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THE PROPOSED RULES FOR CHANGES IN FEDERAL PRACTICE*

*Frank W. Nesbitt***

VII. SUMMARY JUDGMENTS

Provision is made in Rules 42 and 43 for summary judgments.

Rule 42 provides for summary judgment in advance of trial upon the pleadings, depositions and admissions on file with respect to any of the matters involved in the action. Such a judgment may be entered on motion. The adverse party may file affidavits in opposition, and the court may permit either party to take and file depositions or to present oral testimony. If the court find that there is no substantial issue of fact affecting the right of the moving party to judgment, and that he is entitled to a judgment, it shall give judgment accordingly.

With respect to Rule 43, I wonder if it would stand up against an assertion that it violates the Seventh Amendment of the Constitution of the United States. This rule provides that any party seeking to recover upon a claim, counter-claim or cross claim, may, *at any time after serving the pleading presenting the claim,* move for a summary judgment in his favor thereon. Such judgment under the rule shall forthwith be rendered if the motion be supported by affidavits setting forth facts which, on their face, would require a decision in his favor as a matter of law, unless the adverse party shall present opposing affidavits setting forth *substantial evidence* in denial or in avoidance thereof. Please note that these opposing affidavits are not sufficient if they merely assert that the affiant fairly believes that the party on whose behalf the affidavit is made, has a good defense as to all or part of the claim. These affidavits, in order to be sufficient, must set forth *"substantial evidence"* by affidavit to sustain his side of the issue.

The rule goes even further, and provides in its second paragraph that a defendant, at any time after serving on the plaintiff his pleading presenting his defense, may move for a summary judgment as to all or any part of the claim against him. The rule requires that the judgment be forthwith rendered, if the motion be supported by affidavits setting forth facts (which of course

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West Virginia Law Review, Vol. 43, Iss. 2 [1937], Art. 3

means evidence) which, on their face, would require a decision in his favor as a matter of law, unless the adverse party shall present opposing affidavits setting forth "substantial evidence" in denial or avoidance thereof. Here is a provision for a trial in advance of a trial, and without a jury in any case. Is it constitutional? If so, is it wise? Is it fair? Is it fair to the litigants? Is it fair to our already over-burdened district judges?

Rule 44 is an interesting sequence to Rule 43. It provides that if the court, on examining the pleadings and the evidence and *"by interrogating counsel"*, find that a judgment on the whole case cannot be rendered under the motion just referred to, it shall ascertain what material facts exist without substantial controversy, and what material facts are actually controverted. It then becomes the duty of the court to make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as may be just. Upon the trial of the action (and of course this means the second trial, the formal trial, the jury trial in a jury case), *the facts so specified shall be deemed established and the trial shall be conducted accordingly,* unless the court, for good cause shown, sets aside its previous order. This rule may work in Detroit where it has been employed for some years, or in Boston where it has been recently adopted, but, if constitutional, will it work in West Virginia, where our district judges are required to travel all over their districts and hold their courts at various locations long distances apart?

VIII. Trials

The committee, after providing for the above-mentioned summary judgments, at the outset of the branch of its proposed rules relating to the subject of trials, assures us, at the head of Rule 45, that "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". The committee then goes on in that rule to provide that, unless a party at or before twenty days after the service of the last pleading, or at such earlier time as the court may order, *demand* a jury trial, he shall be deemed to have waived it.

One party may demand a jury trial of certain specified issues. It is then up to the other party, within ten days or such

earlier time as the court may fix, to demand a jury trial of all or any of the other issues.

When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried.

Consolidation and severance. Rule 49 gives to the court almost unlimited power with respect to consolidation and severance. A joint hearing or trial of any or all of the matters in issue may be directed where there are actions of a like nature or involving a common question of law pending before the court. This is true notwithstanding the parties may be wholly different. The court may also sever claims joined in a single action, and require that they be proceeded with in separate actions.

Juries. Rule 53 provides for one or two extra jurors to sit as alternates in the court's discretion. These alternates shall be selected and shall have the same functions as the principal jurors, except that they shall not take part in the deliberations of the jury or in the rendition of the verdict, unless called upon to replace a principal juror.

Rule 54 gives to the parties the right to stipulate for a jury of less than twelve, or for a verdict by a stated majority of the jury.

IX. Motion for Directed Verdict — Judgment *Non Obstante*

Rule 56, with respect to motions for directed verdicts and the effect thereof, is interesting and is an inviting subject for discussion. The first paragraph involves what I believe to be a welcome change from the present rule in the federal courts. It provides that in any action tried by a jury, a motion for a directed verdict at the close of the evidence offered by an opponent, shall not operate as a waiver of the right on the part of the movant to offer evidence in the event that the motion is not granted, and that such a motion, which is not granted, shall not be held to constitute a waiver of trial by jury, *even though all parties to the action have moved for directed verdicts.*

It is the second paragraph of the rule which raises a series of controversial questions. That paragraph reads as follows:

> "Whenever a motion for a directed verdict made at the close of all the evidence *is not granted,* the court shall be deemed to have reserved decision thereon and to have taken the verdict subject to a later determination of the questions involved.

After the jury has been discharged the court shall proceed to make such determination of the motion as the ends of justice shall require. If *no* verdict has been returned, the court may order judgment as if the requested verdict had been directed, or may order a new trial; if a verdict *has* been returned it may order judgment upon the verdict or judgment as if the requested verdict had been directed, or a new trial."

It will be observed that the rule makes no provisions for an alternative verdict such as we have in our practice with respect to demurrers to the evidence. It provides for only two circumstances with respect to the action of the jury: First, if there be *no* verdict at all, and second, if there be a *verdict*. In either of those events, the rule would authorize the court to enter judgment in favor of the movant, if the court believe the law to be with the movant. In the first instance *non obstante* no verdict at all, and in the second instance *non obstante* the verdict rendered.

Evidently recognizing a very serious doubt as to the constitutionality of a rule which would give to the court in a jury case the power to render a judgment upon the evidence without the support of a jury finding, the committee has proposed an alternative to the above-mentioned rule, by adding at the end of it the following paragraph:

"Provided that, in actions where there is a right to a trial by jury under the Seventh Amendment to the Constitution, the court shall not, without the *consent of the jury*, reserve the question of the sufficiency of evidence to support a verdict in favor of any party who shall object to such reservation."

With respect to this proposed rule and the alternative paragraph added thereto, the committee expresses itself in part as follows:

"The Committee concluded, first, that if the trial court reserved decision on the question of law, *with the consent of the parties, express or implied,* then it or the upper court on appeal could grant judgment notwithstanding the verdict. We also concluded that there is old common law authority prior to the adoption of our Constitution for the proposition that even if the parties *do not consent,* the court may reserve the question of law *with the consent of the jury.* If these conclusions are right, the rule may provide for judgment notwithstanding the verdict if the parties consent to the court reserving decision on the question, *and even if the parties object, the same result will follow if the jury expressly consents.* If it

were the law prior to the adoption of the Constitution that the question of law could be reserved with the consent of the jury, then a rule to that effect preserves the right of trial by jury as the Constitution requires. Rule 56 is drawn along these lines. It will be noted that it provides that the Court shall be deemed to have reserved decision unless the parties object, *and it also provides, under the alternative addition, that even if a party objects the court may do so if the jury consents.*"

Is the committee right, or is it wrong? Is there real common law authority prior to the adoption of our Constitution for the proposition that even if the parties do not consent, the court may reserve the question of law and render a judgment *non obstante* with the consent of the jury? Even if there be such authority, was it, or was it not, nullified in America by the adoption of the Seventh Amendment providing that "the right of trial by jury shall be preserved"? Preserved to whom — to the jury? Hardly. Preserved to the parties. In the adoption of that Amendment, was it contemplated that the right preserved to the parties might be waived by the jury? That is a question fit for discussion.

X. Judgments

The proposed rules contain some interesting provisions with respect to judgments. Some of these provisions are novel to say the least, from the point of view of the practitioner in the Virginias. For instance, a judgment or final order may be entered by the court upon any issue or issues determined in favor of or against any party or parties at any stage of an action, and the action may proceed as to the remaining issues or parties as justice may require, and a judgment or order entered pursuant to this rule shall be final for all purposes, including the right to appeal therefrom (Rule 63). It is possible to imagine a series of final judgments in a single action, and appeals from them following each other like bullets from a machine gun. Rule 68 contains an interesting provision which may furnish our district judges with occupation during their leisure hours. This rule requires that in all actions tried without a jury, the court shall find the facts specially and state separately its conclusions of law thereon. This includes law actions, of course; and in granting or refusing interlocutory injunctions, the court shall similarly set forth its findings of facts and conclusions of law which constitute the ground of its action.

XI. Registration of Judgments with other District Courts of the United States

Rule 85 provides for the registration of judgments in district courts of the United States other than the district in which the judgment was rendered. This feature of the proposed rules makes provision for something that has been advocated by the American Bar Association for quite a number of years. The rule is proposed in the alternative. I shall refer to the second alternative first. This provision is as follows:

> "A judgment or final order rendered by any district court may be registered in any other district court, and when so registered, for the purpose of enforcement or utilization thereof, shall have the same effect and like proceedings may be taken thereon as if the judgment or order had been originally entered by the court in which such registration is had.
>
> "The clerk of the court in which a judgment or final order has been entered must furnish to any person applying therefor and paying the costs thereof, one or more authenticated copies of the judgment or final order for registration, attested by the clerk and under the seal of the court. Registration of the judgment or final order is perfected by the filing of such copy of the judgment with the court where registration is sought."

The other alternative is perhaps too long to be incorporated in this paper. It limits the right to register to a final order or judgment requiring that money be paid, or that any action shall or shall not be done, or establishing a status, or investing a person with authority over property. It requires an application to the clerk designating the court in which it is proposed to make the registration. Under this alternative the clerk is required to recite in his certificate that the copy of the order or judgment is issued for registration in that designated court, and there must be a certificate of the judge that the attestation is in due form. This alternative also provides that only one such copy may be issued on a single application, but that there may be separate applications for as many copies as may be needed, each copy designating the court in which it is to be registered. Under this alternative, the registered order or judgment cannot be enforced until some person having personal knowledge shall show to the judge: (1) that no stay of execution or *supersedeas,* bond or injunction pending an

Nesbitt: The Proposed Rules for Changes in Federal Practice

appeal is in force in the court which originally rendered the order or judgment; (2) that the original order or judgment has not been set aside, vacated or reversed and has not been modified, except as specifically stated in such affidavit; and (3) that the prevailing party is entitled to have the order or judgment enforced by the court wherein it was originally entered to the extent specified in the affidavit. This alternative Rule 85 further provides that the clerk of the originating court must certify to each of the courts in which registration has been had, the record of any satisfaction or part satisfaction or of any order setting aside, vacating, reversing or modifying the order or judgment.

It likewise becomes the duty of the clerk of any court in which registration has been had, to certify such of the foregoing records as may be filed in *his* court, to the court in which the original order or judgment was rendered. This alternative penalizes any person who shall bring an action on an order or judgment when registration pursuant to this rule would accord him the same relief. The penalty is that costs shall be denied him. Under these provisions the party against whom the judgment was entered may at any time move to vacate the registration on the ground that the statute of limitations of the forum would bar an action on the judgment, or that the judgment has been set aside, vacated or reversed. He may also move to modify the registration in the respect and to the extent to which the original judgment has been modified.

XII. Appeals

Rule 72 abolishes petitions for appeal to the circuit court of appeals, and provides that an appeal may be had by serving a notice of appeal and filing it with the district court. This rule and Rule 74, regarding the making up of the record on appeal, and particularly the requirement that the judge examine and certify the record, are very strenuously opposed by Mr. Claude M. Dean, Clerk of the Circuit Court of Appeals of this circuit. He delivered an address at Asheville opposing these proposed changes, and has published a pamphlet giving the reasons for his opposition. Those principal reasons seem to be: first, that the committee is overstepping its functions in proceeding to deal with the subject of appeals and records on appeal, in view of the fact that the legislation under which the work is being done limits the scope of the work to rules for practice and procedure in the district courts and

West Virginia Law Review, Vol. 43, Iss. 2 [1937], Art. 3

in the Supreme Court of the District of Columbia; second, that the prescribing of a separate method of appeal from the district courts to the circuit courts of appeals merely brings confusion in view of the existing rules with respect to direct appeals to the Supreme Court of the United States; third, that the method proposed by the committee in Rule 74 necessarily involves a largely increased amount of labor for the district judges in the matter of making up the record.

The committee offers as an alternative Rule 74, a proposal abolishing the printing of the record on appeal, and the substitution of an original typewritten record with three typewritten copies furnished to the judges of the circuit court of appeals. This alternative provides that the appellate court may by standing rule require that the printed briefs of the parties shall reproduce those portions of the record which may be necessary to the understanding of the respective assignments of error. This alternative is also opposed by Mr. Dean in his pamphlet. The committee says, however, that the great majority of the states do not require printed records on appeal, but allow the alternative use of typewritten copies. They say that only eleven states are found which definitely require printed records. The committee suggests that the record on appeal serve merely for reference or amplification of individual points, and that the case be heard on the printed briefs submitted and on the abstracts therein contained.

Rules 74 and 75 contain some provisions which, I believe, will be welcome to all of us. Those provisions abolish the requirement that the testimony of witnesses shall be reduced to narrative form in making up the record on appeal. The committee states that while the old system has a tendency perhaps to reduce the length of records and save something in printing, those advantages are more than outweighed by preparing the narrative form, and by the heavy burden and expense on litigants and lawyers in preparing and settling and agreeing upon narrative statements. The committee believes (and I believe) that the bar generally will approve the abolishment of the requirement for the narrative form.

An interesting question is raised by the committee in connection with its proposed Rule 68 with respect to the effect which should be given to the findings of a trial court in a jury-waived case. At present in equity cases, the appellate court has quite broad authority to review the evidence, and pass on the weight of evi-

dence. On the other hand, in law cases by statute the findings of a court in a jury-waived case are given the same effect as the verdict of a jury, *to-wit,* conclusive as to controverted facts. Three alternatives are open: first, to retain the present system; second, to provide uniformity between law and equity cases by giving the findings in equity cases, as well as in jury-waived cases, the effect of a verdict; or, third, adopting uniformity by enlarging the power of the reviewing court over findings in a jury-waived case, by making it correspond to the existing authority in review of equity findings.

The committee seems to favor the third alternative, in view of the fact that it will bring uniformity as between equity cases and law cases which have been passed on by the judge of the trial court without the intervention of a jury, and at the same time, will not limit or restrain the power of the appellate court with respect to reviews in equity. The committee opposes the continuation of the present system which creates an artificial difference as between judge-decided cases which happen to be at law, and those which happen to be in equity. The continuation of that system, if we are to have the one form of procedure governing both law and equity, would, in many cases, require the appellate court to spell out which questions are legal and which questions are equitable before determining the scope of the appellate court's powers with respect to those questions.

At the Conference at Asheville, there was some difference of opinion between many of the district judges on the one hand, and some of the circuit judges on the other hand. Those district judges advocated a rule which would forbid the reviewing court from reviewing controverted questions of fact which had been passed on by the trial court. On the other hand, the appellate judges seemed to favor the rule preferred by the committee, *to-wit,* that in law cases tried without a jury, as well as in equity cases, the appellate court have the power to review controverted questions of fact.

XIII. Removals

Naturally the question will arise in the minds of many of the members of the bar as to what application these rules of procedure and practice are to have to cases removed from our state courts. That subject is covered by Rule 90, sub-division (d), as follows:

West Virginia Law Review, Vol. 43, Iss. 2 [1937], Art. 3

"These Rules shall apply to civil actions removed to the District Court of the United States from the State Courts, and shall govern all procedure after removal, and a repleading shall not be ordered unless the Court deems it advisable. In an action, removed from the Court of a State, in which the defendant has not answered, he must answer or present his other defenses or objections available to him under these rules within the time fixed by the law of the State, or within five days after the filing of the transcript of the record in the District Court of the United States, whichever period may be longer. In a removed action in which all necessary pleadings have been filed at the time of removal, a party who has not already waived his right thereto shall be entitled to jury trial under the circumstances and in the manner provided in Rules 45 and 46 if claim therefor is served and filed within ten days after the record of the action is filed in the District Court of the United States."

CONCLUSION

Such are the new rules. Such is the New Deal in pleading and practice and procedure in our federal courts. Code pleading glorified. We of the Virginias and of Maryland are about all that are left in defense of our common-law Alcazar. Our turn to surrender has come. The glories of our past are but tales to be told. A new banner waves over our fortress. The revolution is here. On the first of September of next year, the conquerors plan to take charge. *Sic transit gloria mundi.*