim that is not germane cannot be disposed of in the action. It may be held for a separate trial or be stricken out.[78]

---

77. McAnarney v. Lembeck, 97 N.J.Eq. 361 (E. & A. 1925); Beller v. Fenning, 101 N.J.Eq. 430 (Ch. 1927); Town of Montclair v. Kep, 110 N.J.Eq. 506 (Ch. 1932).

78. Midland Corp. v. Levy, 118 N.J.Eq. 76 (1935), *aff'd*, 120 N.J.Eq. 197 (E. & A. 1936).

In the law courts the pleading rule, though not as restricted in its scope, is somewhat similarly treated. The statute[79] provides that "subject to rules, the defendant may set off or counterclaim any cause of action". The statute also provides that "if a defendant files a counterclaim or set off, the court in its discretion may order separate trials If a counterclaim filed cannot be conveniently disposed of in the pending action, the court may strike it out".[80] Pursuant to this last mentioned rule, it has been held that a counterclaim for the conversion of stock cannot be conveniently tried with an action on a note and should therefore be stricken.[81] The equity courts, therefore, and perhaps the law courts as well, would not countenance such causes of action as might be raised under the Federal Rule on permissive counterclaim.

The provision for compulsory counterclaim has a slight counterpart in the New Jersey Set Off statute[82] which requires that in a suit for a liquidated demand the defendant must assert by way of set off any liquidated demand which he has against the plaintiff or be thereafter precluded from bringing any action for such debt or demand which might have been set off in such action. Of course, the Federal Rule applies to unliquidated demands as well as liquidated and in that sense is broader than the New Jersey rule. It is more limited, however, in its requirement that the compulsory counterclaim arise out of the occurrence or transaction that is the subject matter of the opposing party's claim.

Singularly enough there is no statement in the rule about any penalty for failing to file a counter-claim which may be considered a compulsory one. The inference is clear, however,

---

79. Rev. St. 1937, 2:27-136.

80. Rev. St. 1937, 2:27-141.

81. Elizabeth Trust Co. v. Central Lumber Co., 112 N.J.L. 522 (E. & A. 1933).

82. Rev. St. 1937, 2:26-190, 191.

that it is to be a bar against any further action. But suppose a defendant who is brought in the federal court in *invitum* refuses to present his counterclaim for decision to the federal court? Would the Federal Rule preclude him from asserting his cause of action in a state court if he could obtain jurisdiction over the opposing party? The New Jersey court could hold that the Federal Rule did not oust it of jurisdiction since the rules are merely procedural. The spirit of the rules, however, would tend the other way.

Another significant feature is that in the federal counterclaim the pleader may ask for relief different in kind from that sought in the pleading of the opposing party. This would permit a defendant sued for money damages to seek specific performance, for example, or a decree setting aside a conveyance. Of course, under the New Jersey practice such a hybrid suit would be rejected.[83]

The Federal Rule also permits a counterclaim against a co-party if the claim arises out of the transaction or occurrence that is the subject matter either of the original action or a counterclaim therein. This pleading, which is called a cross-claim, may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

The New Jersey rules are somewhat different and definitely more restricted although the right to file a counterclaim against a co-defendant is well settled.[84] Under the Practice Act, in an action at law, if the defendant files a counterclaim or set off, he may and when required by the court shall issue a summons against any party necessary to be brought in.[85] The Chancery

83. Procedural reform in New Jersey has not yet reached the point of merger of law and equity similar to code practice.

84. Chancery Rule 28, Supreme Court Rule; Candiano v. Pittenger, 7 Misc. 1027 (S. C. 1929).

85. Rev. St. 1937, 2 27-139.

Rules provide that the defendant may counterclaim against the plaintiff and contains language similar to that in the Practice Act.[86] It seems that neither contemplates a counterclaim against the third party alone merely because he may be liable to the cross-claimant, but each permits bringing in a third party if a counterclaim has been filed. The provisions of the Chancery and Practice Acts seem to contemplate bringing in third parties who are essential to a counterclaim filed against the plaintiff or complainant as the case may be.[87]

A provision which permits bringing in third parties similar to the New Jersey practice is found in Section h of Rule 13 and that Rule also contains a provision permitting separate trials for convenience and to avoid prejudice.

This practice of permitting counterclaims and cross-claims by any party to the action against an opposing party may raise some interesting jurisdictional problems, particularly when third parties are brought into the case under Rule 14. Suppose the defendant brings in a third party defendant under Rule 14, or a new party intervenes under Rule 24: These parties would be subject to the requirement of setting up counterclaims which arose out of the transactions or occurrence which is the subject of the opposing parties claim. Under the theory that bringing in new parties presents a situation which is or should be only ancillary to the main subject matter,[88] no diversity requirement should exist.

RULE 14: THIRD-PARTY PRACTICE

Rule 14 presents an important innovation in Federal practice and demonstrates most forcefully the short-cut method to

86. Chancery Rule 28.

87. *Cf.* Second National Bank & Trust Co. *v.* Pittenger, 11 Misc. 321 (S. C. 1933); Carey v. Brown, 92 N.J.Eq. 497, 501 (Ch. 1921).

88. A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE, MOORE and FRIEDMAN, 1st ed. (1938).

the settlement of disputes which is contemplated by the rules. It is called "third-party practice" and permits a defendant, or a plaintiff if a counterclaim is asserted against him, to bring in a third party under certain circumstances. The Rule has been borrowed from the Admiralty Practice,[89] although similar provisions have existed in other states including New York[90] and Pennsylvania.[91] The Federal Rule, however, is more comprehensive. It provides that before the service of his answer, a defendant may move for leave as a third party plaintiff to bring in a third party liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted the third party appears as another defendant against whom the original plaintiff may assert a cause of action, if he has any. An adjudication on the case between the plaintiff and the defendant is binding on the third party defendant. There is no limit to the number of parties who may be brought in by this procedure except, of course, that the new defendant must be liable to his immediate plaintiff or to the predecessor plaintiff of his immediate plaintiff for all or part of the claim against the immediate plaintiff.

The questions that may be raised under this Rule are limitless, and the procedure which it employs is sufficiently novel to intrigue even the most ingenius.

The Rule presents, for example, a problem in jurisdiction. Although there is no statement in the Rule, it may be that it is still essential to show the jurisdictional elements in order to bring in a third party. In cases decided before the Rules and based on similar State Statutes applied in the Federal Court by virtue of the Conformity Act the question of diversity of citizenship was vital. It has been held that there must be diversity between a defendant and the party he brings into the

89. United States Supreme Court Admiralty Rules (1920), Rule 56.
90. N.Y.C. P.A. (1937), secs. 193 (2), 211 (a).
91. Pa. Stat. Ann. (Purden, 1936) Tit. 12, sec. 141.

action.[92] But it has also been held that no diversity is necessary between the party brought in and the original plaintiff since the former is not necessary or indispensable to the latter's cause of action against the original defendant.[93] If the Rule is to be at all effective it may be necessary to eliminate certain requirements of diversity, otherwise it will be only by fortuitous circumstance that a third party defendant can be brought into the suit. In many cases the desired third party defendant will be a resident of the same jurisdiction as the third party plaintiff and to the latter the Rule will be of no avail. Nor will it be of any use where the third party defendant is outside the territorial jurisdiction of the Federal District, except in those special cases where the court's process may extend further.[94] In *King v. Shepherd v. The National Mutual Casualty Company*[95] the plaintiff, a resident of Arkansas, sued a citizen of Missouri to recover damages which resulted from an automobile accident. The defendant, by a third party complaint, brought in his insurance company, a citizen of Oklahoma. The insurance company moved to dismiss the third party complaint on the ground that the venue was improper and the motion was granted. The court held that the third party complaint presented a severable controversy and in light of Rule 82 which prohibits the construction of the Rules so as to extend the venue of actions, the Western District of Arkansas was not the proper venue for the third party proceeding. This decision follows the view adopted by early cases construing the state statutes[96] but appears contrary to the purpose of third party practice. If a controversy between the third party plaintiff and the third party defendant is deemed to be ancillary to the original suit, then there should

92. Wilson v. United American Lines, 21 Fed. (2) 872, S.D.N.Y. (1927).
93. Lowry & Co. v. National City Bank, 28 Fed. (2) 895; D.C.S.D. N.Y. (1928).
94. *E.g.* U.S.C.A., Tit. 15, secs. 5, 25 (Sherman Act).
95. 25 A.B.A.J. 155, D.C.W.D. Ark. (1938).
96. *Op. cit.* 92, 93.

be no further jurisdictional or venue requirement. A somewhat similar situation arose in *Seemer v. Ritter*[97] where the plaintiff, a Virginia resident, sued defendant, a Pennsylvania resident, for injuries suffered in an automobile accident. The defendant sought leave to move as a third party plaintiff to bring in residents of Maryland on the ground that the plaintiff's injuries were due to their negligence and not his. The plaintiff opposed the motion on the ground that the district was not the proper venue of an action against the proposed third party defendant. The court did not decide whether it had jurisdiction over the proposed defendants but held that no right of the plaintiff could be impaired by the joinder and that the proper person to object were the proposed defendants, who could do so after service had been made upon them and that the objection would be avoided if they submitted themselves to the jurisdiction voluntarily.

It is important for this purpose to note that the New Jersey statute[98] permitting service on non-resident owners and operators can apparently be used by a defendant to bring in a third party although no direct cause of action is asserted between the parties, as in the Pennsylvania case. The New Jersey statute permits the service "in any civil action or proceeding against such chauffeur, operator or owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within this State, in which a motor vehicle operated by such chauffeur or operator is involved". It does not appear from the language of the statute, that the process must be issued at the behest of the person actually injured.

Litigation involving third party practice should receive special treatment from the courts so that once jurisdiction is obtained it will be kept until the entire controversy between all the parties will have been determined in one court. This, after

97. 25 F. Supp. 688, D.C.M.D. Pa. (1938).
98. Rev. St. 1937, 39:7-2.

all, is the purpose of the rule. It should be sufficient if one cause of action has the jurisdictional requirements. The suggestion that the third party practice be treated as ancillary to the main suit would, if adopted, preserve the jurisdiction of the court over all parties without the problem of further diversity requirements.

The pleadings between the third party plaintiff and the third party defendant would be governed by the Federal Rules but here, also, there may be pitfalls. The defendant, for example, may allege that the third party alone is liable for the cause of action which the plaintiff asserts against him and then at the trial the defendant may be able to prove only a partial liability.

In *Yellow Cab Company of Phila. v. Rogers*[99] involving such a situation based upon the Pennsylvania Statute, the Court held that no verdict could be rendered against the third party since the proof did not conform to the pleadings. The Court refused to conceive that the third party plaintiff could at the trial change his theory to some form of liability other than the liability alleged. In view of the new Federal Rule 15, however, permitting such changes, this case may no longer prevail.

This Federal Rule is a definite extension of the comparable state statutes. It might be used, for example, to bring in a joint *tort feasor* and thus secure contribution, although under the state law no such result could be obtained. The question of an infringement upon substantive law might then be raised. The Rule might also be used to bring in a joint and several obligor on a bond, a surety, guarantor or indemnitor. This also will raise substantive conflict. An indemnitor under New Jersey law cannot be held liable unless the principal suffers a loss by actually paying the claim indemnified. It has been recently held in New Jersey that under a contract of indemnity no action can be brought or recovery had until the liability which is the sub-

99. 61 Fed. (2) 729 C.C.A. 3rd (1932).

ject of the indemnity is discharged.[100] This is a rule of substantive law and should again, under the *Erie v. Tompkins* decision, be controlled by state law rather than by the Federal Rules, particularly since under the substantive law no cause of action exists until the principal makes actual payment. If the contract is merely to pay legal liabilities then the cause of action against the insurer is complete when the liability of the assured attaches.[101]

This raises another interesting problem. Could the defendant in such a case make his insurance company a nominal party defendant to the action? If so, the consequences to the insurance company might very well be disastrous. The problem is particularly important in the negligence field. Most insurance contracts insure against liability and not against loss and in view of the New Jersey law the right of action against the insurer is complete as soon as the liability of the assured attaches and the insurance company could not, therefore, assert that there was no cause of action against it until an actual loss occurred. May the defendant, therefore, claiming that his insurance company is liable to him if he is liable to the plaintiff bring in his carrier as a defendant and, as a corollary of this, may a defendant join another *tort feasor* and the latter's insurance company? A strict application of the rule would result in an affirmative answer. A defendant generally would gain nothing by bringing in his carrier but cases involving relatives are not infrequent and it is not inconceivable that the driver of a car involved in an accident which causes injuries to his passengers who are friends or relatives might without much persuasion join his insurance carrier as a party defendant. It may be that such conduct would violate the co-operation clause in the policy, particularly where the insurer has already, under the policy

100. Chodosh Bros. v. American etc. Insurance Co., 119 N.J.L. 335 (E. & A. 1938).

101. *Op. cit.* 100.

provisions, undertaken the defense of the action. But suppose the company denied coverage or liability on some other ground? It would then be of extreme advantage to the defendant to apply to the court for leave to join his carrier and thus litigate all matters in one action, except for the fact, however, that if the company succeeded in avoiding the liability the action of the defendant in joining the company might well prove a boomerang. The same would be true if the insurance company, although defending the action for the assured, did so reserving its rights subsequently to raise the question of its liability. Suppose also that the insurance company refused, against the wishes of the assured, to make a settlement within the limits of the policy, and chose to defend the action? In each case the assured might well consider it to his advantage to make his liability carrier a party to the action. We point out a few of the problems that the ingenuity of counsel could invent.

It is interesting to note the reaction of the New York courts to the third party practice. In *Jacobs v. Pellegrino*[102] the defendant in a negligence action applied for permission to join its insurance company in the suit, claiming that if it was held liable, the insurance company would in turn be liable to it. The insurance company had denied liability under the policy and refused to defend for the assured. The court denied the application and pointed out that the liability of the insurance company to the defendant arose out of a contract which had no relation to the main cause of action and that making the insurance company a party would necessarily raise the question of insurance, which it is the policy of the courts to exclude. Perhaps the insurance company may contract itself out of the rule, or it may be that the right of the insurance company not to be joined under the state law is a substantive right which the

102. 277 N.Y.S. 654 (1935).

Federal Rules cannot impair. In any event the problem is significant.

Rule 14 deals only with third party defendants being joined by defendants, but in this connection Rules 18 (b) and 20 are important since under them the opportunity to join the insurance company of the defendant would seem to be given to the plaintiff as well. 18 (b) provides that whenever a claim is one which heretofore was cognizable only after another claim has been prosecuted to a conclusion the two claims may be jointed in a single action. This Rule is directly contrary to the New Jersey rule which provides that where a cause of action against one person is not complete until after a decree or judgment against another, such person cannot be joined as a defendant.[103] Under Rule 20 parties may be joined if the claim arose out of the same transaction or occurrence, and if any question of law or fact common to all of them will arise in the action. Under either of these Federal Rules, therefore, the plaintiff might join the insurance company as a party defendant.

It is true that under the New Jersey insurance statute[104] a suit can be instituted against the insurance company only after judgment has been obtained against the assured and execution thereon returned unsatisfied,[105] but the fact that the claim against the company cannot be prosecuted until a decision has been rendered on a prior claim against the assured would not be a bar to the action in the Federal court. Here also, however, the right of the insurance company not to be joined, a right derived from State law, may be a substantive one to remain unaffected by the rules.

The Rule provides that the third party defendant is bound by the adjudication of the third party plaintiff's liability to the

103. Chancery Rule 25; Supreme Court Rule 17.

104. Rev. Stat. 1937, 17:28-2.

105. Joining the insurance company was tried and rejected in Damiano v. Damiano, 6 Misc. 849 (Cir. Ct. 1928). No judgment had been obtained against the assured, also a party to the suit.

plaintiff. But this it would seem should apply to the subject matter of the main cause of action between plaintiff and defendant and not as to the liability of third party defendant to the third party plaintiff.

RULE 15: AMENDED AND SUPPLEMENTAL PLEADINGS

This Rule deals with amended and supplemental pleadings and is another example of the liberal approach to procedural problems. Two sections are important for our purpose. Section (b) permits an amendment to pleadings to be made in order to conform to the evidence. This may be done during the trial unless the objecting party satisfies the court that the admission of the evidence would prejudice him in maintaining his action or defense on the merits, and in such case the court may grant a continuance to enable the objecting party to meet such evidence. This Rule rejects completely the principle which prevails in New Jersey that a party is bound by the theory of his pleadings.[106]

Under the Federal Rule the theory of the pleadings is determined by the evidence adduced at the trial. In *Nester v. Western Union Telegraph Company*[107] the plaintiff showed himself entitled to recover but was unable to prove actual damages as alleged in his pleading. He did prove the right to liquidated damages. The court held that in view of the liberal rules of the reformed procedure the right to recover is based not on allegations or theory of damages, but on the basis of facts shown in the record. Recovery was permitted without requiring an amendment to the pleading to conform to the evidence. In this connection a recent case decided by the New Jersey Court of

106. Jordan v. Reed, 77 N.J.L. 584 (E. & A. 1908); Westville Land Co. v. Handle, 112 N.J.L. 447 (S. C. 1933); Allan v. Spring Street Realty Co., 111 N.J.L. 88 (E. & A. 1933).

107. 25 F. Supp. 78, D.C.S.D. Cal. C.D. (1938).

Errors and Appeals illustrates the difference in the approach. In *Rein v. Travelers Insurance Company*[108] the Court held that it was improper to permit an amendment to the *ad damnun* clause of the complaint so that the plaintiff could recover installments of benefits under an insurance policy which had accrued between the commencement of the action and the date of the trial, and also to recover premiums paid between the same period. Under Rule 15 of the Federal Rules such an amendment would have been permitted by way of a supplemental pleading.[109] The decision of the Court of Errors and Appeals also indicates that there may be some difficulty in applying the Federal Rules on supplemental pleading to actions arising out of New Jersey. The Court declared that to permit the amendment would abrogate substantive common law principles, and that the Practice Act under which the amending power was derived related merely to methods of procedure and not to rights of action. It held that the amendment did not affect merely matters of procedure, form and convenience, but instead affected "substantial rights". If it is meant that to permit an amendment which would raise claims accruing after the original pleading has been filed would impair substantive rights under New Jersey law, then the Federal Rule which permits such amendment by way of a supplemental pleading may not properly be applied in this Federal jurisdiction to cases arising out of New Jersey.

Rule 15 also states the ordinary rule with respect to the relation back of amendments to pleading, and if the claim or defense asserted in the amended pleading arose out of the con-

---

108. 121 N.J.L. 565 (E. & A. 1939).

109. *Cf.* Texarkana v. Arkansas Louisiana Gas Co., 83 L. Ed. 435 (1929), where the United States Supreme Court directed that the District Court permit the filing of a supplemental petition to bring the controversy to date by setting up facts occurring subsequent to he original filing date but which might justify other or further relief.

duct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading. This Rule is more liberal than that which prevails under the New Jersey practice, where in order to obtain a relation back of the amendment, the amended pleading must merely restate in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action alleged in the original complaint. No new matter or new claim can be set forth.[110] Under the Federal Rule it would seem that a new cause of action can be stated in the amended pleading so that the time of the commencement of the action will date back to the date of the original pleading if it arose out of the same transaction or occurrence.

CONCLUSION

This discussion of some of the Federal Rules in their relation to New Jersey practice has emphasized several factors which are of great importance to New Jersey practitioners. There are differences in the details of practice, it is true, but not sufficient variance to cause undue concern. Greater difficulties will arise in determining in what court the suit should be brought. The time worn practice of shopping for the best court in which the suit should be instituted has not been completely eradicated by the Federal Rules. *Erie v. Tompkins* has not helped the situation but on the contrary has intensified the problem. It must be already clear that the rules will necessitate an exhaustive study of New Jersey substantive law to determine the most advantageous forum and while a determination by the New Jersey courts of state substantive law is binding on the Federal Court the ultimate question and the most important one is "What is substantive law"? The court of last resort on the question seems to be the Federal Court and a new vista of

110. Rygiel v. Kanengieser, *supra*, note 60.

conflict looms on the horizon. Attaining uniformity requires a judicial interpretation not only rational in scope but also one that is conscious of the basic theory and background of the rules.

It is not our duty to be hypercritical. Past experience with similar rules in New Jersey leads us to believe that many of the Federal Rules will become as dead letters as their counterparts in the New Jersey Practice and Chancery Acts. Others will take their proper place in the scheme of procedure. Time will appraise the result.

SAMUEL KAUFMAN,
SANFORD FREEDMAN.

NEWARK, NEW JERSEY.