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THE "NEW RULES" IN NEW MEXICO

Some Disenchantment in the Land of Enchantment†

JERROLD L. WALDEN*

When the State of New Mexico adopted the body of the Federal Rules in 1942, it could truly be said that it was following in the pioneering tradition of the great West. At that time, local counterparts of the Federal Rules existed in only two of her sister States, Arizona and Colorado, both similarly of western heritage. Enthusiasm for the federal reform elsewhere lagged. Indeed, in the first decade following upon the promulgation of the Rules by the United States Supreme Court, but a mere handful of States had modeled their codes of procedure after the federal standard.

In the last ten years, however, adoption of the Federal Rules by the several States has become almost fashionable. In fact, so swiftly are outmoded state codes being cast aside in favor of the new Rules that it is difficult to keep abreast of the annual number of conversions to the faith.

This fervor is a healthy one for the Federal Rules constitute on the whole an excellent attempt to facilitate the just settlement of judicial controversies both through the simplification of procedural requirements and the furnishing of procedural devices intended to assist litigants in the course of trial to the fullest. But as procedural reformers since the day of Field have learned to their dismay, it takes more than mere codification of reform to attain it. While this is a lesson

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1. Rule making authority was conferred upon the New Mexico Supreme Court by N.M. Laws 1933, ch. 84, § 1, N.M. Stat. Ann. § 21-3-1 (1953). The Federal Rules were adopted and became effective as of August 1, 1942 and appear in N.M. Stat. Ann. § 21-1-1 (1953).


that New Mexico has unfortunately had to relearn, her experience is one which may well serve to dampen somewhat the enthusiasm of those who trumpet the success of federal reform by merely pointing without further examination to the growing number of States that have adopted the Rules under the popular notion that the more jurisdictions, the more reform.

I. Pleadings

One of the most accurate measures of the success of any procedural reform movement is the extent to which judicial decisions rest upon the merits of controversies rather than upon technical niceties of written documents artificed by attorneys before trial. Common law pleading with its extreme dialecticism almost guaranteed against this ever occurring except through sheer perseverance or chance. The rigid demands exacted by the Codes for fact pleading and the resurrection of the forms of action constituted, if anything, mere token improvement. The Federal Rules, on the other hand, provide a refreshing contrast, for nothing could be better designed to eliminate unnecessary controversy over pleadings than the simple requirement that the pleader state his claim for relief in plain terms, short and to the point.6

Since New Mexico has drawn upon the Federal Rules for practically all of her pleading requisites, one would no longer expect decisions emanating from her highest court to turn upon the formalistic construction of written preliminaries. Yet despite repeated lip service to the policy of the new Rules by her courts,7 the cases attest to the fact that in New Mexico, reform has come hard. Martinez v. Cook8 is illustrative. There, plaintiffs asserted a prescriptive right of natural drainage across the lands of defendants and sought damages because the watercourse had been blocked thereby causing serious flooding of their premises. The complaint alleged a "continuous, uninterrupted, adverse and exclusive" use of the drainway for the prescriptive period. But the use necessary to acquire title by prescription, so averred the New Mexico Supreme Court, must be "'open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner.'"9 Since several of the indispensable allegations had been omitted, the supreme court affirmed an order of the trial court dismissing the complaint. As for the new Rules, the court out of deference suggested that had plaintiffs merely alleged a prescriptive right in general terms, they

6. Fed. R. Civ. P. 8(a): "A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."


8. 56 N.M. 343, 244 P.2d 134 (1952).

9. 56 N.M. at 351, 244 P.2d at 140, quoting from Hester v. Sawyers, 41 N.M. 497, 504, 71 P.2d 646, 651 (1937).
might well have compelled the court to sustain the complaint. But as it was, "having pleaded some of the necessary elements, plaintiffs will be held to those specifically stated." 

Plaintiffs' misfortunes were multiplied when, in the very same case, their count in estoppel was also adjudged defective. Plaintiffs had alleged that having knowledge of the natural drainway and the fact that plaintiffs had made large expenditures in reliance upon its continuation without obstruction, defendants were estopped from interference. Once again, however, their pleading oversight proved fatal. This time their error, as pointed out by the court, was as follows: "The allegation is the improvements were made with the knowledge of the defendants, but it is not stated the defendants knew or should have known they were made in reliance on the defendants not stopping the drainway."

If the Martinez case is currently good law in New Mexico, it is obvious that the introduction of the Federal Rules has made little change whatever in the strict mandate of pleading appearing in the old Code that the complaint must contain: "A statement of the facts constituting the cause of action, in ordinary and concise language." For judicial interpretations of this provision had made it essential that in each complaint, "every ultimate fact required to be proved to establish a cause of action should be definitely and certainly stated so that inferences from facts stated would not have to be drawn nor resorted to in support of a pleading." (Emphasis added.)

Of course, the federal courts have long recognized that the purpose of Rule 8's modest imposition on the pleader was to obviate the need for detailed particularization of claims and to dispense once and for all with the morass of technicalities that for centuries had been employed to defeat pleadings. For these reasons, the notion that a complaint must contain facts sufficient in themselves to constitute a cause of action has been consistently and emphatically rejected. The rule of pleading laid down in New Mexico, therefore, that once having

10. The New Mexico court has sustained the pleading of conclusions under the new Rules in such cases as Stewart v. Ging, 64 N.M. 270, 327 P.2d 333 (1958); State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).
11. 56 N.M. at 351, 244 P.2d at 140.
13. N.M. Laws 1897, ch. 73, § 32. That virtually no change in the requirements for pleading was intended by the adoption of the Federal Rules has been suggested by the supreme court itself. See Ferran v. Trujillo, 50 N.M. 266, 269, 175 P.2d 998, 999-1000 (1946), where the court said: "While the form of the rule has been changed, we do not understand that the necessity for pleading with particularity the facts upon which the claim or conclusion of the pleader is based, so as to give notice of what the adverse party may expect to meet, has been dispensed with."
14. In re Morrow's Will, 41 N.M. 723, 742, 73 P.2d 1360, 1372 (1937). The cited case held it enough, however, if only the substantial facts constituting a cause of action were stated in the complaint or petition.
15. Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957); John Walker & Sons v. Tampa Cigar Co., 197 F.2d 72 (5th Cir. 1952); Asher v. Ruppa, 173 F.2d 10 (7th Cir. 1949). And see Conley v. Gibson, 335 U.S. 41, 47-48 (1957); 2 Moore, Federal Practice ¶ 8.13 (2d ed. 1948).
undertaken to specify the factual basis of his claim in any respect, the pleader will henceforth be held under pain of dismissal to detail enough facts to establish a good "cause of action" is certainly a radical departure from the spirit of reform contemplated by the new Rules.  

Flexibility in the framing of pleadings and proof of claims is also an essential ingredient of any comprehensive system of procedural reform. In this respect, the Federal Rules measure up to the highest of standards. The Rules of New Mexico, patterned almost exactly after their federal counterparts, expressly permit unlimited joinder of claims, pleading in the alternative, demanding relief in the alternative, as well as pleading inconsistent claims. Furthermore, Rule 54(c) in both instances provides that "... every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In the light of these provisions, it is difficult, indeed, to understand the basis for the quite remarkable doctrine of pleading laid down by a number of New Mexico cases that one cannot sue under the new Rules in express contract and recover in implied contract.  

_Crawford v. Holcomb_ is a leading case in point. The action involved foreclosure of a mechanic's lien by a building contractor. Since the latter had no license at the time the construction contract was negotiated, the trial judge disallowed foreclosure; instead, damages were awarded based upon materials and labor supplied. The judgment was reversed in the supreme court, however, on the sole ground that in New Mexico one cannot sue on an express contract and recover in quantum meruit.

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There was a suggestion by the court in *Crawford v. Holcomb*, supra, that had the pleadings been formally amended so as to present squarely the issue of quantum meruit, the judgment would have been sustained. But even this possibility seems remote in view of the court's decision in the later case of *Chavez v. Potter*. Recovery here was sought for breach of certain verbal contracts alleged to have existed between plaintiff and defendant in the nature of sharecropping agreements. In his demand for judgment, plaintiff prayed for a declaratory judgment that he be allowed to remain on the premises in accordance with the terms of the alleged agreements, or, in the alternative, for a money judgment "upon a quantum meruit." Once again, however, the New Mexico Supreme Court invoked the rule that one cannot sue on an express contract and recover in implied contract to preclude quasi-contractual relief. As for the fact that plaintiff in this case had specifically requested a quantum meruit award, failure of which had been given as ground for reversal in *Crawford v. Holcomb*, supra, the court brushed this aside by referring to the rule of code pleading that "... the prayer for relief forms no part of the statement of the cause of action." To sustain this proposition, it cited cases harking back to territorial days.

Of course under the Rules there is only one form of action known as a "civil action" so that to speak in terms of suing in "contract" or in "quasi-contract" tends to perpetuate the very type of distinction sought to be eliminated. However, there is substantial agreement among the federal courts that under the provisions of the Rules referred to above one may shape one's pleadings so as simultaneously to assert what might be referred to as a contractual claim and a quasi-contractual claim. Even if both theories of recovery are not spelled out in the pleadings, Rule 15(b) would require the complaint deemed to contain a quantum meruit count if the issue were raised and tried without objection. Furthermore, Rule 54(c) would seem to make mandatory the awarding of quasi-contractual relief if the plaintiff were entitled thereto from the facts proven at the trial notwithstanding the absence of any express demand for a quantum meruit award in the pleadings. The prohibition in New Mexico against quantum meruit recovery in a "contractual" action, therefore, detracts significantly from the usefulness of these ancillary rules of pleading and stands in sharp contradiction to the deemphasis of pleadings sought to be attained by the new Rules.

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21. Id. at 665, 274 P.2d at 310.
24. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15 (b) ; N.M. Stat. Ann. § 21-1-1 (15) (b) (1953). It should be noted, however, that in Crawford v. Holcomb, supra note 18, objection was taken to the admissibility of the evidence tending to support the quantum meruit claim.
26. Since this article first appeared the supreme court has radically reversed its position and overruled its holding in *Crawford v. Holcomb*, supra note 18. State ex rel. Gary
It would be mistaken to assume from this critical analysis, however, that New Mexico has altogether rejected the beneficent provisions of the new Rules on the drawing and interpretation of pleadings, for such has decidedly not been the case. Numerous decisions indicate that the Rules have as a practical matter injected a greater liberality in trial practice throughout the State, and the supreme court has frequently gone out of its way to implement their sound purposes through interpretative decisions. Many of these well considered opinions, however, are extremely difficult to reconcile with language such as that gratuitously offered as dicta in the case of Newbold v. Florance to the effect that: "A new cause of action may be alleged in an amended complaint, provided it is founded on facts not wholly foreign to the facts originally pleaded.”

v. Fireman's Fund Indem. Co., N.M., 355 P.2d 291 (1960). In now aligning itself with the federal courts and recanting on the long line of decisions commencing with Campbell v. Hollywood Race Ass'n, supra note 19, the court declared: "We now announce that recovery should be allowed on quantum meruit even though the suit was originally framed on express contract; and that amendment to pleadings be freely allowed to accomplish this purpose at any stage of the proceeding, including considering the pleadings amended to conform to the proof. We are impressed that by this holding we are bringing our procedure into line with the decisions in the federal courts and into harmony with the letter and spirit of our rules of procedure, §§ 21-1-1(15) and 21-1-1(54)(c), which were copied from the Federal Rules of Civil Procedure.” N.M. at 355 P.2d at 294-95. A tendency by the court to retreat from its former position had been noticeable in several of its more recent decisions. For example, in Harbison v. Clark, 59 N.M. 332, 284 P.2d 219 (1955), defendant, a tenant farmer, counterclaimed for breach of an express contract to compensate him for leveling 50 acres of land. The trial court granted him relief, but on the basis of the reasonable value of the labor performed. On appeal, confronted with the ruling cited in the text, the court nonetheless affirmed, explaining: "However, a party is not held strictly to this rule if his adversary litigates the issue with him on the basis of a quantum meruit. That appears to be what happened here, proof of reasonable value of the leveling and breaking... coming on without objection and just as if properly pleaded.” 59 N.M. at 337, 284 P.2d at 222. And see Edwards v. Peterson, 61 N.M. 104, 295 P.2d 858 (1956) (contractual recovery where complaint sought only quasi-contractual relief); Edwards v. Erwin, 52 N.M. 280, 197 P.2d 435 (1948). But see Terry v. Pipkin, 66 N.M. 4, 8, 340 P.2d 840, 842 (1959) (“Evidence on quantum meruit would not have been admissible in a case based on express contract.”)

27. Thus the supreme court has held amendment of pleadings should be allowed where even with amendment they would not technically state a "cause of action." Downing v. Dillard, 55 N.M. 267, 232 P.2d 140 (1951). Amendments to conform the pleadings to the proof have also been generously permitted. Berkstresser v. Voight, 63 N.M. 470, 321 P.2d 1115 (1958) (amendments asserting defenses of assumption of risk and contributory negligence); Western Farm Bureau Mut. Ins. Co. v. Lee, 63 N.M. 59, 312 P.2d 1068 (1957) (amendment to add allegation of insurer’s waiver of notice); Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955) (amendment to change original allegations respecting marking of sheep's ears). And where issues have actually been litigated by the parties, the court has very properly treated the pleadings as amended to conform. Hall v. Bryant, 66 N.M. 280, 347 P.2d 171 (1959) (defense of equitable estoppel); Luval v. Holmes, 63 N.M. 193, 315 P.2d 837 (1957) (reversal because trial court refused to treat complaint as amended); Conway v. San Miguel County Bd. of Educ., 59 N.M. 242, 282 P.2d 719 (1955) (defense of adverse possession); Posey v. Dove, 57 N.M. 200, 257 P.2d 541 (1953) (defense that easement altered by lawful authority); George v. Jensen, 49 N.M. 410, 165 P.2d 129 (1946) (defense of contributory negligence where plaintiff alleged last clear chance).

28. 54 N.M. 296, 222 P.2d 1085 (1950).
29. Id. at 299, 222 P.2d at 1087.
Authority for such a restrictive proposition on the scope of amendments before trial can readily be found in New Mexico in the form of old decisions handed down in the frontier days antedating statehood.\(^{30}\) But there seems no valid reason for projecting them forward into the era of sputniks and "modern pleading," particularly when no such limitation appears in Rule 15 itself; nor have the federal courts found it necessary to construct one.\(^{31}\) One therefore hopes that the dicta in \textit{Newbold v. Florance} will not gain a further foothold, either in New Mexico or elsewhere.

Another facet of the amendment problem has created no end of difficulty in the state. Posit the case where objection is made to issues raised outside of those explicitly contained in the pleadings, and the objection is overruled with (or often without) express leave to amend; judgment is entered for proponent. On appeal, much to appellee's consternation, it is found that the pleadings have never been formally amended and consequently fail to support his judgment. Under these circumstances, if no objection had been made to the trial court, the complaint would be deemed amended in the light of most New Mexico decisions under the Rules, and, in the language of the Rules themselves, "... [F]ailure so to amend does not affect the result of the trial of these issues."\(^{32}\) But the Rules are inexplicit when it comes to the exact status of the unamended complaint where objection has been taken to the introduction of novel issues and overruled.

The practical way in which the federal courts handle this unforeseen contingency was described by Judge Clark in a recent law review article from which, because of its relevance, we take the liberty of quoting at length.

\begin{quote}
With this as with many rules you can, if [you] go over them carefully, think of all sorts of little questions that may still arise. There is one here that I think is a bit amusing. You'll notice that this applies to a case where the issues have been tried, with the parties consenting, expressly or impliedly, which of course means if the parties don't object. I'll ask you what can be done if the parties object, but the judge goes ahead and admits the evidence, but doesn't require the pleadings to be amended, as could be done under the next sentence. ... Suppose there is an objection to evidence as not relevant to the pleadings. If there were no objections and it came in and was tried, this provision would cover it. But assume that there has been an objection and the judge says, 'Ah don't bother me. You're highly technical, Mr. Lawyer. Admitted.' And you go ahead and try it and the matter is pretty thor-
\end{quote}

\(^{30}\) E.g., Bremen Min. & Mill. Co. v. Bremen, 13 N.M. 111, 126, 79 Pac. 806, 811 (1905), where the court said: "Before answer amendments are made as of course, and before trial, about the only limitation of the right of amendment seems to be that an entirely new and distinct cause of action will not be allowed, as, for instance, the changing of an action \textit{ex contractu} into an action \textit{ex delicto} or other cause based upon facts having no relation to the transaction set out in the original complaint."


oughly gone into. Then you get in the upper court and the claim is made that this provision cannot apply because it applies only to a trial by consent. Well, that problem might give you quite a little pause. We have always found ways around it. Theoretically in that situation we ought to reverse because the objection is made, but I cant ever remember a case where we have. As I say, the question doesn't arise very often. It is just one of those little things that shows that very shrewd lawyers can find holes in even the best of rules. Of course we usually find that the best way to handle it is to say, just as the trial judge did, 'Why of course this is within the issues raised.' Then we don't need to worry about this little hole in the rules. Nevertheless I think it is a bit amusing how some of these questions can be raised.8

Far from amused, however, must have been the plaintiff in *Campbell v. Hollywood Race Ass'n* when the New Mexico Supreme Court invoked Judge Clark's "little hole in the rules" to deprive him of a recovery obtained in the lower court. Plaintiff had originally based his claim upon a construction contract attached to the complaint as an exhibit. At the trial, however, he offered evidence to prove that he had performed additional work over and above that called for by the contract for which he sought recovery on the basis of cost plus 20 per cent. The defendant naturally objected on the grounds of relevancy, but leave was granted plaintiff to amend, the evidence was admitted, and from a judgment awarding damages for all of the work performed on a cost plus basis, defendant appealed. The New Mexico Supreme Court, upon reviewing the record, made the distressing discovery that plaintiff had never formally amended his pleadings as permitted by the trial judge so as to include the issue of the value of his labor expended; whereupon it promptly reversed the judgment as unsupported by the pleadings, relying upon the peculiar doctrine heretofore discussed at length that in New Mexico one cannot sue in express contract and recover in quantum meruit. This result is at such variance with all intentions of the notice theory of "modern pleading" that further comment at this juncture would be superfluous.35

33. Clark, Pleading Under the Federal Rules, 12 Wyo. L.J. 177, 192-93 (1958). Language in federal cases indicates a general tendency to support the judgment under these circumstances by treating the pleadings as actually amended if full opportunity for litigation of issues has been present. Thus in Ruud v. American Packing & Provision Co., 177 F.2d 538, 541 (9th Cir. 1949), the court said: "... [I]n support of the judgment, if amendment of the pleadings to conform to the proof should have been made, this court will presume that it was so made. Failure to amend will not affect the result of the trial of the issues actually presented." And see Decker v. Korth, 219 F.2d 732 (10th Cir.), cert. denied, 350 U.S. 830 (1955).


Somewhat less difficult to understand in view of the express provisions in the Rules regarding waiver of defenses not raised by motion or by the pleadings as therein provided is the case of *Shipley v. Ballew.* The question before the supreme court of New Mexico in that case was the propriety of a ruling of the trial judge excluding evidence offered by the defendant to show that a conveyance from him to plaintiff's grantor had been executed without consideration on the ground that the defense had not been raised in the answer. The supreme court upheld the lower court's order, declaring: "Equitable defenses cannot be proved under a pleading containing nothing more than a denial of title and an allegation of ownership in another. To admit the equitable defenses of fraud, error, or deception, such defenses must be pleaded."

*Shipley v. Ballew* is merely another illustration of how strict rules of pleading continue to determine the outcome of litigation in New Mexico irrespective of the substantive rights of parties. The provisions regarding waiver of defenses to the merits should apply only where subsequent opportunity to amend is freely granted under Rule 15. Although it does not appear whether defendant in this case actively sought permission to amend at the time objection was taken to his evidence, even this omission should not necessarily preclude the defense. It has even been suggested that an adversary intending to press his objections to admission of evidence outside the scope of the pleadings insist that his opponent amend. In the heat of trial, this Samaritan conduct may be too much to expect of opposing counsel. But where such evidence has been excluded, an appellate court can very properly reverse and remand with directions that amendment be allowed and hearing had on the untried defense.

One final comment upon pleading reform in New Mexico should be offered in view of N.M. Rule 15(e) which finds no corresponding equivalent in the Federal Rules. This unique subsection is a carryover from the old Code and

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38. 57 N.M. at 13, 252 P.2d at 514-15.
40. 2 Moore, Federal Practice ¶ 12.23, at 2329-30 (2d ed. 1948).
41. Newmann v. Zinn, 164 F.2d 558, 560 (3d Cir. 1947) ("We think he should have insisted on plaintiffs amending if this objection was to be pressed.")
43. N.M. Stat. Ann. § 21-1-1(15) (e) (1953) provides as follows: "In every complaint, answer, or reply, amendatory or supplemental, the party shall set forth in one [1] entire
had been interpreted prior to the adoption of the Rules as requiring a party in either an amended or supplemental complaint to repeat all of the allegations of the original pleading or be deemed to have “abandoned” those omitted.44 Already the reader will no doubt have perceived the difficulty since such technical doctrines as “abandonment” are incongruous in any cohesive system of “modern pleading.”

In Primus v. Clark,45 the New Mexico Supreme Court was confronted with a supplemental complaint that had failed to reiterate certain issues appearing in the original complaint, no doubt because N.M. Rule 15(d), like the Federal Rules, contains explicit authorization for a supplemental pleading setting forth “transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” 46 (Emphasis added.) The supreme court resolved any apparent conflict between 15(d) and 15(e) against the pleader and held that a supplemental complaint in New Mexico must restate all of the allegations of the prior pleading or the plaintiff will be held to have abandoned the issues not repeated.

The holding in Primus v. Clark makes little sense not only in light of the broad objectives of procedural reform but from a practical standpoint since the supreme court, in an earlier appeal in the very same case, had reversed a judgment against the plaintiff on the ground that injustice had been done and had remanded with directions to try the identical issues now held to be abandoned!47 Moreover, as Judge Seymour pointed out in his concurring opinion, federal doctrine under these circumstances forcefully rejects any such concept as “abandonment.”48 To require, as New Mexico now does, that a supplemental complaint repeat all the allegations of the initial pleading obliterates every distinction between an amended complaint and one supplemental and renders Rule 15(d) in such context all but meaningless.

In sum, one must conclude that pleading remains today a highly technical skill in New Mexico despite the freedom supposedly accorded pleaders under the new Rules. Care must be taken to include all the elements of a claim in a complaint once specification of any facts is undertaken; defenses must be raised lest they be forever waived; inconsistencies are to be avoided, particularly in seeking contractual or quasi-contractual relief. At least one eye should be ever cocked for the fatal variance. Out on the desert lie interred the discredited Code and the old forms of action. But in the “Land of Enchantment,” their shades still haunt from their sandy graves.

pleading all matters which, by the rules of pleading, may be set forth in such pleading, and which may be necessary to the proper determination of the action or defense.”

44. N.M. Laws 1897, ch. 73, § 89; Albright v. Albright, 21 N.M. 606, 157 Pac. 662 (1916).
47. Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944). It should be pointed out that despite the ruling criticized in the text, justice finally triumphed, but only after almost 20 years, several trials, and at least 3 appeals from the time plaintiff first initiated suit! See Clark v. Primus, 62 N.M. 259, 308 P.2d 584 (1957).
II. Counterclaims

The free and easy counterclaim device is another vital ingredient in the modern brew of adjective reform.49 In any discussion of New Mexico's experiences under the new Rules, therefore, several significant cases involving counterclaims merit attention as indicative of judicial response toward procedural reform in the State.

The first is the oft litigated case of Clark v. Primus,50 already mentioned in an earlier context. Here, the New Mexico Supreme Court held that in a suit to quiet title, a counterclaim demanding an accounting of rents and profits derived from the premises in question could not be asserted by defendant.51 No explanation for what appears to be outright judicial repeal of Rule 13 was offered except that "This being a statutory proceeding, counter-claims are not within the purview of the quiet title statute."52

The court, by this language, was undoubtedly alluding to N.M. Rule 1 delineating the scope of the Rules and providing that they shall be inapplicable to "... special statutory and summary proceedings where existing rules are inconsistent herewith."53 A careful reading of the quieting title statute,54 however, reveals nothing specifically nor inherently at variance with the unrestricted counterclaim provisions of Rule 13.55 There would thus appear to be no logical basis for refusing to sanction counterclaims in such actions since the Rules make ample provision for dealing with the contingency of trial inconvenience which foreseeably might ensue as a result.56

Assuming for the moment, however, that the holding in Clark v. Primus represents New Mexico's position with respect to counterclaims in quiet title actions, it then becomes necessary to reconcile with it the case of Martinez v. Mundy.57 The latter was an ejectment action (also a statutory proceeding) in which defendant counterclaimed to quiet title to the premises. The New Mexico Supreme Court held the assertion of the counterclaim to quiet title proper and to

49. "A high degree of latitude in the admission of counter-demands would appear, therefore, to have attained solid recognition as one of the conspicuous desiderata of modern reform." Millar, Civil Procedure of the Trial Court in Historical Perspective 136 (1952).
50. 62 N.M. 259, 308 P.2d 584 (1957).
52. 62 N.M. at 263, 308 P.2d at 586.
55. A party is required to state as a counterclaim all claims arising out of the same transaction or occurrence giving rise to his opponent's claim and "... may state as a counterclaim any claim against an opposing party ..." that is not compulsory. Fed. R. Civ. P. 13 (a, b); N.M. Stat. Ann. § 21-1-1 (13) (a, b) (1953). (Emphasis added.)
57. 61 N.M. 87, 295 P.2d 209 (1956).
entertain it would merely conform to the old equity practice that "... [W]hen a court of chancery obtains jurisdiction of a cause, it will retain it to administer full relief."\(^{58}\)

What, in the light of these two cases, is the law of counterclaims in special proceedings under the new Rules in New Mexico? It is difficult to say. Should a special proceeding be brought to quiet title, apparently no counterclaims that do not directly affect the title to the premises involved may be adjudicated. However, in an action in ejectment, also a special proceeding, a suit to quiet title may be freely asserted as a counterclaim. It may be that a quiet title counterclaim is permitted in an ejectment action only because it relates to the title of the premises in question. But there is no language in *Martinez v. Mundy* to suggest that only suits to quiet title may be asserted as counterclaims in proceedings for ejectment. And if other claims may be raised as well, then one would be faced with the anomalous situation where freedom to counterclaim is allowed in one class of special proceedings, *i.e.*, ejectment, and the right to raise counterclaims severely curtailed in another, *i.e.*, suits to quiet title.

Another consequence of these two decisions may possibly follow. Just as there is nothing to indicate that counterclaims other than suits to quiet title may not be asserted in ejectment actions, so too is there no language in the cases which would prevent the raising of a quiet title suit as a counterclaim in any random civil action. If this in fact be the case, then whether or not two actions, one of which involves a suit to quiet title, can be determined in a single proceeding in New Mexico may depend upon the wholly coincidental factor of which party first commences litigation.\(^{59}\)

The recent case of *Terry v. Pipkin*\(^ {60}\) again throws light on the attitude of the state courts toward the liberal counterclaim procedure afforded by the new Rules. The issue in that case was one of res judicata. Plaintiff initially brought an action for breach of contract to pay for pulling and repairing a certain pump in which he also sought to foreclose a materialman's lien. Defendant denied the allegations of the complaint and filed a counterclaim for damages apparently arising from the same transaction. After trial, final judgment was entered dismissing both the complaint and the counterclaim on their merits. Subsequently, plaintiff instituted a second action in which he sought recovery in quantum meruit for the reasonable value of his services in repairing the pump. Defendant contended that plaintiff was barred on the grounds of res judicata since the question of quasi-contractual recovery should have been raised in plaintiff's reply to the defendant's counterclaim in the very first action as required by Rule 13(a).\(^ {61}\)

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58. 61 N.M. at 96, 295 P.2d at 215.
59. This may not always be the case as it is possible that plaintiff may be allowed to join another action in conjunction with a suit to quiet title. See syllabus of the court in *Marquez v. Maxwell Land Grant Co.*, 12 N.M. 445, 78 Pac. 40 (1904); N.M. Stat. Ann. § 21-1-1 (18) (a) (1953). But cf. *McCarthy v. Kay*, 52 N.M. 5, 189 P.2d 430 (1948). In this event, the two actions could be tried together despite the fact that it was plaintiff who commenced legal proceedings. This is only one further reason for suggesting that there is little justification for a ruling which generally precludes counterclaims in quiet title actions.
61. See note 55 supra.
The implications of the problem before the court in *Terry v. Pipkin* can be understood more easily if it is formulated as follows: Must plaintiff who has two "causes of action" under res judicata doctrine nonetheless join them, either by way of amending his complaint or by way of reply, whenever defendant's answer contains a counterclaim arising out of the same transaction sued upon? More broadly stated, does Rule 13(a) contemplate a compulsory counterclaim to a counterclaim?

Although Professor Moore and Judge Clark both agree that such is the intent of the Rules, again New Mexico contrasts. "We know of no provision for filing a counterclaim to a counterclaim, or mandatory requirement to amend a complaint to include additional theories as a result of the filing of a counterclaim," averred the New Mexico Supreme Court in the cited case. While this result appears at odds with any logical exposition of the Rules, if, as was formerly the case in New Mexico, one cannot sue in express contract and recover in quantum meruit to begin with, then the decision follows inexorably from such an anomalous premise.

The cases in New Mexico involving counterclaims under the new Rules must be left to speak for themselves. Such decisions as there are, however, reveal a measure of distrust for the unrestricted counterclaim device as embodied in the Rules and a reluctance to afford it the unlimited scope which was certainly intended by those responsible for its inclusion within the federal reform. Perhaps with time and a greater familiarity with the benefits to be derived from full utilization of counterclaims, this initial antipathy will soften.

### III. Parties

Without doubt, the most significant development in the law of parties in New Mexico since her adoption of the Federal Rules has been the elimination of all distinction between indispensable parties and necessary parties, and as a concomitant, conferring upon all necessary parties the jurisdictional status heretofore thought reserved for parties indispensable. That this procedural heresy has arisen despite the specific language of Rule 19 and a strong and unbroken line of federal precedents to the contrary is, to say the least, surprising. Once again,

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62. 3 Moore, Federal Practice ¶ 13.08 (2d ed. 1948).
63. Speed Products Co. v. Tinnerman Products, 222 F.2d 61, 68 (2d Cir. 1955). Although the opinion was written by Judge Hincks, Judge Clark presided as Chief Judge and registered no dissent.
64. 66 N.M. at 9, 340 P.2d at 843; cf. McCarthy v. Kay, 52 N.M. 5, 189 P.2d 450 (1948).
65. Rule 13(a) speaks in terms of claims the "pleader" has against an opposing party thereby drawing no distinction between counterclaims which must be raised by defendants on the one hand and by plaintiffs on the other.
66. See discussion in Section I, supra.
67. N.M. Stat. Ann. § 21-1-1(19) (1953) is, with minor discrepancies not here relevant, identical with Fed. R. Civ. P. 19. Under it, persons having a "joint interest" must be joined, but a court may entertain a cause if it is unable to secure jurisdiction over "persons who are not indispensable, but who ought to be parties if complete relief is to be accorded . . . ."
68. The cases drawing the distinction between necessary and indispensable parties antedate the Rules by many years. The classic is Shields v. Barrow, 58 U.S. (17 How.) 130 (1855). The Rules were not intended to alter the previous practice. 3 Moore, Federal Practice ¶ 19.05, at 2144 (2d ed. 1948).
however, New Mexico has shown deference to none in her construction of the new Rules.

The genesis of the action providing the occasion for this innovation in the law of parties was a not uncommon one. Defendant's truck collided with plaintiff's automobile at an intersection in a small New Mexico village. The cost of subsequent repairs to the damaged car totaled $533.21. Plaintiff, covered by a standard $50.00 deductible policy, received $483.21 from the insurer toward rehabilitation of the vehicle; the remainder he paid himself. In his action, however, he demanded judgment for the entire loss, and when allowed only $50 for his efforts upon trial, promptly appealed. At this juncture, for the very first time, defendant suggested the absence of the insurer as an indispensable party.

At common law, the plaintiff would unquestionably have been the only proper party to have brought the action for the entire sum due from the tortfeasor irrespective of intermediate transactions occurring between himself and the insurer. While New Mexico has accepted the common law as generally determinative of legal relationships, the court was rightly of the viewpoint that it was inapplicable to the instant case in light of the State's recent adherence to the Federal Rules. But there were cases anterior to the Rules which in the court's opinion stood for the proposition that necessary parties and indispensable parties were indistinguishable. These it chose to follow in lieu of contrary federal interpretations because "We do not have the identical problems... [as the

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70. "[I]n tort actions the only plaintiff was the person wronged, and the only defendant the person who did the wrong..." Clark and Hutchins, The Real Party in Interest, 34 Yale L.J. 259, 260 (1925). And see, e.g., Clark v. Wilson, 103 Mass. 219 (1869); Perrot v. Shearer, 17 Mich. 48 (1868); Weber v. Morris & Essex R.R., 35 N.J.L. 409 (1872); Pringle v. Atlantic Coast Line R.R., 212 S.C. 303, 47 S.E.2d 722 (1948).
71. "In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision." N.M. Stat. Ann. § 21-3-3 (1953).
72. The court cited one federal case, Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79 (D. Mont. 1912), decided long before the Federal Rules, and the following New Mexico cases as supporting its conclusion: Walrath v. Board of County Comm'r's, 18 N.M. 101, 134 Pac. 204 (1913); Miller v. Klasner, 19 N.M. 21, 140 Pac. 1107 (1914); Page v. Town of Gallup, 26 N.M. 239, 191 Pac. 460 (1920); American Trust & Sav. Bank v. Scobee, 29 N.M. 436, 224 Pac. 788 (1924); Mann v. Whitely, 36 N.M. 1, 6 P.2d 468 (1945); Burgueote v. Del Curto, 49 N.M. 292, 163 P.2d 257 (1945); Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949); and Hugh K. Gale Post No. 2182 V. of F. W. v. Norris, 53 N.M. 58, 201 P.2d 777 (1949). Except for Mann v. Whitely and Teaver v. Miller, supra, in all of these earlier New Mexico decisions the absent party was held to be indispensable. Occasional language appearing in some of them referring to "necessary and indispensable" parties was therefore not inappropriate inasmuch as an indispensable party is an a fortiori case of necessary party. This, of course, does not make all necessary parties indispensable. This principle was recognized by the New Mexico court itself in Mann v. Whitely, supra, where it was held in a suit to foreclose a mortgage in which subsequent purchasers had been joined but the original mortgagors had been omitted that the latter were indeed necessary parties but not indispensable parties so as to preclude an adjudication of the priorities of the interests sub judice. Teaver v. Miller, supra, held merely that for venue purposes the drawee bank was a necessary party in a suit by the drawer to enjoin payment and to cancel certain checks. In sum, the prior case law thus furnishes little support for the ruling in Sellman v. Haddock, and notwithstanding the court's reliance on stare decisis, the case must be considered as blazing new trails in the law of parties.
federal courts] and need not now disturb the position taken and held by this court for many years."

The upshot of this analysis was that the insurer was held "a necessary, meaning indispensable, party to this suit . . ."; and the failure to raise the issue upon trial did not constitute waiver since, "If the insurance carrier is an indispensable party, then the court was without jurisdiction and the situation is the same as if no attempt at a trial had been made." The judgment in favor of plaintiff was accordingly reversed.

Inasmuch as the amount of the judgment appealed from in this case of Sellman v. Haddock totaled a mere $50, it is difficult not to sympathize with the sentiments prompting the dissenting opinion of Justice Sadler which placed such great emphasis, not upon the law of parties, but upon the ancient maxim, de minimis. While the case truly was Much Ado About (almost) Nothing, it gave rise to some interesting legal problems which are often absent in controversies concerned with many multiples of the sum involved.

The insurer in Sellman v. Haddock having paid a portion of the insured's loss, it became, under accepted legal doctrine, a partial subrogee. In both New Mexico as well as in the federal courts, every civil action must be brought in the name of the real party in interest. Who, then, is the real party in interest where but a partial subrogation has occurred? If the insured is the real party in interest so that he must sue alone, two actions may ultimately prove necessary since the insurer may have to seek recovery subsequently over against the insured.

73. 62 N.M. at 403, 310 P.2d at 1053. The reasoning of the court at this point is striking. It proceeds somewhat as follows: the common law is the rule of decision in the state; but the common law is inapplicable because it has been displaced by the Federal Rules. However, decisions interpreting the Rules have no force because the law prior to adoption of the Rules is controlling.

74. 62 N.M. at 393, 310 P.2d at 1046.

75. Note that the rule is frequently to the contrary where the money is merely "loaned" to the insured. See Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 108 S.E.2d 618; Aetna Freight Lines v. R. C. Tway Co., 298 S.W.2d 293 (Ky. 1956); Gould v. Weibel, 62 So.2d 47 (Fla. 1952); Blair v. Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950); Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918). The plaintiff claimed that such was the nature of the transaction in Sellman v. Haddock, supra note 69, but the court found to the contrary.


77. Where the insurance company has paid only a portion of the damage sustained by the insured, what appears to be a majority of jurisdictions having the real party in interest rule allows an action for recovery of the entire loss to be maintained by the insured. See, e.g., Iowa Nat'l Mut. Ins. Co. v. Huntley, 78 Wyo. 380, 328 P.2d 569 (1958); Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Permanent Ins. Co. v. Cox, 99 Ohio App. 389, 133 N.E.2d 627 (1955); Parker v. Hardy, 73 S.D. 247, 41 N.W.2d 555 (1950); Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P.2d 98 (1944); Shiman Bros. & Co. v. Nebraska Nat'l Hotel Co., 143 Neb. 404, 9 N.W.2d 807 (1943); Harrington v. Central States Fire Ins. Co., 169 Okla. 255, 36 P.2d 738 (1934); Solberg v. Minneapolis Willys-Knight Co., 177 Minn. 10, 224 N.W. 271 (1929). Under these circumstances, the insured holds any recovery in excess of his uncompensated loss in trust for the insurer. Baker v. Fortney, 299 S.W.2d 563 (Mo. Ct. App. 1957); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957); Parker v. Hardy, supra; Moultroup v. Gorham, 113 Vt. 317, 34 A.2d 96 (1943); Harrington v. Central States Fire Ins. Co., supra. In most of these jurisdictions, however, the insurer is generally permitted to participate in the action, either by joinder, Smith v. Pate, supra; South Carolina Elec. & Gas Co. v. Aetna Life
If the insurer, on the other hand, is the real party in interest, then one would be faced with the anomalous situation of the subrogee recovering an amount greater than he has acquired through subrogation. If, however, it be conceded that each is a real party in interest, it must be frankly recognized that some technical violence may at times be done to the strict rule against splitting a cause of action inasmuch as two suits against the defendant may occasionally be required before full satisfaction can be secured.

Perhaps the best solution presented to the problem under the Federal Rules is that supplied authoritatively by the Supreme Court of the United States in United States v. Aetna Casualty & Surety Co. In that case the Court held both insurer and insured, in the event of partial subrogation, to be real parties in interest and hence each competent to bring an action in its own right. Where one sued without the other, however, joinder could be compelled by the defendant on the ground that the absent party was a "necessary" party within the meaning of Rule 19. But this defense could be waived in view of the fact that "They are clearly not 'indispensable' parties . . . ." By holding that each party to the action could assert only its "actual interest" in the tort claim, the Court frankly acknowledged the possibility of "splitting" should either party

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78. But see Farmers Ins. Exch. v. Arlt, 61 N.W.2d 429 (N.D. 1953) (insured or insurer may recover entire loss since "splitting" prohibited).

79. "[I]t cannot be expected," declared the New Mexico supreme court in Sellman v. Haddock, "that this Court will permit the splitting of that which is a single cause of action, with the result that the present plaintiff can have judgment for $50 and so end the matter, to the injury of the insurer if defendant is liable at all. It is clear that only one cause of action exists," 62 N.M. at 403, 310 P.2d at 1053. But cf. Moncreiff v. Lacobie, 89 So.2d 471 (La. Ct. App. 1956) (insurer may sue for indemnity paid; insured, for total loss). Actually, since the rule against splitting is merely a convenient device for requiring the joinder of claims against a defendant which a plaintiff would otherwise be free to join or not as he might choose, application of the rule in cases of partial assignment or subrogation is unjustified. See Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Fidelity & Guar. Fire Corp. v. Silver Fleet Motor Express, 242 Ala. 559, 7 So.2d 290 (1942). Its only function in such circumstances would be either to preclude partial assignments or subrogations on the one hand or require the joinder of parties as well as claims on the other. As for the former, the very purpose of the real party in interest rule was to give legal recognition to the status of those such as partial assignees and subrogees. And the compulsory joinder of parties rule is specifically designed to reflect the policy of the law regarding the latter. Still, created by judges rather than deity, the cause of action may ultimately turn out to be more difficult to disintegrate than the atom.


81. 338 U.S. at 382, n. 19. Accord, Harlem Cab Ass'n v. Diggs, 82 A.2d 143 (D.C. Mun. App. 1951); see Clark and Hutchins, supra note 70, at 272.
prosecute an action to conclusion without the other.\textsuperscript{82} It reasoned, however, that "In such cases the United States, like other tortfeasors, may have to defend two or more actions on the same tort..."\textsuperscript{83}

The previous discussion furnishes a better perspective in which to review the law of parties in New Mexico under the new Rules as judicially interpreted. Despite the explicit language of the Rules themselves, all distinctions between necessary and indispensable parties would appear to have been extinguished.\textsuperscript{84} There would thus seem to exist in the State but three classifications of parties: formal parties, proper parties, and "necessary and indispensable" parties.

Notwithstanding its unorthodoxy, this categorization of parties has much to commend it for the line separating necessary and indispensable parties has long been a tenuous one at best. It is an understatement to say that this rather artificial distinction has led to untold confusion in the past on the part of both writers and courts.\textsuperscript{85} Nonetheless, two definite drawbacks persist. First is the absence of any meaningful criteria in the law as enunciated at the present time for differentiating between New Mexico's progeny of "necessary and indispensable" parties and other parties of less vital stature. This will undoubtedly be a source of much troublesome litigation in the future. More important is the high jurisdictional position to which the quondam necessary party, through its shotgun marriage to the indispensable party, has now been elevated in the State.\textsuperscript{86} Here again future consequences cannot be foretold, but it is likely that many an unwary litigant in the "Land of Enchantment" will find his case impaled upon the jurisdictional sword of "necessary and indispensable" parties.

IV. Trials

A. Trial By Court: The most distinguishing characteristic of non-jury trials

\textsuperscript{82} "It is true that under this rationale, there will be cases in which all parties cannot be joined because one or more are outside the jurisdiction, and the court may nevertheless proceed in the action under Rule 19(b)." 338 U.S. at 382.


\textsuperscript{85} "The party called by one court 'indispensable' is by another called 'necessary.' Whom one writer has labeled 'insistible' another has termed 'conditionally necessary,' another 'necessary,' and another 'substantial.'" Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 328 (1957).

\textsuperscript{86} That the absence of either necessary or indispensable parties deprives the court of jurisdiction over the parties before it is an entirely unsupportable legal principle. Professor Paul Hays has demonstrated this with customary brilliance in his highly stimulating and instructive guide for teachers of procedure. Hays, Teachers' Manual for Cases and Materials on Civil Procedure 16 (1948). The Hays thesis is expanded at length in Reed, supra note 85, passim. As is there pointed out, the question of whether a court should proceed to decide the rights of the parties before it notwithstanding the absence of an interested party calls for an equitable determination arrived at by weighing the extent to which a judgment rendered in the pending case will factually impair the interests of the absent party against those factors compelling an immediate decision with respect to the rights of the litigants at hand. See Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976 (2d Cir.), cert. denied, 308 U.S. 597 (1939), and Benger Labs., Ltd. v. R. K. Laros Co., 24 F.R.D. 450 (E.D. Pa. 1959) (indispensable parties dispensed with).
in the federal courts is the mandate for special findings in all cases. In adopting the Federal Rules, New Mexico incorporated this requisite only in part, no doubt because existing law, which was in large part retained already closely paralleled the federal reform.87

Federal Rule 52(a) requires that the judge, in all non-jury actions, "... shall find the facts specially and state separately ... [his] conclusions of law thereon. ... ." N.M. Rule 52(B) (a) (1) is substantially identical in this respect, obliging the court in trial without jury, to render a decision that "... shall consist of its findings of fact and conclusions of law ... ." The language in both instances is mandatory, but in New Mexico, there is no necessity for special findings in the absence of a request in some form from one of the parties.89 The practice is otherwise in the federal courts where great weight is attached to the importance of findings in all non-jury actions. Moreover, in New Mexico only those "ultimate" as distinct from "evidentiary" facts need be found in any case.90

Another distinctive feature of New Mexico's law of findings is the scope of appellate review. In the federal courts, review of findings in all cases has been assimilated to the practice formerly obtaining in equity appeals.92 New Mexico, on the other hand, expressly retains review "at law" for trial by court in those instances where a jury trial has been waived.93 However, this dichotomy between

89. N.M. Stat. Ann. § 21-1-1 (52) (B) (a) (6) (1953); Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949); Veale v. Eavenson, 52 N.M. 102, 192 P.2d 312 (1948); Carlisle v. Walker, 47 N.M. 83, 136 P.2d 479 (1943); see Fed. R. Civ. P. 52, Advisory Committee's Notes (1937). The court may, however, even in the absence of request, remand the case for the making of findings "where the ends of justice require." N.M. Stat. Ann. § 21-1-1 (52) (B) (a) (7) (1953); Prater v. Holloway, 49 N.M. 353, 164 P.2d 378 (1953).
90. See United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942); Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940); see generally 7 Moore, Federal Practice ¶ 52.06 [1] (2d ed. 1951).
91. "The findings of fact shall consist only of such ultimate facts as are necessary to determine the issues in the case, as distinguished from evidentiary facts supporting them." N.M. Stat. Ann. § 21-1-1 (52) (B) (a) (2) (1953); accord, Smith v. South, 59 N.M. 312, 283 P.2d 1073 (1955); Laumbach v. Laumbach, 58 N.M. 248, 270 P.2d 385 (1954); State Nat'l Bank v. Cantrell, 46 N.M. 268, 127 P.2d 246 (1942). But, as the court observed in Stroope v. Potter, 48 N.M. 404, 409, 151 P.2d 748, 751 (1944): "What are the ultimate and what are evidentiary facts often presents a close question...."
93. "And upon the trial of any cause by the court, without a jury in common-law cases, each party shall have the right to make all objections and take all exceptions that he might have made or taken, as if the trial had been before a jury; and upon a review [the supreme court] shall hear and determine the said cause in the same manner and with the same effect as if it had been tried before a jury." N.M. Stat. Ann. § 21-1-1 (52) (B) (a) (1953).
review of actions where the jury right has been waived and of suits formerly in equity is strictly a formal one inasmuch as review "at law" of a trial court's findings of fact would appear to be all that is available in New Mexico under any circumstances.\textsuperscript{94} Review of findings made by New Mexico district courts consequently tends to be somewhat narrower in scope than that obtaining in appeals in federal courts.\textsuperscript{95}

Where findings have created the most difficulty in New Mexico has been in cases on appeal when an attempt has been made to reverse either a general finding or special findings as unsupported by the evidence. The express provisions of the Federal Rules dispense with the need either for requests for findings to be made\textsuperscript{96} or objections to findings given\textsuperscript{97} as conditions precedent to review. And

\textsuperscript{94} The rule is so firmly laid down in the state that it is said citation is no longer necessary that the findings of the lower court will not be disturbed where supported by substantial evidence. Hines v. Hines, 64 N.M. 377, 328 P.2d 944 (1958). The test is indiscriminately applied in review of cases where the parties would have been entitled to a jury trial but for waiver and where there is no right to trial by jury in the first instance. Compare Little v. Johnson, 56 N.M. 232, 242 P.2d 1000 (1952), and Erb v. Hawks, 52 N.M. 166, 194 P.2d 266 (1948) (actions on real estate brokerage contracts); Galloway v. White, 64 N.M. 470, 330 P.2d 553 (1958) (suit to impress equitable lien); Rudolph v. Guy, 61 N.M. 254, 259 P.2d 462 (1956) (breach of contract); Brown v. Cobb, 55 N.M. 169, 204 P.2d 264 (1949) (cancellation of lease); Rasmussen v. Martin, 60 N.M. 180, 289 P.2d 327 (1955) (cancellation of mineral deed); Wedgwood v. Colclazier, 55 N.M. 32, 226 P.2d 99 (1951) (negligence action); Village of Cludefroft v. Pittman, 63 N.M. 168, 315 P.2d 517 (1957) (ejectment); Hines v. Hines, supra (divorce proceeding). The substantial evidence rule is the same test applied in reviewing judgments in jury trials where it is claimed there is insufficient evidence to support the verdict, Vira- montes v. Fox, 65 N.M. 275, 335 P.2d 1071 (1959); Reid v. Brown, 56 N.M. 65, 240 P.2d 213 (1952); that the trial judge erroneously refused to grant a motion for directed verdict or judgment n.o.v., Johnson v. Nickels, 66 N.M. 181, 344 P.2d 697 (1959); Barakos v. Sponduris, 64 N.M. 125, 325 P.2d 712 (1958); or that the trial judge improperly denied a motion for a new trial. Cf. Adams v. Cox, 55 N.M. 444, 234 P.2d 1043 (1951). Thus on review of findings, the weight of the evidence will not be considered in any case. Hugh K. Gale Post No. 2182 V. of F.W. v. Norris, 63 N.M. 312, 318 P.2d 609 (1957); Pentecost v. Hudson, 57 N.M. 7, 252 P.2d 511 (1953); Hudgens v. Caraway, 55 N.M. 458, 235 P.2d 140 (1951); see State ex rel. Reynolds v. Massey, 66 N.M. 199, 344 P.2d 947 (1959).

\textsuperscript{95} 2 Barron & Holtzoff, Federal Practice & Procedure § 1135 (1950), Sanders v. Leech, 158 F.2d 486 (5th Cir. 1946), and Western Cottonoil Co. v. Hodges, 218 F.2d 158 (5th Cir. 1955), support the substantial evidence test, and to that extent federal review of findings corresponds to review in New Mexico. However, the breadth of appeal in the federal courts may on occasion be more extensive since a finding may be reversed when, "... although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). And see Sanders v. Leech, supra, where in addition to laying down the substantial evidence rule, the court furnished the following two additional grounds for reversal of findings made by the lower court: "... (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case." 158 F.2d at 487. On the whole, however, there has been a marked tendency for "equity" review to coincide more and more with review "at law." See Clark and Stone, Review of Findings of Fact, 4 U. Chi. L. Rev. 190, 207 (1937).

\textsuperscript{96} "Requests for findings are not necessary for purposes of review." Fed. R. Civ. P. 52(a).

\textsuperscript{97} "When findings of fact are made in actions tried by the court without a jury, the
the decisions in the federal courts, while not entirely in accord, are largely con-
sonant with the view that requests or objections are altogether unnecessary for
purposes of appeal in any case.\textsuperscript{98} New Mexico Rule 52(B) (b), which had its
genesis in the Federal Rules, would also appear to have obviated the need for
objections to findings in order to preserve for appeal the question of the suffi-
ciency of the evidence to support them.\textsuperscript{99} But the state supreme court has
attached little, if any, meaning to the explicit language therein;\textsuperscript{100} instead, it
has considered paramount some wording in Rule 52(B) (a) (6) declaring that
a party will waive findings "... if he fails to make a general request therefor in
writing, or if he fails to tender specific findings and conclusions." The court
has deemed this provision to require either the tender of special findings of fact
and conclusions of law or objection to special findings\textsuperscript{101} or to the failure to
make any findings as a sine qua non of review. In their absence, one is precluded
from appealing not only the failure of the trial judge to make any special findings
whatev\textsuperscript{102}er, but the all important question as to whether findings actually
made, whether general\textsuperscript{103} or special,\textsuperscript{104} are supported by the evidence.

Thus the procedural niceties that now proliferate the law of findings of fact
in New Mexico in non-jury trials have come to constitute a dangerous trap
ready to snap fast upon the least suspecting litigant.\textsuperscript{105} Despite the appearance
of mandatory language in the Rules, there is no requirement that special findings
question of the sufficiency of the evidence to support the findings may thereafter be raised
whether or not the party raising the question has made in the district court an objection
to such findings or has made a motion to amend them or a motion for judgment." Fed.
R. Civ. P. 52(b).

\textsuperscript{98} See S Moore, Federal Practice § 52.10 (2d ed. 1951).
\textsuperscript{99} N.M. Stat. Ann. § 21-1-1(52) (B) (b) (1953) is identical in all respects to Federal
Rule 52(b), supra note 97.
\textsuperscript{100} See Robertson, New Mexico Rules of Civil Procedure for the District Courts,
\textsuperscript{101} Apparently objections must be made with some particularity since a "general
exception" to the findings will not suffice. Clouser v. Clouser, 46 N.M. 220, 126 P.2d 289
(1942).
\textsuperscript{102} Cases cited in note 89, supra.
\textsuperscript{103} Scuderi v. Moore, 59 N.M. 352, 284 P.2d 672 (1955); Garcia v. Chavez, 54 N.M.
22, 212 P.2d 1052 (1949); Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949); Lillibridge
v. Coulter, 52 N.M. 105, 192 P.2d 315 (1948); Prater v. Holloway, 49 N.M. 333, 164
\textsuperscript{104} Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952); Duran v. Montoya, 56 N.M.
198, 242 P.2d 492 (1952); Chavez v. Chavez, 54 N.M. 73, 213 P.2d 438 (1950); Rubal-
cava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949); see Whatley v. Colcott, 61 N.M. 455,
302 P.2d 514 (1956).

105. Only recently, the trap was nearly sprung on the City of Albuquerque! After
trial before Judge Arledge to which the City was party, adverse findings were prepared
by opposing counsel and served on Peter Gallagher, Special City Attorney. On being
informed that the Judge was anxious to dispose of the case prior to the expiration of his
term some two days hence, the City Attorney obligingly endorsed his signature upon the
proposed judgment which accompanied opponent's findings beneath the word "Submitted."
The plight from which the City had to extricate itself in attempting to appeal
when it had submitted no findings of its own before the Judge left office and had
obligingly endorsed "Submitted" upon opponent's proposed judgment accompanying
opponent's findings is described in Barelas Community Ditch Corp. v. City of Albuquer-
que, 63 N.M. 25, 312 P.2d 549 (1957).
actually be made, and no objection on that score can be raised on appeal unless a general request for findings is presented in writing or specific findings tendered. Moreover, even these can be ignored by the trial court with impunity if they do not call for findings of "ultimate" facts, whatever those may be. More important, review of the evidence to support a general finding will be denied for want of a request for or tender of special findings together with conclusions of law, or in lieu thereof, either an exception taken for failure to make findings or a proper motion to amend the general finding of the lower court. By the same token there is no appeal for one who would secure review of the evidence to support special findings absent tender, objection, or motion to amend.

B. Trial By Jury: With several significant exceptions to be noted below, trial by jury in New Mexico under the new Rules corresponds closely to the prevailing trial practice in jury actions in federal courts. One distinctive characteristic of New Mexico's trial rules, however, is the express authority directly conferred upon the trial judge to comment upon the evidence. A verdict, too, may be rendered by ten out of twelve jurors in New Mexico district courts, a signal variation. Of less consequence, perhaps, are the advancement in the time for instructing the jury in New Mexico trials so as to precede final arguments of counsel and the fact that special verdicts, as such, are not permitted.


107. For the possibility of preserving the right to appeal the question of sufficiency of the evidence to support findings by motion to amend the findings made by the trial court, see Owensby v. Nesbit, 61 N.M. 3, 293 P.2d 652 (1956). Quaere, however, whether such course is open when the trial judge has made no special findings but only a general finding. Under such circumstances, it has been suggested that the course is to move to modify the judgment. See Gilmore v. Baldwin, 59 N.M. 51, 278 P.2d 790 (1955). The latter must be done within 30 days of judgment; the former within 10. N.M. Stat. Ann. §§ 21-9-1, 21-1-1(52) (B) (1953).

108. "The judge, in so instructing the jury, may make such fair comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the cause." N.M. Stat. Ann. § 21-1-1(51) (c) (1953). While this is the practice in the federal courts, 5 Moore, Federal Practice ¶ 51.07 (2d ed. 1951), it has never been expressly articulated in the Federal Rules. For an interesting case interpreting the local Rule, see Hartford Fire Ins. Co. v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959).


110. "Except where instructions, whether oral or written, are waived, the judge in all cases shall charge the jury before the argument of counsel. . . ." N.M. Stat. Ann. § 21-1-1(51) (c) (1953).

111. N.M. Stat. Ann. § 21-1-1(49) (1953) provides that: "In civil cases, the court shall, at the request of either party, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party requesting the same. . . ." While this is similar to Fed. R. Civ. P. 49(b) authorizing a "General Verdict Accompanied by Answer to Interrogatories," there is no local provision analogous to Fed. R. Civ. P. 49(a), "Special Verdicts." And the New Mexico Supreme Court has ruled that in the absence of waiver or consent, special interrogatories cannot be submitted to the jury unless accompanied by a general verdict. Saavedra v. City of Albuquerque, 65 N.M. 379, 338 P.2d 110 (1959). It should also be observed merely as a
The most confusing features of trial by jury in New Mexico are encountered in the law of instructions. The decisions yield a clutter of the usual abstruse rules regarding instructions which serve the salutary purpose of preserving jury verdicts on appeal but which in no way assure that the proper function of the judge's charge, to guide and enlighten the jury, will ever be achieved. Although in this respect New Mexico is by no means unique, a few words about instructions under the new Rules are not out of order.

The general rule in New Mexico is that all instructions are to be considered together, and if they fairly disclose to the jury the issues, then a reversal will not be ordered for inconsequential error in giving or refusing a charge. This means that under certain circumstances, an erroneous instruction may be "cured" when viewed in light of the charge as a whole. It is error, however, to instruct in terms which are indefinite or to charge the jury by way of an abstract proposition of law. Moreover, the charge must not single out and unduly emphasize any particular aspect of the case.

The above are only a few of the major legal propositions in the light of which the trial judge must formulate and deliver his charge. His task is made immeasurably easier, however, by virtue of the fact that even the most palpable judicial error in instructions cannot be assailed on appeal unless the correct ritual in the lower court has been performed by the objecting party.

N.M. Rule 51 (g) purports to lay down the proper procedure for challenging the trial court's charge. It requires that—"For the preservation of any error in the charge, objection must be made or exception taken to any instruction given; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered to the jury in accordance with a faulty request submitted by both parties, there is no grounds for reversal." Otero v. Physicians & Surgeons Ambulance Serv., Inc., 65 N.M. 319, 336 P.2d 1070 (1959). Thus where it is virtually assured that the jury will be completely misinformed, the verdict must stand!


tion must be tendered, before retirement of the jury.” A fair reading of the above rule would lead to the conclusion that if one would appeal the failure to charge at all on a given point, then a request on the issue must have been submitted below; if, on the other hand, one wishes to claim that the instruction given is wrong, the appropriate objection must have been interposed. As thus construed, the strictures of the rule would not be particularly onerous and would not vary substantially from the burdens imposed upon litigants in the federal courts. But judicial gloss has created another procedural pitfall out of the judge’s charge which at times may be all but impossible to avoid.

Let us take the first phase of the problem of preserving error in instructions, namely the situation where the trial court fails to charge at all regarding a given proposition of law. On this point, N.M. Rule 51(g) quoted in the preceding paragraph must be read in conjunction with N.M. Rule 51(a) which declares unequivocally that—“In all cases, civil or criminal, the court shall instruct the jury regarding the law applicable to the facts in the cause, unless such instructions be waived by the parties.” This provision would seem to create an unqualified duty in the trial judge to charge the jury in every case on his own initiative. How, then, is the requirement that a request to charge be tendered in order to preserve objection on appeal contained in Rule 51(g) supra, to be read in light of Rule 51(a) apparently making it an obligation of the court to instruct in every case regardless of request?

The New Mexico Supreme Court has endeavored to reconcile these two conflicting provisions in the new Rules by holding that it is incumbent upon the trial judge to instruct, requested or not, upon “the fundamental law applicable to the facts in the case” unless instructions are waived. As a corollary, the court need not charge on “incidental questions” arising during the course of trial in the absence of specific request. Little quarrel can be had with this construction of the Rules, unless it be with the difficulty inherent in attempting to draw an artificial line between “fundamental” and “incidental” questions of law.

This matter aside, however, let us suppose that the trial judge in New Mexico applies the formula laid down by the supreme court and charges the jury of his own accord on what he considers to be the basic issues. Assume, further, that his charge is erroneous in one or more respects. What steps must the aggrieved party take to preserve error for appeal? The answer to this question appears in the leading case of State v. Compton, a criminal proceeding but nonetheless.

119. Compare Fed. R. Civ. P. 51 which provides: “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict....”
123. 57 N.M. 227, 257 P.2d 915 (1953).
relevant, where the court detailed the appropriate procedure in the following terms:

We believe the correct interpretation . . . is that where the court has not instructed on the subject it is sufficient to preserve the error if a correct instruction is tendered. But, where the court has instructed erroneously on the subject, although a correct instruction has been tendered on the point, if it leaves it doubtful whether the trial judge's mind was actually alerted thereby to the defect sought to be corrected by the requested instruction, the error is not preserved unless, in addition, the specific vice in the instruction given is pointed out to the trial court by proper objection thereto. (Emphasis added.)

It would appear, therefore, that in order to raise the question of an erroneous instruction on appeal, the complaining party must not only have objected to the specific charge as given but must also himself have tendered a correct charge on the issue in question. This dual requirement would appear directly contrary to the language of Rule 51 (g) quoted supra, which specifically posits request and objection as alternative prerequisites rather than conjunctive. Furthermore, it all but nullifies Rule 51 (a) as judicially construed which requires the judge to charge on "fundamental" questions even in the absence of any request therefor. For a rule making it the duty of a judge to charge without request on fundamental matters but precluding appeal in the absence of request if such charge is in error is all but worthless. One would suppose that the obligation to charge, if it exists at all, imports at the very least the obligation to charge correctly.


Since the time this article was originally submitted for publication in the Federal Rules Decisions, the court has vigorously reaffirmed this ruling. State v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960).
128. Cf. State v. Reybal, 66 N.M. 416, 419, 349 P.2d 332, 334 (1960): "No objection was made to the instructions nor did appellant tender different ones with a request that they be given." (Emphasis added.)
129. The synthesis in the text, it should be cautioned, is only one of several possible. It may be that in the absence of any request on a given issue, the obligation rests upon the judge to charge correctly, and a mere objection will suffice; but if perchance a request is made, the request must itself constitute a correct proposition of law. This rule is
Here again, the procedural trap is well concealed, and counsel may be ensnared before he can extricate himself. This is because of the so-called doctrine of "contributory error in charge," which requires that the request, even if made, itself constitute a correct proposition of law before the court's error can be appealed. Its rigid application may make it all but impossible in certain cases to secure review despite the gravest error. Perhaps appellate courts should penalize a party for the lack of brilliance or diligence of his counsel in failing to submit an instruction which is in all respects sound. But it should be remembered that the attorney in the cause is after all not the judge, who, under the Rules, is obliged to charge the jury properly. And if counsel proves himself as fallible as the trial judge in failing to ascertain the law, still two errors do not make a charge correct any more than do two wrongs a right. That a man may be convicted or lose valuable rights because counsel has not properly phrased a general proposition of law correctly in a situation so unclear that the trial judge himself has committed equal error seems carrying the technicalities of procedural law to the nethermost reaches.

CONCLUSION

From the preceding discussion, it would be rash to conclude that procedural reform in the State of New Mexico has been a complete failure. Yet one can with some justification suggest that it has been something less than an absolute success. It is perhaps more difficult to assess the reasons for the shortcomings of any reform than to pinpoint the areas where reform has fallen short. And more presumptive as well. Nevertheless, some explanation for New Mexico's experiences under the new Rules should be essayed.

Realistically, seldom does any reform movement fully live up to the exaggerated expectations of those responsible for its conception. Particularly is this true in the field of adjective law where the emasculation of the Field Code by the courts stands out as an everlasting monument to the fate of reform movements. Viewed in this context, the relatively early adoption of the Federal Rules hardly better since it places the practitioner in a dilemma: If he makes no request, he may appeal an error in charge merely upon objection, but at the sacrifice of presenting his own instruction for the trial court's consideration; if he does submit a request, he can not appeal from the instruction of the trial court, however erroneous, unless the instruction tendered is absolutely correct.

130. State v. White, 58 N.M. 324, 270 P.2d 727 (1954) typifies the problem. The accused was found guilty of murder in the second degree after a plea of not guilty by reason of insanity. His attorney had requested an instruction, refused by the trial court, which would have extended the M'Naghten Rule. On appeal, the New Mexico Supreme Court frankly confessed that the prior state of the law on the subject in New Mexico was so confused that "We find ourselves ... in a position of doubt as to the conclusion already reached in the case law. ... This confusion has resulted in text writers' [sic] citing New Mexico cases on both sides of the controversial argument." 58 N.M. at 328, 270 P.2d at 729. The court agreed that an extension was warranted and that the trial court had committed error in its charge. Nonetheless, it held that defendant could not contest the ruling inasmuch as his own request was itself legally deficient. As thus interpreted, the rule becomes reductio ad absurdum since in order to have complied with the requirement, defendant would at the time of submitting his request have had to divine precisely how the supreme court would formulate the proposition to be charged when the case appeared before it on appeal at some future date.
in New Mexico and their continuous day to day employment in the district courts of the State constitute perhaps the best evidence of a highly successful reform movement. And this despite occasional aberrations that have from time to time occurred, serious though these may have been.

As for the very real obstacles that the Rules have encountered in the State, it would perhaps be facetious to suggest that failure to adopt Federal Rule 1 in its entirety is in any way responsible. Yet the intentional omission from N.M. Rule 1 of the directive that the Rules "... [S]hall be construed to secure the just, speedy, and inexpensive determination of every action," is at least indicative that those responsible for their introduction contemplated a narrow rather than a broad sweep for their principles. 131

Certain lacklustre characteristics of the local reform may also be attributed to the rather begrudging acceptance of the Rules by many of the senior practitioners of the State who have been thoroughly schooled in an earlier jurisprudence. However much one may wish to criticize their judgment in this respect, with their sincerity there is certainly no quarrel. Traditional concepts are not easily discarded, and particularly is this true in such a field as law which derives so much of its impetus from social forces intent upon preserving established orders, economic or otherwise. Like old soldiers, old precepts do not die; they merely fade away. And often all too slowly, as witness the difficulty which the New Mexico Supreme Court itself has encountered in the very face of the new Rules with such ancient procedural bugaboos as the cause of action, 132 the theory of the case, 133 election of remedies, 134 abandonment, 135 and the adversary system of justice. 136 Under such circumstances, that occasional departures from the liberal objectives of reform have occurred is not in the least surprising. For proper perspective, these must be viewed in light of the long line of cases where the new Rules have been accorded their full ambit by practitioners and courts alike.

In closing on an optimistic note, New Mexico must be given her due for the fact that she has not been content to stand pat with her original facsimile of the Federal Rules. Amendments and interpretations have endeavored to keep state practice abreast of prevailing procedure in the federal courts. 137 An article appearing in a national publication only a short time ago had occasion to observe

131. "This provision is the polestar for the construction of the Federal Rules. ... It has been hailed by many writers as the most outstanding attribute of the new federal procedure." Dobie & Ladd, Federal Jurisdiction & Procedure 551, note 16 (2d ed. Forrester 1950).
136. "Certainly it was never the intention of the statutes or rules regulating appeals that one meeting with adverse rulings on his pleadings could withdraw from the combat below, bring his pleadings here, have us point out the deficiencies, and then return, amend the defective pleading and resume the battle with his adversary." Martinez v. Cook, 57 N.M. 263, 264, 258 P.2d 375, 376 (1953).
that "The excellent federal rule concerning the waiver of jury trial has not been adopted." This is no longer the case. The same work also noted that decisions up to that point "... [had] done little to encourage any extensive and indiscriminate use of the summary judgment procedure." Yet we now find the supreme court of the State approving the judicious application of the summary judgment remedy in appropriate cases in consonance with the broad objectives of the Rules. Concurrently, earlier hostility toward pre-trial has now mellowed. Finally, although the State has never adopted Federal Rule 84, the supreme court has nonetheless placed its broad stamp of approval upon pleadings conforming to the wonderfully simple forms appended to the Federal Rules.

With the continued willingness of the supreme court to provide a workable system of procedural justice in harmony with the general purposes of the new Rules and the enthusiasm shown by young practitioners for the versatility of the Rules in facilitating their daily practice, it is not amiss to suggest that within a short time, New Mexico may once more regain her rightful place in the van-guard of procedural reform.

138. Id., at 492.
140. Robertson, supra note 137, at 495.
144. See Veale v. Eavenson, 52 N.M. 102, 192 P.2d 312 (1948). Of equal importance is the fact that since this article first appeared in the Federal Rules Decisions in the spring of 1960, the supreme court has unanimously repudiated a long line of precedent which unjustifiably precluded quasi-contractual relief in a contract action and narrowly restricted the scope of amendment of pleadings during and after trial. State ex rel. Gary v. Fireman's Fund Indem. Co., N.M., 355 P.2d 291 (1960).