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AFTERTHOUGHTS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE AT CLEVELAND, JULY, 1938*

At this Institute, attended by about five hundred lawyers from all parts of the United States, the eighty-six rules of the new code of Civil Procedure for the Federal District Courts, effective September 16, 1938, were discussed in detail.

Starting with Rule One, it was pointed out that the scope of the new rules extends to all civil suits in law and equity with certain exceptions as prescribed in Rule 81, such as bankruptcy and copyright, etc. . . . about which a word will be said later. The rules apply in the Federal District Courts and the question arises whether they extend to Hawaii or the Virgin Islands, etc. Congress will, no doubt, amend the organic act to include all district courts as it appears expedient.

As the rules are considered, it should be kept in mind that they only apply to practice and procedure and in nowise extend to substantive law. *The new rules* is in one sense a misnomer as these rules are a composite of rules that have very considerably been tried and tested in England, in the Federal Courts, and likewise in various code states. A few are original, while others have their source in the Federal Statutes such as the Equity rules of 1912 and 1915.

One of the chief purposes of the new Federal Rules is to have the states follow them and eventually conform to them to the extent that the substantive law of each state will permit. Which new policy is a reversal of a policy that has prevailed during the last one hundred fifty years. Heretofore, the Federal Rules were promulgated with the idea of con-

* [Because of the widespread dissemination of the Federal Rules, it is thought that these observations, made by a learned student of procedure, will prove valuable to the reader notwithstanding the readily available text of the Rules is not set forth herein. Editor.]

formity to the practice and procedure in the forty-eight states and it was just this impossible situation that made the new rules imperative.

Rule Eighty-one, among other things, states that the new rules do not apply to either bankruptcy or copyright unless the Supreme Court of the United States promulgates a rule to the contrary. It is expected that the Supreme Court will make a rule during the Fall term to the effect that the new rules should apply to bankruptcy and copyright.

Some of the rules present interesting sidelights. For example, the basic rule two which unites law and equity adopts the usual rule of the code states to the effect that, "There shall be one form of action to be known as 'Civil Action'." This rule, evolved from the New York code of 1848, is found in substance in the modern code states. (In Illinois the new Civil Practice Act has practically the same language). Rule Three provides that a civil action is commenced by filing a complaint with the court and thus differs, for example, from the New York rule which requires that the defendant must be served. Rule Four applies to *process* and section D relating to personal service should be particularly noted as it is the result of a compromise between the strict and the liberal theories of what constitutes personal service. Also note Rule Four (d) 7, which is a sort of catchall provision relating to personal service. Likewise Rule Four (f) is notable for an interesting provision that makes a change in the law by enlarging the territorial limits of effective service in some cases.

Rule Six as to time, section (b), should be observed because it permits the court to enlarge considerably the period of *time* originally specified for either affirmative or negative performance. Section (c) of the same Rule provides that the expiration of a term of court does not change the discretionary rule as to the enlargement of the time period by the court. Rule Seven illustrates the policy of the new rules as to

simplicity by the short pleadings it sets up. The modern source of this rule can be seen in the New York Code. Rule Eight relates to general rules of pleading and subdivision (8) to claims for relief, among other things provides that relief in the alternative or of several different types may be demanded in a single case. Rule Eight (c) which is modeled on the English practice as well as that found in a few code states provides that affirmative defenses will be necessary in certain instances. Rule Eight (d) provides that if you fail to speak when called upon, you are presumed to have admitted the fact in issue. Rule Eight (e), par. 2 again shows the flexibility of the new Federal rules by providing that you are not limited to the single weapon theory as it permits you to choose as many theoretical weapons as you think your case needs. In other words, the common law sporting theory is not the theory of the new rules since you need not select any single weapon and rest your success on it but can use that which seems most expedient.

In Rule Ten (b) the second sentence should be noted: "Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matter set forth." The committee drafting the rules thought that this was the best way to handle a question that often comes up as to whether there is one cause of action with several claims or whether the several claims were sometimes separate causes of action. The new rule now leaves the matter in the hands of the trial courts.

Rule Eleven as to signing of pleadings contains the following, "The signature of an attorney constitutes a certificate by him that he has read the pleadings . . ." This came from the old Equity rule and is mentioned because it illustrates how the new rules are a composite of many tried rules. Note the aspect of the penalty against an attorney that this rule entails for improperly signing a pleading. Rule Twelve pro-

viding for a twenty day service of an answer after being served with a cross claim might be noted and also that the twenty day period is enlarged to sixty days when the United States is the party served. Rule Twelve (b) should be given a glance because it prescribes how defenses should be presented.

Rule Thirteen (a) provides for compulsory counterclaim and has been added on the modern theory found previously in the Federal Equity rules and also in some states, that you should settle all matters you litigate in the same action and provides that if you fail to do this you cannot later file a separate action. Rule Thirteen (b) as to permissive counterclaims contemplates dragging out all matters involved in the action and is based on the modern theory of giving the action a wide rather than a narrow scope.

Rule Fourteen, Third-Party Practice, is a very important new rule that evolved from the modern practice in states such as New York. It is a 1938 short cut to settle many claims in one action. This is a very broad rule permitting the bringing in of third parties. A lawyer attending the Institute asked Dean Clark whether in a motor carrier case this rule permitted the bringing in of insurance companies and when he answered "Yes," those in attendance uttered more Ahs and OHs than they did about any other rule that came before the Institute. Later Dean Clark pointed out that the bringing in of the insurance company as a third party must be limited by the conditions prescribed in the rule. There was much ado over this aspect of the rule but it was finally pointed out that as the third-party practice permitted by this new rule merely seeks to provide a remedy for existing gaps in the law, Major Tolman cited the case of the corporation officer sued individually for statutory liability imposed upon corporate officers where the corporation no longer existed. Although there were other officers and stockholders equally liable under the then existing law it took about five years before it was decided

after various appeals that the officer who had been sued alone was liable. After judgment against him under the old practice, he could bring in third parties equally liable and compel contribution. Note that this was five years after the original suit and necessitated new actions. If Rule Fourteen had been in effect at that time, the officer sued individually could have immediately brought in as third parties, the other officers and stockholders who were equally liable to share the burden.

Rule Fifteen (b) providing that amended pleadings conform to the evidence is important and section (c) of the same Rule concerning the relation back of the amended pleading, should be considered in the light of an attempt to get away from the rule in some states that the Statute of Limitations bars the action whenever the amendment involves either a new cause of action or a new legal theory.

One of the most important of the new rules is the Sixteenth, Pre-Trial Procedure. Although it evolved from England and some of the states, it has been in recent years developed in such cities as Boston, Los Angeles, and Detroit. The origin of pre-trial procedure in Detroit is interesting . . . it started out with mechanic lien cases and gradually was extended piece-meal to other types of cases and finally it went all the way and included civil cases generally. Though only in its incipiency it seems to be recognized that this new remedy of pre-trial is one of the best for the purpose of overcoming expense and delay. At the outset pre-trial should be understood as not taking away a single right, although it does aid "discovery" and helps to stabilize the docket. The object of this remedy is not to have a settlement without a trial by jury, but there is one thing that the few available statistics show about this practice and that is that a large number of cases are settled without a jury and many are settled before they reach the final stages of trial. Further sidelights on pre-trial practice are given in the report of the committee on Pre-

Trial Procedure of the American Bar Association as approved July 25, 1938, at the annual meeting in Cleveland, which approves pre-trial practice and urgently recommends its adoption in all the metropolitan courts.

Rule Seventeen relates to the capacity of parties plaintiff and defendant either to sue or be sued and is rather liberal in scope. This rule in substance follows the rules adopted in the more modern code states. In paragraph (b) of Rule Seventeen it should be noted that the law of an individual's domicile determines his capacity to sue or be sued. But when a corporation is a party, the law under which it was organized applies. Likewise the application of this paragraph to unincorporated associations should be observed, especially as to labor unions, even though it only restates existing law as to them and does not state a new law as the labor unions contended in the Congressional Committee hearings.

Rule Eighteen (a) as to joinder of claims is very liberal and permits practically unlimited joinder of claims . . . and Rule Eighteen (b) as to joinder of remedies is likewise liberal and among other things provides, "In particular a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

Rule Nineteen (a) as to necessary joinder of parties includes this unusual provision, "When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, *in proper cases, an involuntary plaintiff.*" For example, the underscored portion of the previous sentence would apply where an assignor of a patent would not come in. It is well also to note Rule Nineteen (b) as to the effect of the failure to join, namely, the court can go forward with the proceeding as this rule cuts down the scope of "Indispensable parties." Rule Twenty (a) as to permissive joinder of parties is fairly wide and adopts the common test of law or fact that is found in modern acts such as the Illinois Practice Act. (Of

course you can trace the source of this rule to England and states like New York and Illinois.) The common law rule was not as broad as Twenty (a) as the new rule is really an evolution of the more liberal equity rule as to joinder of parties. In passing to Rule Twenty-two as to Interpleader it is to be noted that when you look at Rule Twenty as to Joinder and Rule Twenty-two as to very liberal interpleader, they seem to be alike, in fact they are in many respects except Rule Twenty-two expressly does away with the technical rules of Interpleader and fuses in the bill in the nature of a bill of Interpleader to make for a more practicable and justiciable result.

Rule Twenty-three as to Class Actions is an attempt to restate the rule of equity as to the doctrine of representative suits . . . and Rule Twenty-three (3) should be especially noted which provides as to a spurious class suit that if it is several, and there is a common question of law or fact affecting the several rights and a common relief is sought, the doctrine of representation applies. Rule Twenty-four tells you when you can intervene and provides that a motion to intervene stating the grounds is the agency to employ. Rule Twenty-five as to Substitution of Parties in case of death, incompetency, or transfer of interest, carries over the equity rule and the statutory rule found in many states with a few variations; and Rule Twenty-five (d) should be noted . . . it was inserted to get around the federal decision which held if an injunction is obtained against a public official, Mr. X, and he dies and Mr. Y becomes his successor, the injunction against Mr. X was not extended to Mr. Y, his successor . . . now it is by Rule Twenty-five (d).

Rules Twenty-six to Thirty-seven as to depositions and discovery should be read as a series of links in a new chain allowing liberal discovery where there was often none before. The whole law of discovery has been liberalized by virtue of the new rules. Heretofore you really had no discovery in the

federal courts as you had in the state courts. Now you have, by virtue of these rules, as broad a discovery in the federal courts and may be a little wider than you have in the state courts. Rules Twenty-six to Thirty-seven must be read in the light of adding a wide jurisdiction to an extremely restricted area . . . and as to perpetuation of testimony in Rule Twenty-seven, it should be noted that it gives an option to use either the state or the federal rule, namely; if a deposition can be used in a state court in Illinois for example, it can be used in a federal court . . . or you can follow the federal rule Twenty-seven.

In order to avoid abuse, the new rule as to discovery provides in Thirty (d) and Thirty (e) certain rather novel penalties. Rule Thirty-four as to discovery and the production of documents and things for inspection, copying, or photographing, should be read with one eye on Rule Thirty-five, Physical and Mental Examination of Persons. It is to be noted that the latter rule depends upon an affirmative order of the court. Rule Thirty-six, Admission of Facts and of Genuineness of Documents, should be carefully perused as it is very extensive and sort of reverses the former practice by now requiring affirmative action to avoid admission.

Rule Thirty-eight preserves the right of jury trial. Then Rule Forty-one, Dismissal of Actions, should be noted and at the same time one might contrast it with the old rule in Illinois that you could take a non-suit any time before the judge read the instructions. There was a question raised about Rule Forty-one . . . Is It Procedural? The answer was given that it is procedural since this rule states the effect of dismissal and an opinion of Chief Justice Marshall of the Supreme Court of the United States and also an English case was cited in support of that position.

Rule Forty-four, Proof of Official Record, was doubly interesting to me when I found out that Col. John H. Wigmore wrote it. It is an attempt to bring order out of chaos and

state a simple, workable rule. Rule Forty-seven (b) provides for alternate jurors . . . either one or two as the court may direct. Rule Forty-eight, in line with enlightened thought, provides for juries of less than twelve and majority verdicts and is quite a change from the common law rule.

Rule Fifty, Motion for a Directed Verdict, avoids the trap that in times past caught the unwary, by providing, "A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts." Rule Fifty-two, Findings by the Court, is very important and among other things is an example of a modern equity rule being used as a source for a rule in the new code. It reads in part, "In all actions tried upon the facts without a jury, the court shall find the facts especially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . ." Requests for findings are not necessary for purposes of review. Rule Fifty-four (b) is outstanding as it permits a split judgment that is found in some of the state codes. Along with this rule (relating to Judgments) Fifty-four (c) should be noted as to Demand for Judgment as it incorporates the general practice of the codes, and note for example . . . "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."

Next one should note Rule Fifty-six, Summary Judgment, as it incorporates the best ideas of today and widens the scope of the Summary Judgment as it applies to all cases and attempts to frustrate stalling by permitting one, in situations where stalling was used in the past, to ask for a Summary Judgment as a matter of law. Rule Fifty-seven, Declaratory Judgments, provides for rather extensive use of that remedy as it states, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." This overcomes the doubt that prevails as

to whether you could use the declaratory judgment in the alternative. Rule Fifty-eight on Entry of Judgment calls for notice of the fact that "The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

To again see how the 1938 Federal Code has used modern sources, note Rule 60 (b) as to Mistake; Inadvertence; Surprise; Excusable Neglect and then compare it with the California code and note the similarity of expression. Rule Sixty-one, Harmless Error, is an important provision that has been inserted to take the sting out of *Harmless Error,* and seeks to protect a judgment from such objections that have often unfairly upset it in the past. Rule Sixty-five, Injunctions, further illustrates another source of these new rules, namely, existing federal statutes. Rule Seventy, Judgment for Specific Acts; Vesting Title, among other things provides, "If real or personal property is within the district, the court, in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law."

Rule Seventy-seven (b), Trials and Hearings, referring to Hearings states, "But no hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all the parties affected thereby." Rule Eighty-one (c) Removed Actions, is important and you will note to quote from it that, "Repleading is not necessary unless the court so orders." Rule Eighty-three, Rules by District Courts, permits the local district federal judges to make local rules for their district and the local rules are final unless the Supreme Court otherwise provides. By virtue of Rule Eighty-six, these rules became effective September 16, 1938.

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