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The Proposed Rules for Changes in Federal Practice

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THE PROPOSED RULES FOR CHANGES IN FEDERAL PRACTICE*

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On June 19, 1934, there became effective an Act of Congress vesting in the Supreme Court of the United States, certain powers with respect to procedure in the district courts of the United States and in the Supreme Court of the District of Columbia. That Act provides as follows:

> Sec. 1. 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.
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> 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.[1]

On June 3, 1935, the Supreme Court, by order entered, determined that, pursuant to the second section it would undertake the preparation of a unified system of general rules for cases in equity and actions at law in the district courts 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.

Under that same order, the Court appointed to assist it in this undertaking, an advisory committee composed of fifteen dis-

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1 48 STAT. 1064 (1934), 28 U. S. C. A. §§ 723b, 723c (1935).

tinguished lawyers from all parts of the United States, some of whom are engaged in the active practice of their profession, and some of whom are heads of the law schools of great universities.

The chairman of the committee is Honorable William D. Mitchell of New York City, former Attorney General of the United States. The secretary of the committee and its official reporter is Dean Charles E. Clark of the Law School of Yale University. Among the members, we find Dean Armistead M. Dobie, of the Law School of the University of Virginia. He is the only appointee from this immediate section of the country.

It is the duty of the committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of a unified system of rules as above described.

On May 1, 1936, the advisory committee submitted to the Court a preliminary draft, with the request for leave to print and distribute the draft to the bench and bar as a basis for suggestion and criticism. That leave was granted, and the printing and distribution were had. During the summer, the advisory committee has had the benefit of a very great amount of comment and suggestion. Conferences were held in the several circuits with respect to the proposed rules. These conferences were, in most instances, addressed by members of the advisory committee, by the federal judges and by numerous representatives of the bar who had been appointed as committees from the several districts.

While there may be some changes in the final draft, this is certain: We are to have a unified system of general rules for cases in equity and actions at law, so as to secure one form of civil action and procedure for both classes of cases. That fact was settled by the Supreme Court's order of June 3, 1935. The tentative draft offers several rules in the alternative, but I believe that the attitude of the advisory committee, with respect to these alternatives, has been made fairly clear, and that those of us who had the privilege of hearing the discussions can predict fairly well the course which will be taken by the committee in its final draft with respect to these alternatives.

I have said that, at least in the Virginias and in Maryland, the operation of these new rules will be revolutionary, and I think that you will agree with me before I am through. Let us take a bird's-eye view of them.

I. The Scope of the Rules

They declare in the first and second rules that they shall govern the procedure in the district courts of the United States and in the Supreme Court of the District of Columbia in all civil cases wherein it is sought to obtain the relief previously obtainable by actions at law and suits in equity, and that hereafter, there shall be only one form of action and one mode of procedure, that form to be known as a "Civil Action", and that procedure to be known as "Civil Procedure". The rules provide that they are to be construed in all particulars so as to further, and secure as speedily, simply and inexpensively as possible, the just determination of every action.

II. The Commencement of an Action and the Service of Process, Pleadings, Motions and Orders

Under these rules, when you institute an action, it is your duty to prepare not only your own complaint, but your own summons as well. This summons shall require the defendant to serve his answer upon you within twenty days after the service of the summons and complaint, and shall notify him that if he fail, judgment will be taken against him by default for the relief demanded in the complaint. The committee proposes three alternatives with respect to what shall be done with your complaint and your summons. One alternative is that you shall file your complaint with the court and deliver the summons and a copy of the complaint to the marshal for service. Another alternative is that you shall have your summons and complaint served by the marshal or by some private person and returned to you, and that you shall file them with the court not later than twenty days after the service. The third alternative is that you shall prepare your summons and complaint, have them served on the defendant by the marshal or a private person and returned to you, with the privilege in you to keep them until the defendant notifies you to file them, after which notice, you are required to file them within five days. But in any event, you must file them before the action is called for trial.

This third alternative seems to be favored by the committee. It substantially follows the rule in force in New York, Minnesota, Washington and a number of other code states. It is sometimes called the "hip pocket" rule, since the pleadings are carried in the possession of counsel for the parties until a filing is required

by one side or the other, or until the case is ready for trial. Under this rule, there is no record of the pendency of an action until that time. The argument in its favor seems to be that it avoids early publicity, reduces the accumulation in the clerk's office of many cases which are eventually settled or abandoned, and lessens the fees paid by litigants in cases which do not reach the stage where action becomes necessary. Against this rule, it is urged that a lawsuit should be a matter of public record, with the papers available to the court at once, and under the control of the court for the purpose of directing a speedy trial or exercising other control over the controversy, and as notice to all persons.

When you have instituted your suit as above outlined, the burden falls on the defendant to serve his answer on you within the twenty days specified. Under the "hip pocket" rule, the defendant need not file his answer in court except upon five days notice from you, or in any event before the action is called for trial.

III. Service of Pleadings, Appearances, Motions, Orders and Other Papers

The provision of the rules with respect to service of documents is interesting to say the least. Rule 6 provides that every pleading subsequent to the original complaint, and every written motion, notice, appearance, claim, demand, offer or similar paper, and every order which is required or permitted to be served shall, as to any party who has appeared by attorney, be served upon the attorney unless otherwise ordered by court. This service shall be either by delivery or by mailing of a copy of the paper to be served. Delivery shall mean handing the attorney or the party a copy, or leaving a copy at his office with his clerk, or other person having charge thereof, or, if there be no one in charge of the office, by leaving such copy in a conspicuous place therein, or, if the office be closed, or the person to be served has no office, by leaving it at his dwelling house or usual place of abode with some adult person who is a member of his household; and that service by mail shall be complete upon mailing. The question as to whether the leaving of a legal document in a conspicuous place in a lawyer's empty office, or the mere fact of mailing without registration or other precaution should be sufficient service is worthy of consideration.

IV. Pleadings

The pleadings in a civil action wherein there is no counterclaim or cross claim shall, unless otherwise ordered by the court, consist of two documents only (Rule 9). First, a complaint, and second, an answer. However, in case a defendant shall cause a third party to be summoned to answer a claim by him, there shall also be a third party complaint on the part of that defendant and a third party answer on the part of the party thus summoned. No technical forms of pleadings or motions are required. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

All allegations of claim or defense shall be made by a series of numbered paragraphs, each of which shall contain a statement of a single set of circumstances, so far as that can be done with convenience, and a paragraph may be referred to by number in all subsequent pleadings. Each claim founded upon a separate and distinct transaction or occurrence, and each defense, other than by way of denial, shall be separately stated in a separate count or defense whenever such separation facilitates the clear presentation or adequate understanding of the matters set forth. Statements in a pleading may, by reference, be adopted in a different part of the same pleading, or in another pleading, and a copy of any written instrument may be attached to a pleading as an exhibit and made a part thereof for all purposes.

A party may set forth two or more statements of a claim or defense alternatively, or hypothetically, either in one count or defense, or in separate counts or defenses, and an insufficient alternative or hypothetical statement shall not affect a sufficient one. A party may also state as many separate claims or defenses as he may have, regardless of consistency, and whether based on legal or on equitable grounds, or on both.

Rule 13 contains an interesting paragraph when read in connection with our present modified common law rules in the Virginias. It requires a party in pleading to a preceding pleading to set forth affirmatively as new matter a claim of assumption of risk, contributory negligence or fellow servancy.

Rule 16 declares that when no further pleading is permitted, a party may, within ten days after the service of the last pleading upon him, raise any objection in point of law thereto by motion. Under the same rule, all objections concerning the sufficiency of

the service of process, venue and lack of the court's jurisdiction shall be raised by the defendant at one time, by motion. This motion shall be made before answer; shall constitute a special appearance without being nominated as such; and shall be decided as a preliminary matter. Either the plaintiff or the defendant may serve a motion for judgment on the pleadings within ten days after the pleadings are closed. The rules require that such motion shall be heard and decided promptly.

Rule 18, Counter-Claim and Cross Claim. The rules are extremely liberal with respect to the setting up of counter-claims and cross claims. If a defendant has a counter-claim growing out of a transaction which is the subject matter of the action, he *must* assert it in his answer or be barred with respect to it, if the court has jurisdiction to entertain it and can acquire jurisdiction of such new parties as are necessary. The defendant *may* also set up as a counter-claim *any* claim which he has against the plaintiff which might be the subject of an independent action, provided, of course, that the court has jurisdiction. Indeed, if the defendant *acquire* a claim pending the suit, he may bring it in by supplemental answer. The rule goes even further, and permits the defendant to bring in a third party defendant if he has a claim against him growing out of any transaction which is one of the subject matters of the action, including a claim that this new defendant is, or may be, liable to the original defendant for all or part of the plaintiff's original claim against the original defendant. Even more, if the determination of the counter-claim or cross claim requires, for the granting of complete relief, the presence of new parties, the court shall order them to be brought in as defendants. Under such circumstances, the court may try all the litigation together or separately by various claims, cross claims and counter-claims, and it may pronounce a single judgment or several judgments at one time or at different times as seems best. The court may order a delay in the execution of a prior judgment until a subsequent judgment or judgments be given.

When an action is at issue. Unless the answer contains a counter-claim or cross claim, *pleaded as such,* no further pleading shall be required or permitted, except as ordered by the court. The party to whose pleading an answer or other responsive pleading is made, may, at the trial, assert any matter either in denial or in avoidance of any affirmative averment in the responsive pleading, and may *interpose any claims, legal or equitable,* arising out of the

transaction which is the subject matter of such affirmative averment. Shades of Chitty and John B. Minor!

Order formulating issues to be tried. By Rule 23, the court is given power to examine the issues in advance of trial on motion of any party, and to order that any issues as to which there is no real or substantial dispute be disregarded, to specify the issues as to which there is a real and substantial dispute, and to order that only those issues be tried. Just a little job for our judges during their spare moments!

V. Joinder of Parties and Causes

I have said that the rules were revolutionary when viewed from the standpoint of the Virginia and West Virginia practitioner. With respect, at least, to this subject of joinder, there can be no dispute in this respect. Rule 25 starts off with these two sentences:

> "A party may in one complaint or counter-claim state in the alternative or otherwise, as many different claims, *legal or equitable or both,* as he may have against an opposing party. Likewise there may be such joinder when there are multiple parties, either plaintiff or defendant or both, provided that the requirements of Rules 26, 27 and 28 are satisfied."

Rule 26 requires the joinder on one side as plaintiffs or defendants of all persons having a joint interest, but authorizes a plaintiff to make a defendant of any person who should join him, but refuses to do so.

Rule 27 authorizes the joinder in one cause of action, as plaintiffs, of all persons in whom *any right to relief* in respect of, or arising out of, the same transaction or series of transactions is alleged to exist, either jointly, severally or in the alternative, *"if any question of law or fact common to all such plaintiffs will arise in the action."*

The same section authorizes joinder as *defendants* of all persons against whom is alleged to exist, either jointly, severally or in the alternative, *any right to relief* in respect of, or arising out of, the same transaction or series of transactions, *if any question of law or fact common to all such defendants will arise in the action.* The revolutionary and *"omnum gatherum"* character of these provisions is almost startling, to me at least, when I consider in connection with them the fact that a plaintiff may set up in his complaint as many different claims, legal or equitable or both, as he may have against any opposing party (Rule 25).

Rule 27 goes on to provide that a plaintiff or a defendant need not be interested in obtaining or defending against all the relief prayed for. Judgments may be given to one or more of the plaintiffs for the relief to which he or they may be found entitled and against one or more defendants according to their respective liabilities. Misjoinder is not a ground for dismissal, but any claim against a party may be severed and proceeded with separately. The court may make such orders as seem advisable to prevent embarrassment or delay or expenses arising by reason of the inclusion of parties having no mutual controversial status, and may order separate trials if deemed proper. I suspect that the committee got this rule from those governing an old southern pastime — the battle royal.

Intervention. A provision under this heading set out in Rule 29, seems to take care of a situation in receivership causes which has been the source of considerable complaint and annoyance. I refer to the helplessness of unsecured creditors in receivership proceedings, and particularly in foreclosure proceedings wherein there is a receiver. The provision is that the court may permit intervention in an action in which property "is within the custody of the court or an officer thereof, if the moving party is so situated that distribution or other disposition of the property would adversely affect him". Generally speaking, the provisions for intervention are extremely liberal.

VI. Depositions, Discovery, *Etc.*

Rule 31 revolutionizes the law with respect to discovery. It provides that at any time after jurisdiction has been obtained over any defendant (and that means at any time after service of process on that defendant), the testimony of any person, whether a party or not, may, at the instance of any party, be taken by deposition for the purpose of discovery or *for use as evidence at the trial or for both purposes.* It further provides that an adverse party or his agents or employees, or the officers, directors, agents or employees of any public or private corporation, partnership or association which is an adverse party, or any witnesses who are unwilling or hostile, may be examined *as if under cross-examination.* The deponent may be questioned regarding any matter, not privileged, which is relevant to the pending action, whether relating to the claim or defense of the examining party *or to the claim*

or defense of any other party. That is something new in West Virginia.

Now what may be done with these depositions after they have been taken? Well, they must be filed, and any part, or all of them, so far as admissible under the rules of evidence, may be used at the trial or hearing or upon any motion or interlocutory proceeding in the case in accordance with the following provisions:

> *First,* by a party for the purpose of contradicting or impeaching the testimony of the deponent as a witness (even though he be the witness of the party who took his deposition).
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> *Second,* if the person whose deposition was taken is a party to the action or an officer, director or managing agent of a corporation or partnership, his deposition may be used by the adverse party for any purpose. It cannot be used by the non-adverse party except for the impeachment of the deponent.
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> *Third,* if the person whose deposition was taken is neither a party nor an officer, director or managing agent of a corporation or partnership, his deposition may be used by any party for any purpose if the party offering the deposition has been unable to secure the attendance of the witness by subpoena, or if he has gone out of the district and to a greater distance than one hundred miles from the place of trial or hearing.

The rule declares that a party shall not be deemed to make a witness his own for any purpose by merely taking his deposition. The witness is deemed to be the witness of any party who *introduces in evidence* any part of the deposition, except to contradict or impeach the deponent. But this provision applies only to so much of the deposition as the party *has introduced.* At the trial or hearing any party may rebut any evidence contained in *any deposition,* whether introduced by him or not, and may show statements contradictory thereto made at any time by the deponent.

Rule 32 authorizes the taking of depositions without special order of court. It also provides, however, that on motion of the party proposing to take the deposition, an order may be entered directing that it be taken before a standing master or special master authorized to rule on the admission of evidence. If the examination of a party or of any officer, director, agent or employee of a party conducted otherwise than before a master, is shown to be in bad faith or for the purpose of oppression, annoyance or embarrassment of the deponent or a party, the court in which the action

is pending, or the court in the district where the deposition is being taken, may direct the officer conducting the examination to cease forthwith from taking the deposition. If such an order is made, the examination shall proceed thereafter only upon the order of the court in which the action is pending.

In this connection, it is interesting to note that the rules with respect to the taking of depositions, as well as several other rules, seem to amend the law with respect to costs. They provide that in certain cases of delinquency on the part of a party which involve the incurring of expenses by the opposite party, the delinquent party may be ordered to pay to the injured party the amount of the injured party's reasonable expenses, including reasonable attorney's fees. For example, if a party has given notice for the taking of a deposition and fails to attend, he may be made subject to such a penalizing order.

Discovery regarding documents and tangible things. Rules 37 and 38 contain the most drastic provisions requiring the listing and production for inspection of all documents regarded by either party as material and demanded by him. They also provide for the copying or photographing of papers or other tangible things.

Physical and mental examination of persons. Rule 39 gives to the court, in which any action in which the mental or physical condition of a party is involved, the power to order him to submit to an examination. It directs that the court name the person or persons by whom the examination shall be made. It requires the examiner, upon reasonable compensation therefor, to deliver to any party applying a written statement of his findings and conclusions in the form of an affidavit which may be inspected and copied by any other party. If the examiner refuse to do so without justifiable cause, he may be required to do so by order of the court on such terms as may be deemed just.

Admission of facts and of genuineness of documents. By Rule 40, a party may, at any time, by written notice, request any other party to furnish, within not less than ten days, a written admission as to any relevant document or any specified relevant fact stated in the notice which can be fairly admitted as stated therein without qualification or explanation.

Rule 41 visits upon the head of a party who has been delinquent with respect to discovery, *etc.*, most drastic penalties, the selection of the penalties being largely in the discretion of the court. (To be concluded.)