December 1938

The New Federal Rules

Edson R. Sunderland

University of Michigan Law School

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons

Recommended Citation


This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
I think the promulgation of the new Federal Rules must be looked upon as a triumph for Virginia, because regulation of federal procedure by rules of court, if you will remember, was from the very beginning a Virginia project. Mr. Thomas W. Shelton, of Norfolk, Virginia, was the man that proposed it, and he carried on a persistent campaign for its accomplishment as long as he lived. As the result of his tireless efforts extending over almost a quarter of a century, the Supreme Court was at last given statutory power to make rules, and under that authorization these rules were adopted.

It is difficult to give a connected account of mere procedural regulations, but there are certain general aspects of the new system of rules which may well be referred to by way of introduction.

In the first place, the effect of the rules has been to eliminate the conformity act. It was the conformity act which troubled Mr. Thomas W. Shelton and its failure was the motivating force behind the long struggle under Mr. Shelton's leadership on the part of the American Bar Association to obtain Congressional authority for the Supreme Court to make rules in law actions.

In the second place, the new rules have eliminated the Federal Equity Rules of 1913. They constitute a substantially complete code of practice identical for law and equity. In a few instances they adopt, by express language, the state practice as an exclusive...
or optional method. For example, in service of process upon individuals or corporations, the state practice may be followed at the option of the plaintiff. There is, however, no service by publication provided by these rules. That kind of service, when necessary, must be effected under federal statutes, as referred to in Rule 4 (e). The procedure for provisional seizure of person or property, including arrest, attachment, garnishment or replevin, will conform to the state practice as the exclusive method, subject to any relevant federal statutes.¹

Procedure for execution will conform to the state practice as the exclusive method, while in procedure supplemental to and in aid of execution the state practice may be followed as an optional method, subject, of course, to Congressional legislation.² Evidence will be admitted if either a state or federal rule sustains its admissibility.³ Perpetuation of testimony may be had either under the state practice or under the federal practice.⁴ But the manner of taking depositions pending suit, which has heretofore been optional as between state and federal practice, is now exclusively federal.⁵

I think no tears will be shed by the bar of this country over the fact that the immense body of judicial decisions as to what matters are or are not controlled by the conformity act, no longer have any value except for the legal historian. The equity practice as followed by the High Court of Chancery in England, heretofore governing the federal courts on all equitable matters not covered by equity rules, is abolished as a controlling procedure. However, the English chancery practice may still be resorted to for suggestions in solving equity problems where the rules do not completely cover the case. It has always been the practice, everywhere in the United States, for courts to look back at both the chancery and the common law practice for advisory precedents to supplement local legislation.

It is quite noticeable in the new rules that there has been a distinct effort to enlarge the discretionary power of district judges. There are two theories for drafting rules of procedure. One is to draw the rules so as to expressly lay down provisions covering all

---

¹ Rule 64.
² Rule 69.
³ Rule 43.
⁴ Rule 27.
⁵ Rule 26 (a).
contingencies. The other is to cover the main features of the procedure by explicit rules and to leave a great many details to be determined by the judges in their discretion. The latter theory has been definitely adopted in these rules. I have before me, although I shall not read them, a list of forty express provisions by which various matters are left to the discretion of the judge. Thus, the court has discretion to authorize service of process by persons other than the marshal;⁶ to permit amendments to returns of process and pleadings;⁷ to order separate trials in order to prevent parties from being embarrassed or delayed;⁸ to order a jury trial where not demanded;⁹ to permit counsel to examine jurors, or the court may itself examine the jurors;¹⁰ to impanel alternate jurors to hear a case;¹¹ or to direct the jury to return a special verdict.¹² The court has discretionary power to appoint a special master in any case.¹³ Partial judgments at various stages of the proceedings may be entered in the court’s discretion;¹⁴ judgment by default may be set aside for good cause.¹⁵ So that the rules themselves, so far as they lay down definite provisions for procedure, are fairly brief and simple. I would say they are far less elaborate than the rules of the High Court of England.

In general it is to be noted that the new rules abolish procedural distinctions between law and equity.¹⁶ That has long been the practice in most of the states of the United States, but in West Virginia those distinctions still exist. This provision of the federal rules will therefore be of particular interest and novelty to the practitioners in this state. In law and equity there are the same pleadings, the same form of averments, the same counterclaims, the same joinder of parties and actions, the same references and the same forms of judgment; but procedural distinctions are prescribed between jury and nonjury actions, so far as the nature of the two types of trial make those appropriate. In other words, the procedural distinction heretofore existing between law and equity

---

⁶ Rule 4 (c).
⁷ Rule 4 (h).
⁸ Rules 20 (b), 42 (b).
⁹ Rule 39 (b).
¹⁰ Rule 47 (a).
¹¹ Rule 47 (b).
¹² Rule 49.
¹³ Rule 53 (a) (b).
¹⁴ Rule 54 (b).
¹⁵ Rule 55 (c).
¹⁶ Rule 1.
has been supplanted by the distinction between jury and nonjury cases. The nonjury cases constitute a single class, whether they are cases which were previously denominated suits in equity or actions at law; so the important distinction will be between the jury and nonjury cases, and not between cases at law and in equity. The court calendars are required to classify actions as jury actions and court actions, and it makes no difference whether the jury actions are such as were called equitable or legal. Findings in all nonjury cases are required, and they are not to be set aside unless clearly erroneous,\(^7\) which means that the equity rule as to the binding effect of findings is applied to all nonjury cases whether they are legal or equitable. Masters’ findings in nonjury cases are to be accepted by the court unless clearly erroneous,\(^8\) but in jury cases they are merely admissible in evidence subject to objections on the points of law.\(^9\)

Any matters not regulated by these rules may be made the subject of regulation by district court rules;\(^20\) but in regard to matters not covered by any rules, and of course there will be many such matters, since no set of rules was ever complete, there was a good deal of discussion as to what procedure should be employed to fill the gaps. One suggestion was that where the rules failed to cover any matter of procedure the old equity procedure should be followed; another was that the procedure at common law should control. Neither suggestion was adopted. In all cases not provided for by rule the district courts may employ any method not contrary to the rules, in accordance with their own judgment. The purpose was to make the rules practical and workable, and any good method of getting the desired results in any case ought to be satisfactory if not inconsistent with these rules.

It is specially provided in Rule 82 that, "These 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." Jurisdiction and venue are therefore not affected in any manner and the rules must be construed in accordance with that principle.

Taking up the separate rules, the first one I shall mention, Rule 3, deals with the commencement of suits. We have been familiar with two different theories: that used in equity where the

\(^{17}\) Rule 52.
\(^{18}\) Rule 53 (e) (2).
\(^{19}\) Rule 53 (e) (3).
\(^{20}\) Rule 83.
commencement of suit dated from the filing of the complaint, and that used at law where commencement dated from the issuance of the original writ. The equity system has been adopted in the new federal rules, and commencement of suit is effected by filing the complaint. Some objections were expressed. It required time to draw and file a complaint; there might be an emergency, and a quick way should be available. But there was never any trouble in that respect in equity, and it was decided to adopt that system.

As to the form of process, Rule 4 (b) prescribes that it shall be directed to the defendant (in West Virginia I believe it is directed to the sheriff), and no return day is named. Service of process under the new rules may be by the marshal or by any person specially appointed. The expense of service by the marshal is often very considerable, and the rule expressly provides that persons other than the marshal shall be freely appointed to make service where expense can be saved. That is somewhat similar to the West Virginia rule which allows service by any credible person, even though the writ is directed to the sheriff. Old Federal Equity Rule 15 provided for service by one specially appointed but it did not contain a provision encouraging the use of such appointees.

Rule 4 gives complete directions for personal service on different kinds of parties. They are very simple, easy to understand and convenient to follow. A substituted form of personal service is provided by leaving a copy at the usual place of abode with some person of suitable age and discretion then residing therein. The old federal equity rule provided that such service could be made by leaving a copy at the usual abode of the defendant with some adult person of the family. The new rule is a little less liberal than the West Virginia rule, which provides that if the process server cannot find a person over the age of sixteen years with whom to leave it at defendant's residence, he may post it on the front door.

As to appearance under the new rules, it must be made within twenty days after service, without regard to terms of court. In fact the word "term" in connection with procedural matters does not appear in the new rules. Our customary procedure has been based upon the "term" unit; that has been eliminated.

The new rules have very simple and effective provisions for service of notice and other papers. They are to be served, accord-

\footnote{Rule 12 (a).}
ing to Rule 5, by delivering the paper personally, or by mail, or by leaving it at the office with a clerk or in a conspicuous place in the office, or by leaving it with the clerk of the court if the address is unknown. No one should ever find himself in a position where he cannot make service under those rules.

The provisions for pleading perhaps represent one of the most striking changes so far as West Virginia practitioners are concerned. West Virginia has always been the home of the common law. If West Virginia ever abandons common-law pleading, I do not know where teachers in law schools will go for material to use in their classes, because West Virginia Reports contain the best modern cases on common-law pleading. Illinois has been also a stronghold of the common law but Illinois reformed its pleading about three years ago, leaving West Virginia as almost the last bulwark of the common law.

The new rules dealing with pleading seem to introduce a very drastic change, but as a matter of fact they practically follow the federal equity rules of pleading of 1913 with slight changes. Rule 7 provides for a complaint and answer thereto, a counterclaim in the answer and a reply thereto, a cross-claim against a codefendant and an answer thereto; a third party complaint by the defendant and a third party answer thereto, and a reply to an answer or a third party answer if ordered by the court.

Under these rules it may happen that no issue will be reached on the pleadings. One might wonder about the utility of starting for a destination if it is a matter of no consequence whether or not it is ever reached. But something will be accomplished in any case. If you do not reach an issue on the pleadings, you at least will have a general although vague idea as to what kind of an issue is likely to be reached by the evidence at the trial. Anything may be introduced in evidence at the trial which is relevant to the case of either party, whether supported by the pleadings or not if it would have come into the pleadings had they been carried to a final issue according to the common-law system of special pleading. It is utterly illogical in theory, but it works fairly well. A great many states have similar limitations as to the point where the pleadings must end. I think there is no code state except Kentucky where the pleaders can go on indefinitely until a final issue is reached on the pleadings. As a matter of fact most issues are reached on the complaint and answer, and the termination of the pleadings before is-
sue can hardly cause serious trouble if there is a means for obtaining a discovery before trial.

Demurrers and pleas are abolished, and all defenses whether of law or equity, are to be set up in the answer, except that six enumerated defenses may be set up either by answer or by motion. Those six are: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.

Under the federal equity rules only points of law apparent on the pleadings could be raised by motion, but under these rules the six designated defenses, even when not apparent on the face of the pleadings, may be brought into the record by motion supported by affidavits. It is a rather convenient system for presenting defenses based on a few controlling facts, and I think will cause no trouble whatever.

As to the form of allegations, Rule 8 of the new rules provides that there shall be a short and plain statement of the grounds upon which the court's jurisdiction depends. There are forms attached to the rules showing what sort of a statement is required. It is a very simple statement and very easy to make. I think the form will be very useful. Form 2 in the appendix at the end of the rules, shows this statement:

"(a) Jurisdiction founded on diversity of citizenship and amount.

"Plaintiff is a citizen of the State of Connecticut and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

"(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

"The action arises under the Constitution of the United States, Article ——, Section ——; (the —— Amendment to the Constitution of the United States, Section —)—; (the Act of ——, —— Stat. ——; U. S. C., Title —— as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars."

That is all there is to it, and all that is necessary in addition to the

---

22 Rule 7 (c).
23 Rule 12 (b).
24 Rule 29.
supporting facts in the body of the complaint, to give the proper jurisdictional averment on a federal question.

Going to the statement of the case itself, Rule 8 provides for a short and plain statement of the claim showing that the pleader is entitled to relief. You will notice that the words "cause of action" do not appear; neither does the word "fact." The reason for that is, nobody knows what "facts" are; courts have been trying for five hundred years to find "facts" and nobody has ever been able to draw a line between what were and what were not "facts." Since the word "facts" has given a great deal of trouble the suggestion was, Why not eliminate it? Since the phrase "cause of action" has given trouble, eliminate that also. Whether this will do any good is very doubtful, for both terms are embedded in the literature of the law and in the vocabulary of the profession.

The real test of a good pleading under the new rules is not, however, whether the allegations would be deemed good at common law. The test is whether information is given sufficient to enable the party to plead and to prepare for trial. A legal conclusion may serve the purpose of pleading as well as anything else if it gives the proper information. If the party wants more he may ask for more details in regard to the particular matter that is stated too generally.\footnote{Rule 12 (e).} Alternative and hypothetical statements of claims or defenses are permitted.\footnote{Rule 8 (e).} This is somewhat shocking to the common-law pleader. As a matter of fact an alternative or hypothetical position is often the true one, but the rule of common-law pleadings compelled the pleader to pretend the contrary.

Inconsistent counts and defenses are specially permitted,\footnote{Rule 8 (e) (2).} subject, of course, to counsel's certificate that there is good ground for them.\footnote{Rule 11.} At common law I think it was always largely a matter of discretion with the court as to what defenses could be joined. There are common-law cases in which defenses are stricken because they are inconsistent with others, and other common-law cases where they are permitted to stand although they are inconsistent with others. The truth is that inconsistency should be a matter of no importance. Often a party is in doubt because he is unable to fully ascertain the facts. If a lawyer is going to properly protect his client it may be necessary to make statements which on their
face are inconsistent, but when it is done in good faith, because he has been unable to obtain adequate information as to which of the two is true, no harm will result.

As to the scope of the issues, general denials and general issues are not permitted. There is one apparent exception, namely, where one desires in good faith to controvert everything in his opponent's pleading. That, however, is substantially an impossible case for there could hardly be one case in a thousand which is so completely fictitious that there would not be something in the pleading that the other party knows is true.

As to separate statements of claims and defenses, the common law quite rigidly required the use of separate counts or paragraphs. Equity did not use the count system because it was contrary to the theory of equity, which did not permit unrelated matters to be set up in the same bill, and which required the answer to contain a comprehensive showing of the defendant's position. Under the new rules separate counts or defenses are necessary only when it will facilitate the clear presentation of the matters set forth.

As to joinder of causes of actions, the new rules introduce what might be said to be a novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great field of discussion and argument over technical points respecting joinder. It is a curious thing that, after the difficult experience of the common law in regard to joinder, where it appeared that no court and no judge ever succeeded in stating a complete and satisfactory rule for joinder, the reformers in New York, in 1848, when they undertook to eliminate the undesirable features of the common law, felt it necessary to replace the technical restrictions of the common law respecting joinders, with other restrictions equally technical. The arbitrary system of joinder introduced into the New York Code and followed in the codes of other states has proved very difficult.

29 Rule 8 (b).
30 Rule 10 (b).
31 Rule 18.
to apply and nobody knows, even at the present time, what can be joined and what cannot be joined under the code statutes.

Federal Rule 18 eliminates all that trouble. Specifically, where the parties are the same, there is no restriction whatever. Where the parties are different, full freedom of joinder is permitted, subject to the rules as to the joinder of parties. That means where the parties are different any joinder is permitted in cases which arise out of the same transaction or occurrence, or series of transactions or occurrences, and involve a common question of law or fact. There should be some unity in the problems presented. If the claims arise out of the same transaction or occurrence, or series of transactions or occurrences, involving a common question of law and fact, the requisite unity is present. That rule is really nothing more than the equity rule relating to multifariousness.

Under these new rules a number of joinders are permissible which in most states could not occur, such as claims for damages in the alternative against two independent tort-feasors; damages for injury to a house claimed by the owner and the occupier; damages claimed by many persons affected by the same libelous statement; claims against a person causing a personal injury and a physician who afterwards negligently treats the patient; a claim against A for judgment and to set aside A’s fraudulent conveyance to B, this last joinder being expressly permitted under Rule 18.

In dealing with counterclaims, Rule 13 employs the same principle. Any claim by any defendant against any plaintiff arising out of the transaction or occurrence which is the subject matter of the plaintiff’s claim, may be set up as a counterclaim, and it must be so used or it is waived. Convenience is served by including the whole transaction. If there is a cross-claim against a coparty which arises out of the same transaction relied on by the plaintiff in his complaint, that cross-claim may be litigated in the same suit in which the rest of the transaction is litigated.

Again, there is no requirement that a counterclaim must have been acquired or matured before the action was commenced. The defendant may buy up claims against the plaintiff after he has been sued and use them as an offset to any judgment the plaintiff may obtain. A counterclaim may be set up by supplemental pleading, by leave of court, if it accrues after the defendant has

32 Rules 19, 20.
served his defense.\textsuperscript{33} Those are certainly liberal rules, all of them based upon the fundamental theory of convenience, prevention of delay, and saving of time and expense.

There are very liberal rules for amendment under the new federal system.\textsuperscript{34} There is no restriction at all upon the right of the court to allow any amendment. An amendment may be made as of right to conform the pleadings to proof which has been admitted without objection.\textsuperscript{35} There may be an amendment to permit the admission of evidence objected to, if the determination of the merits will be facilitated and the objecting party fails to satisfy the court that the amendment will prejudice him.\textsuperscript{36} As to the effect of an amendment, the rule is very liberal. The amendment relates back whenever the matter asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. As long as the pleader stays within the general subject matter dealt with in the original pleading, the amendment relates back. Even if he does not succeed very well in stating that subject matter, if he has done enough to indicate that he has attempted to state it, the amendment will relate back. In this country a great many very technical distinctions have been drawn in regard to the relation back of amendments so as to escape the bar of the statutes of limitations. This rule will make it impossible to preserve many of those unjustifiable distinctions which are found so frequently in American reports.

Rule 15 substantially enlarges the amendment provisions in West Virginia. According to the West Virginia statutes, the court may, to promote substantial justice, permit an amendment to conform to the proof, but it can be only by leave of court when, in the court's opinion, it will do substantial justice.\textsuperscript{37}

As to the joinder of parties, the new rules are very liberal. Necessary parties are those having a joint interest. That is the rule under any system of procedure. Permissive parties are those who assert or against whom is asserted any right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any question of law or fact common to all of them will

\textsuperscript{33} Rule 13 (e).
\textsuperscript{34} Rule 15.
\textsuperscript{35} Rule 15 (b).
\textsuperscript{36} Ibid.
\textsuperscript{37} W. VA. REV. CODE (1931) c. 56, art. 4, § 27.
The purpose in allowing a liberal joinder of parties is to enable connected matters to be brought together, to be litigated in the most convenient manner.

Rule 23 as to class actions is simple and intelligible, which is more than can be said of any rule that I know of heretofore promulgated either by statute or court rule. It was the rule in equity that when a question was one of common or general interest of many persons, one or more might sue or defend for the whole. That means nothing at all; it is merely a suggestion that the court refer back to the equity practice. Practically the same rule is found in many code states; it is wholly inadequate and gives no information. The new rule introduces no change of principle in respect to class suits, but merely expresses in a simple, intelligible way the operating principles by which the courts have been guided in dealing with class suits. What the committee tried to do was to specify in this rule all the types of cases in which class suits had in fact been authorized, and to state the conditions which the courts appeared to consider necessary for instituting class suits. First of all, of course, the parties should be so numerous that it is impracticable to bring them all before the court. Secondly, there must be an adequate representation, which, of course, is fundamental. Take the English case of Markt & Company v. Knight Steamship Company,38 where an action was brought by a number of shippers of goods in the same ship to recover damages against the ship owner for the loss of the goods due to the sinking of the ship by a Russian warship during the Russian-Japanese war. Some of the shippers sued for themselves and all others. The court held that it was not a proper representative suit, and the reason was that there was no adequate representation; that each shipper was interested in his own damages and not in the damages claimed by others. One of the judges, in a separate opinion, said that if the suit had been brought for a declaration of right instead of for damages, it would have been a proper class suit, because there would have been adequate representation, since the conditions of liability were exactly the same for all the shippers, and any shipper who represented himself adequately was bound to represent all others equally well so far as the determination of rights was concerned.

Thirdly, a community of interests is required. That may be of various types. The interests may be joint, as in the case of a

---

voluntary association; or common, as in the case of tenants in
common; or, secondary, as where stockholders have an action in
case directors refuse to enforce their rights. Or, the interests may
be several in the same property. Or, the community of interest
may exist where the interests are several and there is a common
question of law or fact affecting them and a common relief is
sought as, for instance, in a taxpayer's suit to enjoin. The rule
simply aims to enumerate or describe all the kinds of class suits
which may be brought, thereby saving the courts and the lawyers
the trouble of going back to the equity practice in every case.

Rule 24 does for intervention what Rule 23 does for class ac-
tions. A simple statement is given of the cases where intervention
can be employed. The basic principles are that it should be
allowed if the applicant will be bound by the judgment, or will be
adversely affected by the disposition of property in the custody
of the court, or if the applicant's claim and the main action have
a common question.

The rule as to interpleader, merely removes a number of
technical restrictions which grew up under the old chancery prac-
tice and caused trouble.

The new rules provide for a procedure designated as "third-
party practice". When the defendant is entitled to indemnity
from a third person, or to contribution, or to reimbursement, he
may bring in the third person by leave of court as a third-party
defendant, and the third person will be bound by the adjudication
of the main action and of the claim against himself. England has
used it since 1875 with satisfactory results. New York has used it
since 1922. The cases would include a surety who could bring in
his principal, an agent who could bring in his principal, a lessee
sued by a lessor on a covenant who could bring in a sublessee, a
joint tort-feasor who could be brought in if contribution is allowed,
as it is in West Virginia. The effect of bringing in a third party
is the same, I think, as giving him notice under the current practice,
but it has the advantage that both liabilities are determined at once
and the defendant may not have to pay out anything.

There is another novel feature of the new rules called "pre-
trial procedure". As everyone knows, pleadings have never been
adequate to show the real issues. We have always gone upon the

---

39 Rule 22.
40 Rule 14.
41 Rule 16.
theory of party presentation. The parties are allowed to allege what they please and to deny what they please. The allegations or the denials may, of course, be fictitious and they often are, yet each party must come to the trial prepared to meet every apparent issue with all the evidence at his command. There is nothing in civil procedure to serve as a preliminary check like the indictment of a grand jury or a preliminary examination in criminal procedure. England has been developing pre-trial procedure for half a century. A report of a Royal Commission recently appointed to consider The Dispatch of Business at Common Law has recommended its extension. A system of pre-trial procedure has been independently developed in the courts in Detroit, Michigan, which has proved very effective. Every case when ready for trial goes on what is called the "pre-trial docket" for informal discussions between judge and counsel. Two advantageous results may come from such a pre-trial hearing: the case may be settled and go off the trial list, or the issues may be restricted if the case is to go on for eventual trial. There are no figures available as to the extent to which the scope of the trial has been limited by the pre-trial hearing, but there are statistics available as to the final settlement or disposition of cases without a trial. The pre-trial hearing in Detroit comes about two weeks before the case would normally be called for trial, so that all cases which are ready for trial would go on the trial docket except for this pre-trial hearing. In 1935 in the circuit court in Detroit there were 4,965 cases ready for trial. Out of those cases 2,016, or 40.6 per cent were finally disposed of through the pre-trial hearing and never went on for trial at all. In 1936 there were 5,834 cases ready for trial, and out of that number 2,886, or 49.4 per cent, were finally settled on the pre-trial hearing and never went on for trial. In 1937 there were 5,798 cases ready for trial, and of that number 3,198, or 55.1 per cent, were finally settled and disposed of through the pre-trial hearings and did not come on for trial.

The new federal rule authorizes the court in its discretion in any case to order a pre-trial hearing, at which counsel will be called before it for a preliminary and informal discussion to consider the following matters: simplifying the issues, amendments, admissions of facts or documents, limitation of the number of expert witnesses, references, or any other matters likely to aid in the disposition of the cases, and the court is to make an order, on the basis of the pre-
trial discussion, regarding the subsequent course of the case. Not only is the court permitted in its discretion in any particular case to hold a pre-trial hearing, but it is authorized to provide by general rules for a pre-trial calendar.

Discovery, which is the next subject which I wish to discuss, represents one of the most important departures from previous practice. Before one can realize what the new rules as to discovery mean, one should understand in a general way the sort of discovery which has heretofore been available in the federal courts. There were just four sources or authority for any proceeding involving discovery before trial in the federal courts. Those four sources were two statutes and two equity rules. The two statutes were 28 United States Code, section 639, dealing with depositions de bene esse, and 28 United States Code, section 644, dealing with depositions under dedimus potestatum and in perpetuum. The two equity rules were Rule 47, providing for depositions in exceptional cases, and Rule 58, which was entitled "Discovery." The two statutes applied in both law and equity cases, while the two rules were limited to equity cases. As a matter of fact there was no discovery as such provided by the two statutes. They did not purport to do more than authorize depositions before trial for the purpose of obtaining proof, not for the purpose of discovery. Discovery was a mere accidental incident. The need for taking depositions as proof was the condition for taking them. The need for discovery had nothing to do with the matter. Thus under section 639, dealing with depositions de bene esse, depositions were allowed when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or about to go out of the United States, or when the witness was aged or infirm, etc. Discovery is just as valuable in other cases as in those mentioned. Perhaps ten or twenty per cent of one's witnesses might fall under these classifications; if so, eighty or ninety per cent of the witnesses would be immune from depositions, so that the discovery value of depositions taken de bene esse was very small and uncertain. Section 644, for depositions under a dedimus or for perpetuation of testimony, prescribed that depositions could be taken only to prevent a failure or delay of justice. Those were limitations placed upon the taking. The special need for taking must appear from the circumstances of the particular case. And the statute also

42 Rules 26 to 37.
prescribed that the deposition must be taken according to common usage. The Supreme Court held, in *Ex parte Fiske*, that calling upon a party in advance of trial to extract something which the other party might use or not as suited his purpose, was a very special usage, based upon local statutes, and not within section 644. The incidental value of section 644 for discovery purposes was therefore exceedingly small. Furthermore, in law cases there was no discovery whatever, incidental or otherwise, in respect to documents. These could be called for in advance of the trial only by subpoena *duces tecum* in connection with depositions taken under one of the two statutes. There was therefore the same primary restriction upon discovery of documents as upon discovery by oral examination. Discovery of documents was purely incidental to the taking of proof. Finally, there was no provision for discovery, and no discovery intended, regarding any tangible thing, or land, or physical or mental condition; and there was no provision for obtaining admissions of fact or of the genuineness of documents. There was no recourse to state statutes for discovery under the conformity act, because it was held that the federal statutes provided a complete system of deposition procedure, and the conformity act was therefore not applicable.

In equity cases there were the two rules mentioned, in addition to the two statutes which applied in equity as well as at law. Equity Rule 47 authorized the taking of depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being "no depositions". The purpose here was not discovery but obtaining proof. The cases where the need for discovery was greatest might be those where the need for proof was the least, or *vice versa*.

Equity Rule 58 is the only provision in the entire federal system intended for discovery. That rule provided for three things, general discovery, discovery of documents and admissions. So far as general discovery is concerned, it was very inadequate in its method; it provided for only written interrogatories. As Mr. Justice Davis, of the Supreme Court of Canada, pointed out last night, written interrogatories are very ineffective methods for discovering anything. They are almost useless in many cases and are effective in none but the most simple matters.

The Massachusetts Judicial Council has called attention to one

---

43 113 U. S. 713, 5 S. Ct. 724, 28 L. Ed. 1117 (1885).
case where 2,258 written interrogatories were used in an effort to pin down the other party and get something out of him.\(^4\) Forms were printed for interrogatories in Massachusetts in automobile accident cases containing from two hundred to four hundred questions.

Judge Learned Hand, in a case in New York, commenting upon the use of written interrogatories, said: "A much more convenient way would be to . . . allow . . . an oral examination. This I cannot compel; and much the same result may probably be obtained, though it must be confessed with a maximum of expense and time and labor, by allowing the interrogatories to be renewed as often as justice requires."\(^5\)

Secondly, Equity Rule 58 is very restricted in its scope. It was available only to ascertain facts relating to the party's own case, not those of his adversary's case. It is good for attack but not for defense. It is nothing, in fact, but the discovery available under the old chancery bill of discovery. The discovery most needed is denied, that least needed is permitted.

Further, Equity Rule 58 was very restricted as to the class of deponents; only parties could be interrogated, not mere witnesses. In the case of a corporate party only one officer could ordinarily be interrogated as to the same matter.\(^6\) As to the discovery of documents there was the same restriction in scope as applied to the interrogatories. The parties are required only to produce documents relative to the case of the party seeking discovery, and not of the adversary.

As to admissions, Rule 58 was very narrow. It applied only to the execution and genuineness of documents, not to facts in general.

Such was the system of federal discovery practice when these new rules were drawn, — a most inadequate system.

Outside of the federal system there was a large variety of state statutes. Some based the right to take depositions upon the condition making probable the need to use them at the trial. Some broadened the scope but narrowed the method, as in Massachusetts; some broadened the method but narrowed the scope, as in New York. Some restricted the class of deponents, such as only desig-

nated officers, or only one or a limited number of corporate representatives; some included any corporate employees; some allowed only present employees; some allowed free examination of ordinary witnesses; some allowed no such examination; some allowed it only on court order; some allowed free discovery as to the names of witnesses; some permitted such discovery only on the order of the court; some allowed demand for admissions of any type of fact, while others provided for no such practice or restricted it to genuineness of documents; some allowed a sworn list of all relative documents, such as Mr. Justice Davis mentioned in regard to the Ontario practice; some authorized the use of the subpoena duces tecum; some distinguished between documents subject to discovery as of right and other documents; a very few provided for a physical examination of a party, or for inspection of land or other tangible property; one statute only authorized a mental examination. There were precedents in favor of almost every type of discovery and against every type of discovery, so that there was a broad field of experience from which to draw suggestions.

What the federal rules have done has been to remove practically all restrictions as to the right of discovery. Any party may take the depositions of any other party or any witness, either for discovery or for use as evidence, or for both purposes. Depositions may be taken after the answer is served, as of right. At that stage the issues are fairly well drawn, so that there is a substantial basis for determining what would be relevant. Or, depositions may be taken after jurisdiction is obtained over the defendant or over property, but before answer, by leave of court. The defendant may by leave of court, use the discovery procedure to obtain information upon which to draw his answer. But the plaintiff cannot make use of discovery, even by leave of court, to obtain information upon which to draw his complaint, for the action is not commenced until the complaint is filed. I think, however, that if he needs additional information he can probably obtain it by stating what he does know and afterward amending his complaint on the basis of information obtained by subsequent discovery.

As to the admissibility of evidence, all evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in courts of the United States on the hearing of suits in equity, or under the rules

---

47 Rule 26.
of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.\textsuperscript{48} In any case, the statute or rules which favors the reception of the evidence shall control.

As to the right to use depositions taken for discovery, Rule 26 (d) classifies them into three groups. First, any deposition may be used to contradict or impeach the deponent as a witness; second, the deposition of a party or an officer of a party may always be used by the adverse party; third, the deposition of any witness may be used if the court finds, (1) that the witness is dead; or (2) that the witness is at a greater distance than one hundred miles from the place of trial or out of the United States; (3) that the witness is unable to testify because of age, sickness, infirmity, or imprisonment; or (4) that the party has been unable to procure the attendance of the witness by subpoena; or (5) that such exceptional circumstances exist as to make it desirable that the deposition be used. In other words, there is a very broad discretionary field in which the court may, if it sees fit, authorize the use of depositions at the trial.

Rule 28 deals with the officers before whom the deposition may be taken. Within the United States it may be taken before any officer authorized to administer oaths. Under the Ontario practice, as you heard last night from Mr. Justice Davis, it is taken under an official of the court who is called an examiner. The federal rule permits depositions to be taken before notaries anywhere and no commission is required. In a foreign country the deposition may be taken on notice before the secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, without any commission, or before any person appointed by commission or under letters rogatory. A commission or letters rogatory will be issued only when necessary or convenient. If one anticipates no opposition on the part of the deponent, mere notice is all that is necessary. If one does anticipate opposition and it is necessary to have some compulsory process, I do not see how the commission would ordinarily do any good in the absence of special legislation in the foreign country. The only universally effective method of reaching him would be by letters rogatory.

As to the method of taking depositions for discovery, there

\textsuperscript{48} Rule 43 (a).
are three methods provided. Two are general methods: the oral examination, which was described very clearly last night by Mr. Justice Davis, carrying the right to examine and cross-examine, as at the trial, and the examination by written interrogatories, with provision for cross-interrogatories and re-cross-interrogatories. Written interrogatories are ineffective in many cases, but where the matters dealt with are very simple or it is only necessary to make formal proof, such interrogatories would be quite suitable and much simpler and less expensive. If written interrogatories are used and they fail to produce satisfactory results, there is no reason why they should not be followed by an oral examination.

There is a third method provided which is substantially that of old Equity Rule 58, — the submission of written interrogatories directly to the adverse party without the intervention of any officer or the use of cross-interrogatories. It proved very useful in the federal practice and has been continued by these rules.

A combination of written interrogatories with an oral examination is also provided. Parties who are notified of the oral examination, which, of course, may be held at some far distant point, may, in lieu of attending, send written interrogatories to the officer to be put to the witness and the answers will be recorded.

Rulings as to competency or relevancy are not to be made by the officer before whom a deposition is taken; those rulings must be made by the court.

The notice to take depositions, without any order of the court, is sufficient to inaugurate the examination and must be given to every other party. For the oral examination the notice must state the time and place of taking and the name and address of each deponent, but the officer need not be named. For examination on written interrogatories the notice must state the name and address of the deponent and the name and address of the officer, but not the time or place of taking. Reasonable notice is to be given but the time may be enlarged or shortened by the court in its discretion. To make the procedure still more flexible, the rule provides that, by stipulation of the parties, the deposition may be

---

49 Rule 30.
50 Rule 31.
51 Rule 33.
52 Rule 30 (c).
53 Rules 30 (c), 32 (c).
54 Rules 30 (a), 31 (a).
taken before any person, on any notice, at any time or place, and in any manner.\(^{55}\)

As to subpoenas, proof of service of notice of the taking of a deposition constitutes sufficient authorization for issuance of subpoenas by the clerk of the court in the district where the deposition is to be taken.\(^{56}\) If depositions are to be taken in the same district where that suit is pending, the files will doubtless show the service of the notice. If so, the clerk, upon that showing, will issue the subpoenas. If depositions are to be taken in some other district than that in which the suit is pending, the clerk in that district must be furnished with proof that notice of taking depositions has been served. I suppose a certified copy of the notice and affidavit of service would be sufficient. It is only necessary to satisfy the clerk that the notice has been served.

To compel discovery, the first step is to procure a court order after refusal.\(^{57}\) If the order is granted and the court finds the refusal was without substantial justification, it will require the refusing party or deponent and the party or attorney advising refusal, or either of them, to pay to the examining party his reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. That is intended to discourage capricious refusals. If the order to compel an answer is denied and the court finds that the motion was made without substantial justification, it shall order the examining party or attorney advising the motion, or both of them, to pay the refusing party or witness the amount of his reasonable expenses incurred in opposing the motion, including reasonable attorney's fees. That is intended to discourage unreasonable, unnecessary and vexatious applications.

In case of failure to obey an order for discovery there may be various results.\(^{58}\) It may amount to contempt and an attachment may follow. There may be an order that the matters involved in the discovery be taken as established as claimed by the party getting the order. There may be an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated documents, or striking out pleadings or parts thereof, or dismissing the action or

---

\(^{55}\) Rule 29.
\(^{56}\) Rule 45 (d).
\(^{57}\) Rule 37 (e).
\(^{58}\) Rule 37.
a part thereof, or rendering a judgment by default. The rules are therefore well implemented for enforcing discovery.

There is a novel feature which is not found in any other jurisdiction, namely, provisions for protective orders. Lest the rules be abused, it is provided that before the examination takes place the court may, on motion and cause shown, order that the deposition be not taken at all, or in some other place, or that it may be taken only by oral examination or only by written interrogatories, or that certain matters may not be inquired into, or that the examination be held with no one present but parties and counsel, or that the deposition be sealed and opened only on the court's order, or any other order may be made to protect the party or witness from annoyance, embarrassment or oppression. That confers great power upon the court, and I suppose it is possible for the court, operating under those provisions, to quite cripple the use of discovery, but such a result is certainly not to be apprehended. The protective orders will doubtless be used for the purpose for which they are intended, namely, to prevent abuse of the discovery rules. After an examination is under way the court may order that the examination be immediately stopped, or that its scope or manner be limited, as the court may deem proper.

Objections regarding the manner of taking the deposition, or to the conduct of parties, are waived unless raised at the earliest practical time. Objections to the competency of the witness or competency or relevancy of the testimony are not waived by a failure to make them at the examination unless the error might have been removed if the objection had been made at the time, as, for example, a failure to lay a foundation.

Discovery of documents and things, under the new rules, may be obtained only on the order of the court. The provisions for requiring a list of all documents in the possession or control of a party, with an indication as to the person under whose control the document may now be if out of the possession of the party, which is employed in Ontario, as we learned last night, is not employed. I think the rules we have are fully adequate to take care of the discovery of documents without such a provision, and it was felt by many lawyers that it would frequently be a very heavy burden for them to list all the documents which might be relevant to a

50 Rules 30 (b), 31 (d).
60 Rule 32.
61 Rule 34.
case. There might be thousands of items and there might be great doubt as to whether they were relevant or not, and the burden would be upon the party controlling them, on mere demand, to go over the entire number and list all that appeared relevant.

If one does not know what documents are in existence, I suppose the proper course would be to hold a preliminary oral examination regarding their existence and location, and, following that, obtain an order for disclosure of those particular documents which he wishes to inspect. A subpoena ducès tecum may also be employed on order of the court in connection with oral examination, if you know enough about the documents to describe them.

As to physical and mental examinations, these occur only on order of the court and upon notice to all other parties, and the order should specify the time, place, manner and condition of the examination and the person to make it. There is a provision in Rule 35 that if the party examined requests and obtains a physician’s report of the examination ordered by the court, he must, if requested, give the other party a report of any other examination which has been or may be made in respect to the same condition. If the physician who made or should thereafter make an examination of such party has made no report and will make no report, the physician may be subjected to a discovery examination or his testimony may be excluded if offered at the trial.

Under the Ontario practice which we heard about last night from Mr. Justice Davis, admissions are limited to the genuineness of documents. The provision in Rule 36 extends the right to demand admissions to all material facts. When a party makes a request for the admission of any fact or facts or of the genuineness of any designated documents, the admission will be deemed to be made unless the party served with the notice, within ten days, serves a sworn statement specifically denying the matter respecting which the admission was asked or stating why he cannot admit or deny. Under the new rules the admission results from a failure to take affirmative action to avoid it, so the burden is upon the party from whom the admission is asked to protect himself against the admission by a sworn statement.

Rule 27 is a very convenient and very simple rule for the perpetuation of testimony, based on the general scheme of the dis-

---

62 Rule 45 (d).
63 Rule 35.
covery procedure. It specifies the showing the petitioner shall make, and requires an order by the court to authorize the deposition. The order is to be made if the perpetuation of the testimony "may prevent a failure or delay of justice". This is a very liberal rule, under which it would be easy to get an order for the perpetuation of testimony.

Rule 49, dealing with special verdicts is a very effective and workable rule. I am not familiar with the practice as to special verdicts in West Virginia but I assume it is the common-law practice. You know what the difficulties are at common law. The procedure is so technical that a person having the burden of proof can hardly risk a special verdict for fear that it will be inartificially drawn and may inadvertently omit some fact or set it up in an improper manner so that the special verdict will not support a judgment in his favor. The new rule provides a very effective and simple remedy. It is not novel, for it is taken from the statute of Wisconsin. It provides that if any issue of fact is omitted which ought to be submitted to the jury, each party waives his right to a jury trial of such issue unless before the jury retires he demands its submission. As to any issue regarding which no such demand is made, the court may make a finding, and if the court fails to make an express finding it shall be deemed to have found such issue in accordance with the judgment rendered. That takes all the technical risks out of the special verdict. It has worked very well in Wisconsin and the lawyers there tell me that the general verdict has in practice become obsolete because the special verdict is so much more effective. Under the new federal rule special interrogatories are authorized to accompany a general verdict.

Judgments notwithstanding the verdict, rendered on the evidence, are authorized in some six or eight states. Rule 50 provides that when a motion is made for a directed verdict at the close of all the evidence and is denied or not granted, the court is deemed to have submitted the case to the jury subject to a later determination of the legal questions involved. Within ten days after the jury is discharged, the moving party, if he did not obtain a verdict, may move for a directed verdict, and a motion for a new trial may be joined with such motion. At common law the judgment was always rendered according to the verdict unless the record itself disclosed that, as a matter of law, a contrary judgment was required, and if the verdict was for the wrong party as a matter of law on the evidence, rather than on the pleadings, the only remedy
at common law was a new trial. A wrong verdict in such a case could never be corrected by entering the right judgment. Statutes in a number of states have undertaken to remedy this defect in the common law. The first was enacted in Minnesota in 1895. Pennsylvania subsequently adopted such a statute, and it was sought to use it in the federal court in Pennsylvania under the conformity act. That was in the case of *Slocum v. New York Life Insurance Company*, and the Supreme Court of the United States held, in a five-four decision, that it was unconstitutional as interfering with the right to trial by jury guaranteed by the Seventh Amendment. Justice Hughes pointed out in a dissenting opinion that such was not the case. This decision has been widely criticized and has never been followed by any state court. In 1926 the Supreme Court of the United States sustained the use of a similar statute in Massachusetts, in the case of *Northern Railway Company v. Page*. In that case the consent of the jury had been obtained, because they were asked by the court, in case they found for one party, to return an alternative verdict for the other which could be used in case the court was of opinion that as a matter of law the former was not entitled to recover, and they had rendered the alternative verdict. In 1934 a case came up from New York, *Baltimore & Carolina Line v. Redman*, in which the Court sustained the use of a New York statute of this type where the court had expressly reserved its decision on motions for directed verdicts and submitted the case to the jury subject to its opinion on the questions reserved. The Court distinguished this case from the *Slocum* case on the ground that in the latter the submission had been absolute and not subject to the court's opinion, and it was pointed out that the parties had consented to the procedure. The question thus became, Could the practice of rendering judgment on the evidence contrary to the verdict be sustained unless the jury, or the parties, or both, consented? The question was submitted to the Court in connection with the new rules, and the Court answered that the court may submit a case subject to a later decision, without consent of either the parties or the jury. And that is the law as it now stands.

A very simple system of appeals is provided. No exceptions are necessary but only an objection properly stated; no bill of

---

64 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913).
65 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929 (1927).
67 Rules 72-76.
exceptions, in a technical sense, is required; the judge does not authenticate the statement of what happened at the trial, but if the parties disagree the court merely settles the dispute. The record need not be in narrative form but either party may require that any part of it be in question and answer form. As to assignments of error, they are abolished, in the conventional sense. Points to be argued on appeal are to be specified by the appellant in his designation of portions of the record to be included in the record on appeal, where the entire transcript is not designated; otherwise the points need not be specified before the record is made up and may be stated in the brief for the first time. There is no reason for assignments of error being prepared for presentation to the appellate court prior to making up the record except as a basis for what is to be included in it. If the whole record is to be sent up there is no use for any assignment; but if the appellant designates only a part of the record, he should specify the points he relies upon, so that the appellee may determine whether he wants some additional matter put in to protect him on the designated points. The assignments of error or points are therefore to be employed under the new rules only when they are of some use.

The appeal is taken by mere notice of appeal and the clerk makes up the record.

Misstatements and omissions in the record may be corrected at any time by either the trial court or the appellate court, or a supplemental record may be filed. A short record for preliminary use in the appellate court is also provided for when a party wants to move for dismissal, or for a stay, or other provisional relief.

This has been a very inadequate summary of the rules. It is almost impossible to discuss a series of provisions of this kind; it is something like undertaking to read the dictionary. But the matters I have mentioned seem to me to be some of the more important features of the new rules. The purpose which they seek to accomplish is to eliminate technical matters by removing the basis for technical objections, to make it as difficult as impossible, for cases to go off on procedural points, and to make litigation as inexpensive, as practicable and as convenient, as can be done. The rules are really so simple that it is hard for those who are familiar with the technique of the modern litigation to appreciate how simple they are.