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Survey of the New Federal Rules

The New Practice in the Federal Courts in Civil Cases Cognizable at Law or in Equity

By ALFRED J. SCHWEPPE, of the *Seattle Bar*

A new era in federal practice, in suits of a civil nature whether cognizable as cases at law or in equity, has been ushered in by the act of Congress of June 19, 1934¹.

Acting under the authority of this statute the Supreme Court of the United States, with the aid of a distinguished advisory committee,² undertook the preparation of a "unified system of general rules for cases in equity and actions at law in the District Courts

¹48 Stat. 1064; U. S. C., title 28, §§ 723(b), 723(c), reading as follows:

"Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

²William D. Mitchell, of New York City, chairman.

Scott M. Loftin, of Jacksonville, Florida, president of the American Bar Association.

George W. Wickersham, of New York City, president of the American Law Institute.

George Wharton Pepper, of Philadelphia, Pennsylvania, replacing George W. Wickersham (deceased).

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Edgar B. Tolman, of Chicago, Illinois.

Charles E. Clark, of New Haven, Connecticut, reporter to the Advisory Committee.

of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States, and without altering substantive rights.⁷⁸

The Advisory Committee worked for two and one-half years, widely circulated tentative printed drafts of the rules⁴ among the bench and bar of the country for criticism⁵ and in November, 1937, submitted its final report to the court. On December 20, 1937, the Supreme Court, after having modified in a few minor respects the final draft of the Advisory Committee, announced its adoption of the new rules so prepared and, as provided in the act, transmitted them to the Attorney General for submission to Congress.⁶ And the Attorney General, in turn, in accordance with the act, submitted the rules for examination to Congress,⁷ which has referred them to the Judiciary Committees and ordered them printed.

If Congress takes no adverse action thereon, no affirmative Congressional action being required to make them effective⁸, the new rules, to be known and cited as "FEDERAL RULES OF CIVIL PROCEDURE",⁹ will take effect on September 1, 1938.

Thus an objective long sought by the bench and bar of the United States, namely, to remove from the federal civil practice in actions at law the intricacies and pitfalls heretofore existing therein for the casual practitioner in the federal courts, has at last been attained.¹⁰ And, in addition, the great gain has been made, under the initiative of the Supreme Court itself, of establishing only a single procedure for civil cases cognizable at law or in equity.

The important step toward code practice and toward the consolidation of the federal courts of law and equity described by Chief Justice Taft in *Liberty Oil Co. v. Condon Bank*,¹¹ in discussing the act of March 3, 1915¹² permitting equitable defenses

³295 U. S. 774.

⁴Preliminary draft of May, 1936; report of April, 1937; final report of November, 1937.

⁵See XXIV, AMERICAN BAR ASSOCIATION JOURNAL, 97.

⁶See letter of Chief Justice to the Attorney General dated December 20, 1937. As to the purpose of this submission to Congress, see 49 HARV. L. REV., 1303, 1309. Whether amendments to the new rules, if made hereafter, must be submitted to Congress is a debatable question. See HARV. L. REV. 1303, 1309-10.

⁷See Government Printing Office copy of the new rules printed as House Document No. 460 of the seventy-fifth Congress, third session. Copies may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D. C., for 15 cents per copy.

⁸49 HARV. L. REV. 1303, 1309.

⁹Rule 85.

¹⁰See SIMPKINS, FEDERAL PRACTICE (1934) § 4; 49 HARV. L. REV. 1303; XXIV, AMERICAN BAR ASSOCIATION JOURNAL, 97.

¹¹260 U. S. 235, 67 L. Ed. 232, 43 S. Ct. 118.

¹²U. S. C., title 28, § 398; Judicial Code, § 274 b.

in actions at law, has led up to the adoption of a single code of rules, which, so far as now appears, embodies all of the advantages of the state codes and has eliminated their weaknesses, while at the same time preserving trial by jury wholly intact.

Scope of New Federal Rules of Civil Procedure

"These new rules govern the procedure in the District Courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."^{12a} It is stated in Rule 81 that these new rules do not apply to proceedings in admiralty, nor to proceedings in bankruptcy, nor to certain special types of proceedings listed in that rule.¹³ These new rules "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending; except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."¹⁴

Effect of the New Rules on the Equity Rules of 1912

"When the Federal Rules of Civil Procedure become effective they will supplant the equity rules since in general they cover the field now covered by the equity rules and the conformity act."¹⁵ There can be no doubt that on the effective date of the new rules, the equity rules as heretofore known will disappear by name from the practice, although a considerable number of them are in substance preserved in the new rules.¹⁶ When the court, acting under section 2 of the Act of June 19, 1934, undertook to "unite the general rules prescribed by it for cases in equity with those in actions at law . . ." the equity rules, as such, lost their identity in the merging process and are gone.

Effect of the New Rules on the Conformity Act of 1872

"U. S. C., title 28, sections 724 (Conformity Act), 397 (Amendments to Pleadings when case brought to wrong side of the court), and 298 (Equitable Defenses and Equitable Relief in Actions at Law) are superseded."¹⁷ Whether the Conformity Act is so completely superseded as is suggested in the foregoing statement is perhaps debatable,¹⁸ but certainly, to the extent that the new rules

^{12a}Rule 1.

¹³See Rule 81 for these exceptions.

¹⁴Rule 86.

¹⁵April, 1937, report of the Advisory Committee on Rules for Civil Procedure appointed by the Supreme Court of the United States, p. 217.

¹⁶See table contained in April, 1937 draft of the Advisory Committee, p. 217.

¹⁷April, 1937, report of Advisory Committee, p. 3.

¹⁸Congress did not in terms abolish the Conformity Act; and repeals by implication are not favored. *U. S. v. Jackson*, U. S., 58 Sup. Ct. 390. Under the Act of June 19, 1934 (The two sections of the act must be read together, and are so read by the Supreme Court in its initial order under the statute, 295 U. S. 774) "all laws in conflict therewith (with the rules of practice and procedure adopted by the Supreme Court itself) shall be of no further force and effect." (See 49 HARV. L. REV. 1303, 1310-11, 1320-21, as to the extent of this provision.) The new rules do

cover the field formerly covered by the Conformity Act, that act is gone, and may, except possibly for the limited purpose indicated in the footnote¹⁹ be ignored.

Function of Court Rules

“The function of court rules is to regulate the practice of the court and to facilitate the transaction of its business. . . No court rule can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true whether the court to which the rules apply be one of law, of equity, or of admiralty. It is as true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred.”²⁰ The statute²¹

¹⁹See footnote 18.

²⁰Washington-Southern Company v. Baltimore Company, 263 U. S. 629; Woodbury v. Andrew Jergens Co., 61 F. (2d) 736, certiorari denied 289 U. S. 740; Christopher v. Brusselback, 58 Sup. Ct. 350; Clymer v. U. S., 38 F. (2d) 581.

²¹See footnote 1.

not cover every conceivable point of practice. True, Rule 83 seems to cover every matter of practice not referred to in the rules by providing that the district court in each district may make rules not inconsistent with the new rules, and that “in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.” But if this last quoted provision is intended to be a delegation of power to the district courts by the Supreme Court, then it hardly seems warranted by the enabling statute, which authorizes the *Supreme Court itself* to prescribe the practice and procedure by rules and merely abrogates “all laws in conflict therewith,” to-wit, in conflict with the Supreme Court’s own prescribed rules of practice and procedure, and does not authorize the Supreme Court to delegate to the district courts the power to make rules of practice and procedure. To illustrate, if the Supreme Court, purporting to act under the enabling statute, had merely adopted a single rule, in substance like Rule 83 above, delegating the rule-making function to the district courts, would it have been the proper exercise of the statutory power, and would the Conformity Act have been abrogated thereby? While it has been urged (April, 1937, report of Advisory Committee, pp. 214, 215) that under Equity Rule 79 the district court could make equity rules additional to those prescribed by the Supreme Court, it is plain that this right is reserved to the district courts by statute (U. S. C., title 28, § 723; see also § 730), and does not exist by virtue of delegation from the Supreme Court. And though it is also suggested (April, 1937, report of the Advisory Committee, p. 214) that new Rule 83 “substantially continues U. S. C., title 28, § 731 (Rules of practice in district courts),” it would seem quite plain in the light of recent decisions (*Chisholm v. Gilmer*, 297 U. S. 99; *Aetna Insurance Company v. Kennedy*, 301 U. S. 389; *Eley v. Gamble*, 75 F. (2d) 171, C. C. A. (4th); *Sartor v. United Gas Public Service Company*, 3 Fed. Supp. 943; *Barrett v. Virginian Railway Company*, 250 U. S. 473; *Parris Irrigation District v. Turnbull*, 215 Fed. 562; see, however, *Shepard v. Adams*, 168 U. S. 618; *Ellicott Machinery Corp. v. Vogt Bros. Mfg. Company*, 267 Fed. 945, certiorari denied 254 U. S. 607) that the right of district courts under § 731 to prescribe rules in law actions, inconsistent with the state practice, has been conclusively denied. Consequently it appears to be a permissible conclusion that all matters affecting suits of a civil nature cognizable at law, not covered by the new rules, are still subject to the Conformity Act; and that, as to

under which the new rules were adopted expressly provides that the rule shall neither abridge, enlarge, nor modify the substantive rights of any litigant. New Rule 82 specifically states that the rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

Effect of Court Rules

The rule-making power has been exercised by the Supreme Court since the earliest times under direct Congressional authority.²² "A rule of court thus authorized and made has the force of law."²³ Such a rule "is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases that come within it, until it is repealed by the authority which made it."²⁴ "Where no discretionary power is reserved to the trial judge in the rule, he cannot dispense with it in particular

²²44 YALE L. J. 387, 391; 1 WASH. L. REV. 163, 171; *Wayland v. Southard*, 10 Wheat. 1, 22, 42-43, 45-48, 50, per Marshall, C. J., in the federal system the rule-making power is considered a power delegated by Congress, not an inherent power. See also 49 HARV. L. REV. 1303, 1309. But see *Christopher v. Brusselback*, 58 Sup. Ct. 350.

²³Weil v. Neary, 278 U. S. 160, 169, and cases cited; *Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 603, 608; *Superior Fire Insurance Co. v. Martin*, 80 F. (2d) 275, C. C. A. (7th); *Galveston Dry Dock Co. v. Standard Dredging Co.*, 40 F. (2d) 442, C. C. A. (2d).

²⁴*Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 603, 608-9.

such matters, the rule-making power of the district courts under § 731 would only extend to the making of rules which reasonably conform to the local practice. (*Janoske v. Porter*, 64 F. (2d) 958, C. C. A. (6th); *Chisholm v. Gilmer*, 297 U. S. 99.)

Unless, therefore, it can be said that the new rules of procedure, disregarding Rule 83, have themselves covered the entire field formerly governed by the Conformity Act (having in mind that there were numerous exceptions to the applicability of the Conformity Act (see section 10 of this text)), there may perhaps still be a minor field for its operation.

Under this view as to civil actions cognizable at law the new rules would merely render the Conformity Act inoperative *pro tanto*, and it would still remain in effect as to all matters not covered by the new rules, notwithstanding the rule-making power of the district courts under § 731 which has been held to be inoperative when in conflict with state practice under the Conformity Act.

To remove all doubt as to the supplementary rule-making power of the district courts under § 731 and to restore it to its full vigor, it would appear to be desirable that Congress expressly repeal the Conformity Act.

It may be urged on the other hand that the Supreme Court in the adoption of Rule 83 purporting to confer rule-making power on the district courts, or substantially continuing § 731 in effect, has by implication rendered the Conformity Act inoperative even as to matters not covered by the new rules, but it would appear to be at least doubtful whether Rule 83 is the kind of a rule which under the enabling act (Act of

cases.²⁵ A breach of a court rule is, however, a mere error of procedure not affecting jurisdiction.²⁶

Supplementary Rules of District Court

By Rule 83 each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with the Federal Rules of Civil Procedure, and in all cases not provided for by rule may regulate their practice in any manner not inconsistent with the Federal Rules of Civil Procedure. Copies of such rules must be furnished to the Supreme Court. It has been suggested²⁷ that this rule substantially continues U. S. C., title 28, section 731 (Rules of Practice in the District Courts). The status and effect of this rule has also been discussed in a preceding paragraph.²⁸

It should be noted that local rules of the district court are not judicially noticed in the appellate court and should be brought up in the record.²⁹

Law and Equity Under the New Rules

While the new rules provide for "one form of action" to be known as a "civil action"³⁰ applicable to "all suits of a civil nature whether cognizable as cases at law or in equity"^{30a}, the rules merely apply to procedure, and, of course, do not destroy the substantive differences between law and equity any more

²⁵*Ibid.*, Superior Fire Insurance Co. v. Martin, 80 F. (2d) 275, C. C. A. (7th); but see United States v. Tucker, 65 F. (2d) 661, C. C. A. (4th); Spokane Interstate Fair Assn. v. Fidelity and Deposit Company, 15 F. (2d) 48, C. C. A. (9th); Puget Sound Navigation Co. v. Nelson, 41 F. (2d) 256, C. C. A. (9th).

²⁶Abbott v. Brown, 241 U. S. 606, 609.

²⁷April, 1937, report of Advisory Committee, p. 214.

²⁸See footnote 18.

²⁹Washington A. & G. Steam Packet Co. v. Sickles, 19 Wall. 611, 22 L. Ed. 203; Abbott v. Brown, 241 U. S. 606, 609.

³⁰Rule 2.

^{30a}Rule 1.

June 19, 1934) will have the result that "all laws in conflict therewith shall be of no further force and effect". Moreover, if Rule 83 is merely a rule substantially continuing § 731, the rule probably cannot give § 731 any better status than it has at the present time, unaided by the rule. It would seem persuasively arguable that under the enabling statute only the Supreme Court's own formulated rules of practice and procedure can render the Conformity Act inoperative *pro tanto*, and that it cannot be done by a rule purporting to grant supplementary rule-making power to the district courts.

However that may be, there may perhaps be occasional instances where questions of practice arise which are not covered by the new rules, and within the field formerly covered by the Conformity Act, and where it may be of importance to determine whether the trial judge shall follow the state practice, or adopt a practice of his own, or make a rule conforming to the state practice, or differing from it. It would seem to be the safest course to follow the state practice, or to make rules reasonably conforming thereto. (See Janoske v. Porter, 64 F. (2d) 958, C. C. A. (6th)).

than has been done under the state codes. Merely the distinction between law and equity *procedure* has been wiped out. "What was an action at law before the code, is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on principles of equity."³¹ The distinction between law and equity is engrafted in the Constitution itself.³² While under the new rules there is now but "one form of action", legal and equitable *issues* remain as before, and trial by jury is fully preserved.³³ Any number of legal and equitable claims may be joined in the complaint, answer and reply;³⁴ and any party desiring to have any legal issue in the cause tried by a jury has the right fully preserved.³⁵ Issues on which jury trial is not demanded are triable by the court, unless the court in its own discretion orders a jury trial on any or all issues.³⁶ "When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried."³⁷ This presents a simple and workable system of procedure.³⁸

Federal Practice Prior to 1872

Prior to 1872 the practice and procedure in the federal courts in actions at law and suits in equity was subject to the rule-making power of the Supreme Court. This rule-making power dates back to the Permanent Process Act of 1792.³⁹ In 1842⁴⁰ Congress re-

³¹Liberty Oil Company v. Condon Bank, 260 U. S. 235, 242.

³²Thompson v. Central Ohio R. Co., 6 Wall. 137; Ellis v. Davis, 109 U. S. 497; Twist v. Prairie Oil Co., 274 U. S. 684.

³³YALE L. J. 1022, 1041-4; 44 YALE L. J. 1291, 1296, 1298; Bisnovich v. British American Ins. Co., 100 Conn. 240, 123 Atl. 339; Roy v. Moore, 85 Conn. 159, 82 Atl. 233.

³⁴Rule 18.

³⁵Rule 38.

³⁶Rule 39(b).

³⁷April, 1937, report of Advisory Committee, p. 100, citing Liberty Oil Co. v. Condon Nat. Bank, 260 U. S. 235; see also said April, 1937, report, p. 149, and see next footnote.

³⁸See Bisnovich v. British American Ins. Co., 100 Conn. 240, 123 Atl. 339; Roy v. Moore, 85 Conn. 159, 82 Atl. 233; and see Liberty Oil Co. v. Condon, 260 U. S. 235, 67 L. Ed. 232, 43 Sup. Ct. 118; Enelow v. New York Life Ins. Co., 293 U. S. 379; Lhanferoke C. & S. Corp. v. Westchester S. Corp., 293 U. S. 449; Whitney Co. v. Johnson, C. C. A. (9th), 14 F. (2d) 24, certiorari denied, 273 U. S. 734, 71 L. Ed. 864, 47 Sup. Ct. 242. In SIMKINS, FEDERAL PRACTICE (1934) § 59, discussing "Equitable Pleas on the Law Side", it was said: "The equitable and legal issues can now be determined in a single suit, the defendant being no longer required to enjoin the suit at law in order to avail himself of any equitable defense he may have in the case. As stated, the equitable issue will first be determined by the chancellor alone, and then, if an issue of law remains, it is triable by a jury. It seems, however, that, in the absence of a request to have the equitable issue first determined by the court, if the entire case is submitted to the jury, the defendant cannot complain."

³⁹1 Stat. 275; U. S. C. A., Title 28, § 731; Rev. Stat. § 918; Amy v. Watertown, 130 U. S. 301, 303. See 44 YALE L. J. 387, 391-2.

⁴⁰5 Stat. 518.

affirmed the rule-making power of the Supreme Court in suits at common law, in admiralty and in equity.⁴¹ But because the rule-making power in law cases had not been exercised,⁴² Congress, on June 1, 1872, while continuing in the Supreme Court the power and authority to make general rules in equity and admiralty,⁴³ withdrew from that court the rule-making power with respect to actions at common law by the enactment of the Conformity Act⁴⁴, which required the practice in actions at law to conform, as near as may be, to the state practice.

The Conformity Act of 1872

The Conformity Act⁴⁵, designed to bring about uniformity in state and federal procedure in common law causes, provided in substance that the practice, pleadings and forms and modes of proceeding in civil actions at law should conform "as near as may be" to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such courts are held, "any rule of court to the contrary notwithstanding." By the elimination of the circuit courts by the Judiciary Act of 1911, which went into effect January 1, 1912, the act, of course, applied to the district courts only. Until the effective date of the new "Federal Rules of Civil Procedure" on September 1, 1938, civil actions at law will be governed by this statute.⁴⁶ Practice, however, under the Conformity Act never proved satisfactory because, while conformity in a considerable number of instances was required, many exceptions developed to conformity.⁴⁷

Further Express Extension of Rule-Making Power Desirable

While an admirable result has been attained in setting up by rules of court a clear and simple practice in the trial courts in civil cases cognizable at law and in equity, with some provisions bearing on appeals to the circuit court of appeals⁴⁸, the Act of June 19, 1934 relates to proceedings in the district courts. Disparity still exists in the practice on appeals in the federal court system, direct

⁴¹Friedenstein v. U. S., 125 U. S. 224, 232; Amy v. Watertown, 130 U. S. 301, 303.

⁴²44 YALE L. J. 387, 392.

⁴³U. S. C., title 28, § 730; Rev. Stat. § 917.

⁴⁴17 Stat. 197; R. S. § 914; U. S. C., title 28, § 724; Amy v. Watertown, 130 U. S. 301, 303.

⁴⁵U. S. C., title 28, § 724; Rev. Stat. § 914.

⁴⁶See footnote 18; Chisholm v. Gilmer, 297 U. S. 99.

⁴⁷Herron v. Southern P. Co., 283 U. S. 91; Hein v. Westinghouse Air-brake Co., 168 Fed. 766, 769; see SIMPKINS, FEDERAL PRACTICE (1934) § 3; 44 YALE L. J. 387, 401, 409.

⁴⁸See Rule 73, 75, 52; and see May, 1936, preliminary draft of Advisory Committee, pp. XI, XV.

appeals from the district court to the supreme court being taken by one method,⁴⁹ and to the circuit court of appeals by another.⁵⁰ And, of course, appeals from the highest court of a state to the Supreme Court of the United States are not affected by the act, but are controlled by the Act of April 26, 1928⁵¹ abolishing the writ of error and substituting an appeal,⁵² and "must be sought, allowed and perfected in conformity with the statutes theretofore providing for a writ of error".⁵³ This undesirable variety in appellate procedure comes about because the rule-making act of June 19, 1934, relates to the district courts.⁵⁴ Now that the great step forward has been taken to simplify and render uniform procedure in the trial court, it would seem that the next step would be an act of Congress clearly authorizing the same simplification and uniformity of appellate procedure in the federal court system. This could be accomplished by an act specifically dealing with appeals only, thus supplementing the existing act of June 19, 1934, without risk of its abolition or impairment, or by a broad rule-making act authorizing the Supreme Court of the United States to deal by rule with the entire practice and procedure, in all classes of cases and proceedings, in the trial courts and on appeal.⁵⁵

⁴⁹See Rule 72, which is merely descriptive of the present practice.

⁵⁰Rules 73, 75.

⁵¹U. S. C., title 28, § 861 (b).

⁵²United States Sup. Ct., Rule 46 (2); Nashville R. Co. v. White, 278 U. S. 456, 460; Great Northern R. Co. v. Minnesota, 278 U. S. 503, 506.

⁵³*Ibid.*

⁵⁴See 49, HARV. L. REV. 1303, 1307-8.

⁵⁵See the broad rule-making act of the State of Washington, Chap. 118, Laws of 1925 Extraordinary Session; REM. REV. STAT. OF WASH., 13-1 and 13-2; see 49 HARV. L. REV. 1303.

Legislative Committee Seeks Material

The Legislative Committee of the State Bar Association, charged with the duty of going down the line for such needed legislation as shall be called to its attention by the members of the bar, asks that lawyers encountering situations that point to needed correction of existing legislation, or the passage of new legislation, report these matters immediately to the committee. This committee is in a position to speak on behalf of the entire bar on legislative matters and stands ready to act when appropriate subjects are brought to its attention. The code is far from perfect. Address communications concerning needed changes to the Legislative Committee, State Bar Association, 655 Dexter Horton Building, Seattle.