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A NEW FEDERAL CIVIL PROCEDURE

I. THE BACKGROUND

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INTRODUCTION

ON JUNE 19, 1934, the signature of the President of the United States made effective the act conferring upon the United States Supreme Court the power to make rules of procedure for federal civil actions at law and to unite the federal law and equity procedure.¹ The power thus granted to the Court affords an unusual opportunity for introducing effective measures of reform in law administration into our most extended court system and of developing a procedure which may properly be a model to all the states. How this opportunity is met may furnish a real test of the ability of our profession, bench and bar, to meet the needs of an increasingly complex social organization for efficient and workable court machinery. Students of the law and of the social sciences may well watch the outcome with acute interest. In this and a later article we attempt a consideration of the historical background of the reform and

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1. 48 STAT. 1064, 28 U. S. C. A. §§ 723b, 723c (1934), An Act to give the Supreme Court of the United States authority to make and publish rules in actions at law.

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

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

"Approved, June 19, 1934."

what seems to us its teachings as to the direction and the form the proposed change should take.

The manner of passage of the act disclosed some of the ironies which seem to accompany reform movements. It was the culmination of one of the most persistent and sustained campaigns for law improvement conducted in this country, one sponsored by the American Bar Association since 1912, under the militant leadership of Mr. Thomas W. Shelton and his Committee on Uniform Judicial Procedure,² and supported by some of the most distinguished of the legal profession.³ In fact, Mr. Shelton was able to report to one meeting of the Association (in 1916) that the bill had passed the House and Senate; but when he went to Washington to arrange for the ceremonial signing of the act it was discovered that the wrong bill had been passed.⁴ But thereafter the bill met the powerful opposition of Senator Walsh of Montana, long chairman of the Senate Committee on the Judiciary.⁵ Finally, on the death of Mr. Shelton in 1930, the Association's Committee became less active in the support of the measure, until in 1932 the then chairman reported his own view that uniformity in federal actions at law was inherently undesirable,⁶ and a year later the Committee was discontinued at his suggestion and without opposition from the floor.⁷ But sponsorship of the bill was then assumed by Attorney General Homer S. Cummings,⁸ occupant of the Cabinet post for which Senator Walsh had been originally destined. So effective was this new leadership, that the bill became a law with surprising rapidity and unanimity of action.⁹

2. (1912) 37 A. B. A. REP. 35, 434-435. Agitation in the Association for reform of federal procedure had long preceded this date, going back at least to 1886, when David Dudley Field pressed for a federal code of procedure. (1886) 9 A. B. A. REP. 503, 551; (1887) 10 A. B. A. REP. 317; (1888) 11 A. B. A. REP. 63, 79; Osborne, *Some Problems of Procedural Reform* (1921) 7 A. B. A. J. 245, 251.

3. See successive annual reports of the Committee on Uniform Judicial Procedure to the American Bar Association from 1913 to 1930: 38 to 54 A. B. A. REP., e. g. (1926) 51 A. B. A. REP. 505, 519-522. For a general account see Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116; cf. Clark, *Procedural Reform and The Supreme Court* (1926) 8 AMERICAN MERCURY 445.

4. (1917) 3 A. B. A. J. 521; Sunderland, *supra* note 3, at 1124.

5. For his committee reports in opposition, see, e. g., SEN. DOC. No. 105, 69th Cong., 1st Sess. (1927) 1, and cf. Clark, *loc. cit. supra* note 3; SEN. REP. No. 440, 70th Cong., 1st sess. (1928) to accompany S. 759; (1930) 55 A. B. A. REP. 527-537.

6. Reports of Judge McClintic as Chairman, (1932) 57 A. B. A. REP. 118-119, 575; for the report of Mr. MacChesney in 1930, see (1930) 55 A. B. A. REP. 91.

7. (1933) 58 A. B. A. REP. 110.

8. Cummings, *Immediate Problems for the Bar* (1934) 20 A. B. A. J. 212; and see editorial (1934) 20 A. B. A. J. 224. Senator Walsh's untimely death occurred just before the inauguration of President Roosevelt and after Walsh's acceptance of the Attorney Generalship had been announced.

9. There were only two adverse comments on the bill. 78 CONG. REC. 9362, 10866 (1934).

As originally sponsored by the American Bar Association, the act authorized merely uniform rules in procedure in federal actions at law.¹⁰ But in 1922 Mr. Chief Justice Taft addressed the Association shortly before the rendering of his decision in *Liberty Oil Company v. Condon National Bank*¹¹ and urged the union of law and equity in the proposed new procedure.¹² Thereafter there was added a second section to the bill providing for such union,¹³ and from that time on, the bill was pressed in substantially the same form that it had when finally passed. It should be noted, however, that the draftsmen apparently considered the union of law and equity a more drastic step than the establishment of uniform rules for law actions; for under the act the latter may become effective six months after their promulgation, while the "united rules" may 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."¹⁴

The initial steps reported as being taken after the passage of the bill looking to the drafting of the rules hold promise that the Court will exercise both care and leadership in this most important task. A Special Assistant to the Attorney General is to be appointed to act as research adviser to the Court, thus giving augury of considered action only after careful study. And as the Chief Justice himself reports, the Judicial Conference of the senior circuit judges, "at the suggestion of the Chief Justice, considered appropriate methods for assisting the Supreme Court in the discharge of this highly important and difficult task, through the co-operation of the members of the Bench and Bar throughout the country, to the end that the views of the federal judges and of the Bar may find adequate and helpful expression."¹⁵ The personal leadership of the Chief Justice is a guaranty of the completeness and scholarly character of the new rules.

While it is appropriate for the rule-making authorities thus to receive

It passed both Houses of Congress in less than three months after the Attorney General's announcement (*supra* note 8) of his intention to have it introduced and of the President's endorsement of it. (1934) 20 A. B. A. J. 395.

10. H. R. 133, introduced by Chairman Clayton in the Sixty-second and again in the Sixty-third Congress. See H. R. REP. No. 462, 63d Cong., 2d Sess. (1914).

11. 260 U. S. 235 (1922), see *infra* note 164 and accompanying text; Note (1923) 36 HARV. L. REV. 474.

12. Taft, *Three Needed Steps of Progress* (1922) 8 A. B. A. J. 34, 35; *Possible and Needed Reforms in Administration of Justice in Federal Courts* (1922) 8 A. B. A. J. 601, 604, 607, (1922) 47 A. B. A. REP. 250, 259-261, 268. See note 31 *infra*.

13. S. 2061, 68th Cong., 1st Sess. (1924); (1922) 47 A. B. A. REP. 82; (1924) 49 *id.* 485, 496. See *supra* note 1.

14. See *supra* note 1.

15. *Report of the Judicial Conference* (1934) 20 A. B. A. J. 713, 716.

and digest the suggestions of leading federal practitioners and members of the federal bench, yet it is to be hoped that the ultimate responsibility of the Court to lead the bar and bench, and not merely to record the views of the average of the profession, will at all times be recalled and will be fully discharged. Anything like a census of the views of the bar will not only not be helpful but will be inimical to change and improvement. Experience teaches us, that while individual members of the bar are enlightened agents of reform, the general professional reaction is, quite naturally, against change. Thus, a reform of procedure which merely adjusts itself to the majority view of the bar at best can be only a minor readjustment, perhaps even harmful, as displacing a known system by one unfamiliar and retrogressive. Leadership in any walk of life can properly be expected only from the minority and from individuals; it is not a criticism of our profession if we recognize these actualities.

As a matter of fact, we need not apologize, but can take pride in the share which members of our bar have had in procedural reforms. If we look to the example of England, we learn that reform was prevented by the legal profession until an overwhelming lay sentiment was developed, and that throughout, the great procedural reforms of the last century were due to a public enlightened by the press, and not, at least initially, to the bench or bar.¹⁶ We, however, can recall with pride the pre-eminent names in law reform of Edmund Livingston and of David Dudley Field, the father of code pleading, and the activity of the Bar Association for this particular statute. It is, however, unfortunate that reforms tend to be opposed and emasculated by the general opposition of the bar. It is only human for a successful practitioner to conclude that the practice of which he has made himself master is a desirable one to follow. Many striking examples may be cited. Thus, a committee of the Commonwealth Fund made a study of particular questions in the law of evidence and obtained the views of lawyers from three neighboring states as to the widely different rules of these states with respect to an identical problem. In general, the lawyers responded that the only workable rule was the rule of their own jurisdiction and that any other rule would be unworkable, ignoring the fact that it was actually in operation beyond the bounds set by the imaginary line which divides states.¹⁷

Again, at the beginning of this century the complications of procedure in New York and the need for reform had led to the passage of an act directing the submission of a new practice act by the Board of Statutory Consolidation, a small group of able lawyers. That board filed its re-

16. Sunderland, *The English Struggle for Procedural Reform* (1926) 39 HARV. L. REV. 725.

17. MORGAN AND OTHERS, *THE LAW OF EVIDENCE* (1927) 65-98.

port suggesting a new practice embodying the most advanced features of English and American procedure, still a model for efficient law administration. The legislature, however, after a poll of the bar, passed the Civil Practice Act of 1921, which was only a compromise reform and which has led to the conflicting decisions and hampering interpretation which were foreseen at the time of its passage.¹⁸

Still more recently, a notable attempt at reform was made in Illinois, with the adoption of a new practice act, effective January 1, 1934. That act in substance seems to call for a real union of law and equity, but, apparently, due to opposition, the provisions concerning this point are sufficiently vague and uncertain as to make future litigation seem inevitable, with the probable result of hindering, if not postponing altogether, that vitally important feature of modern procedural reform.¹⁹

The grant of the rule-making power in federal law actions is a restoration to the Supreme Court of a power which it long possessed, but did not exercise. The first process act,²⁰ which was by its terms temporary in character, did not contain any general provision relative to rule making, but the permanent process act of 1792²¹ subjected the law, equity, and admiralty practice "to such alterations and additions as the said courts (circuit and district) respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." The provision authorizing each court to regulate its own practice was in effect a partial re-enactment of Section 17 of the first judiciary act of 1789;²² but the

18. See the discussion in CLARK, *CODE PLEADING* (1928) 26-27, 297, and authorities there cited; *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925) (the unfortunate case on the conflicting joinder rules), reprinted in 2 CLARK, *CASES ON PLEADING AND PROCEDURE* (1933) 496, and the authorities there collected.

19. Clark, *The New Illinois Civil Practice Act* (1933) 1 U. OF CHI. L. REV. 209; German, *Illinois Civil Practice Act* (1934) 5 MO. B. J. 85; Hinton, *Pleading Under the Illinois Civil Practice Act* (1934) 1 U. OF CHI. L. REV. 580; Sunderland, *Observations on the Illinois Civil Practice Act* (1934) 28 ILL. L. REV. 861, 864-870; McCASKILL, JENNER AND SCHAEFER, *ILLINOIS CIVIL PRACTICE ACT ANNOTATED* (1933) 59-61.

20. 1 STAT. 93 (1789). This was re-enacted by 1 STAT. 123 (1790), and again by 1 STAT. 191 (1792).

21. 1 STAT. 275 (1792).

22. 1 STAT. 83 (1789). Section 17 read: "That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

In 1792 the Supreme Court outlined how it would use this power for itself, declaring: "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." 2 DALL. 411 (U. S. 1792). See also Section 7 of the Act of March 2, 1793, 1 STAT. 335, which seems to be a partial re-enactment of Section 17.

provision giving the Supreme Court general rule-making power was new. This was reaffirmed in 1842 in the following broad terms:

"The supreme court shall have full power and authority, from time to time, to prescribe, and regulate and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing bills and libels, answers and other proceedings and pleadings, in suits at common law, or in admiralty, and in equity pleadings in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."²³

Failure on the part of the Court to exercise this power in the *common-law field*, led to a withdrawal of that portion of the rule-making power in 1872 when Congress took up the task of modernizing federal common-law procedure, and passed the Conformity Act. Now after a period of sixty-two years this power is restored to the court and authority given to fuse the law and equity procedure.

The teaching of this experience and of experience elsewhere in connection with the rule-making power indicates that it is not sufficient merely to establish a simple and effective system controlled by rules of court. Unless some permanent machinery is provided whereby continual supervision and change can be made, little is gained over legislative control of the functioning of the Court. It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product, and that procedural rules must be continually re-examined and reformed in order to be kept workable. It is to be hoped, therefore, that the Court will develop some permanent means whereby changes and improvements in the rules may be suggested and adopted as experience points to their necessity.²⁴ As a matter of fact, the successful Federal Equity Rules of 1912 might have been still more effective had change been more readily and easily made.²⁵ It would seem possible and desirable for the Court to suggest some permanent committee of the federal bar to recommend to it necessary changes.

23. 5 STAT. 518, § 6 (1842)

24. See Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113; Sunderland, *The Machinery of Procedural Reform* (1924) 22 MICH. L. REV. 292; Sunderland, *The Exercise of the Rule-Making Power* (1926) 12 A. B. A. J. 548; ROSENBAUM, *THE RULE-MAKING AUTHORITY* (1917) c. 3 on the English rules committee. See also Whittier, *Regulating Procedure by Rules of Court* (1927) 11 J. AM. JUD. SOC. 15, where a case of do-nothing is made against several state courts having the rule-making power.

25. Lane, *Twenty Years Under the Federal Equity Rules* (1933) 46 HARV. L. REV. 638.

The distinction, noted above, made in the new act between merely uniform law rules, effective as soon as promulgated, and rules unifying law and equity, effective only at the end of the session of that Congress to which they have been submitted,²⁶ will not, it is hoped, lead to the conclusion that the latter reform should be delayed. Traditionally, the union of law and equity has seemed like a serious change. In actual fact, however, it exists in reality, if not in form, in most of the American states. Half the American states and the territories have officially adopted the code procedure inaugurated by David Dudley Field in the New York Code of 1848, which explicitly adopts the union of law and equity.²⁷ The majority of the remaining states, however, even without such express step, have actually a procedure whereby the same judge administers law and equity in the same court, and even the formal distinctions have been largely obliterated by freedom of transfer of causes from one "side" to the other of the court, and the free intermingling of legal and equitable issues in the same cause. Thus, in Massachusetts, by a process of natural steps, adding provisions for equitable defenses and for transfer of causes, the procedure is apparently actually more united than it is in some parts of the original code state of New York.²⁸ In only some half dozen states is there really still a divided procedure. Moreover, as we point out hereinafter, there is actually a substantial union of law and equity already in the federal courts, and the division is kept alive only by some formal vestiges which ought now to be abolished.²⁹

Unless this step of uniting the federal law and equity procedure, in reality comparatively a small one, is taken, we feel confident that the suggested reform will largely fail of its effect. Certainly in no event can it then be considered as in any way a model for other jurisdictions, for it is not to be conceived that the code procedure, which has worked with quite universal success in so many states, will be rejected by these states for a more backward federal system. New York is often pointed to as an example of the lack of success of the code system. But it is not actually one, for the crowded conditions in New York City, coupled with a multitude of different statutory enactments and diverse rulings of the court, have led to the unfortunate procedural uncertainty which

26. See note 1, *supra*.

27. CLARK, CODE PLEADING (1928) 19-22.

28. *Adams v. Silverman*, 280 Mass. 23, 182 N. E. 1 (1932); *Callahan v. Broadway Nat. Bank*, 190 N. E. 792 (Mass. 1934). And see *Gordon v. Pettey*, 291 Pa. 258, 139 Atl. 914 (1928), noted in (1928) 37 YALE L. J. 1000. For a review of the New York situation see Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; and for recent improvement there see Clark, *supra* note 19, at 214-215. And see WALSH, *EQUITY* (1930) 96-131.

29. *Infra* pp. 415-435.

exists there but does not exist throughout the state as a whole. The success of such widely divergent states as California, Minnesota, and Connecticut indicates the real effectiveness of the procedure. In fact, a large part of Senator Walsh's objection to the new legislation may well be the entirely justified feeling that lawyers in states with forward-looking systems should not be forced in the federal courts to accept the procedure of more backward jurisdictions.³⁰ And Senator Walsh was entitled to ask why the procedure in his own state of Montana in the federal courts should be forced to conform to the unsatisfactory procedure of New York or (then) of Illinois. The nature and force of this objection should be a significant factor in pointing to the need of a complete reform.

As a matter of fact, there is at hand a substantial model for the new rules. The Federal Equity Rules of 1912 successfully accomplished their purpose in essential features and, in fact, embody for the equity practice the best of modern reform procedure, both English and American. By extending their scope, now unfortunately limited in form to the equity cases, to the entire practice in the federal courts, the necessary major element of the reform will be secured. As we point out later, the rules are adaptable to the model of the fused procedure which is essential.

For the purpose of considering these propositions, in the light of history and the existing situation and need, we now proceed to examine (1) the early development of the separate law and equity procedures in the federal system; (2) the Conformity Act, its purpose, scope, and achievement; (3) the movement given impetus by the equity rules of 1912, which has already tended to coalesce federal law and equity; and, in a subsequent article, (4) the form which a new united federal civil procedure should take and the availability of the Equity Rules for its base.

HISTORICAL DEVELOPMENT OF THE LAW AND EQUITY PROCEDURES

In view of the general trend towards the union of law and equity in American and English procedure, the delay of this reform in the federal system seems inexplicable. It is true that certain expressions in the Constitution have been thought to cast doubt upon the validity of the union, but these are not more explicit than similar provisions of state constitutions which have not prevented the development of code pleading, and able commentators have supported the validity of the change.³¹

The expressions referred to are the one in Article Three, Section Two, Clause One, extending the judicial power of the United States "to all

30. See SEN. DOC. NO. 105, 69th Cong. 1st Sess. (1926); Clark, *supra* note 3.

31. See Report by Roscoe Pound, *Law and Equity in the Federal Courts* (1911) 36 A. B. A. REP. 470, 73 CENT. L. J. 204; McCormick, *The Fusion of Law and Equity in*

cases, in Law and Equity," arising under the Constitution, the laws of the United States, and treaties; the one in the Seventh Amendment preserving the right of trial by jury in law actions where the amount involved exceeds twenty dollars;³² and the one in the Eleventh Amendment providing that the federal judicial power shall not be construed to extend "to any suit in law or equity," against a state by a citizen of another state or a foreign country.

The protection afforded to the right of jury trial is obviously not different from that afforded by the state constitutions in jurisdictions having the unified procedure. The constitutional provision has had, it is true, a long and important history with respect to code pleading; but nowhere has it been held to prevent some form of union of law and equity. Some courts, particularly in the earlier days, tended to view it as forcing various differentiations in the forms and details of pleading; but it is now quite well settled—and the experience in the states having the most workable practice systems demonstrates the soundness of this view—that it is a restriction applying only to the trial and operative only at the trial stage of a contested case with respect to the issues as they have then been already formulated. It does not control the pleading or issue-formulating stage of the case or any steps prior to the trial.³³ As discussed below, certain of the Supreme Court decisions—which may be criticized as to details—carry the preservation of the right very far, but

United States Courts (1928) 6 N. C. L. REV. 283; HEPBURN, *DEVELOPMENT OF CODE PLEADING* (1897) 162-164.

"We still retain in those (the federal) courts the distinction between suits at law, suits in equity and suits in admiralty. The Constitution refers specifically to them, and in deference to that separation in the Constitution, the distinction is preserved in the Federal practice. It seems to me that there is no reason why this distinction, so far as actual practice is concerned, should not be wholly abolished, and what are now suits in law, in equity, and in admiralty, should not be conducted in the form of one civil action, just as is done in the code states. . . All that is needed is to vest the . . . power in the Supreme Court with reference to the rules at common law and then to give that court the power to blend them into a code, which shall make the procedure the same in all and as simple as possible." Chief Justice Taft, *Three Needed Steps of Progress* (1922) 8 A. B. A. J. 34, 35; Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts* (1922) 8 A. B. A. J. 601, 604.

32. This Amendment also provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The scope of this provision is considered with respect to the scope of review on appeal under a unified procedure. See the later article, and text accompanying notes 129-130, *infra*.

33. This, the outstanding feature and problem of code pleading, has led to a voluminous literature concerning it. See references in CLARK, *CODE PLEADING* (1928) c. 2 and *passim*; cf. Clark, *supra* note 19; cf. WALSH, *EQUITY* (1930) 96-131.

none make necessary a separate procedure or suggest problems different from those already met in the states.³⁴

The other sections apparently have been thought to contain perhaps the more direct limitation; for, it is argued, the reference to *cases in law and equity* signifies separate cases in law and equity, according to the practice in vogue when the Constitution was adopted.³⁵ But this is not the statement used; in fact, the main provision refers to *all cases*, and the phrase *in law and equity* is in form explanatory of *all*, adding emphasis to it. It seems clear that the intent here was to make sure that jurisdiction of all substantive rights was by Article Three invested in, or by the Eleventh Amendment withdrawn from, the federal courts; and there is nothing to indicate an intent to embalm in the Constitution one single means of enforcing these rights. The unified procedure takes away no rights in either law or equity; on the contrary, it is designed to afford a more simple and effective way of enforcing such rights.³⁶ In line with constitutional construction generally, and notably with reference to the jury, improvements in technique and method are permissible so long as the substantive rights are preserved, and such has been the conclusion of state courts.³⁷ The Supreme Court decisions discussed below upholding and advancing the substantial coalescence of law and equity now obtaining in the federal system show that the constitutional objection is not to be feared.³⁸

34. See discussion pp. 407-409, and note 78, *infra*; cf. *Ex parte Peterson*, 253 U. S. 300, 309, 310 (1920), cited note 96, *infra*.

35. *Bennett v. Butterworth*, 11 How. 669, 674 (U. S. 1850); *McFaul v. Ramsey*, 20 How. 523, 525 (U. S. 1857); *Thompson v. Railroad Companies*, 6 Wall. 134, 137 (U. S. 1867); *Scott v. Neely*, 140 U. S. 106, 109 (1890); *Langtry v. Wallace*, 182 U. S. 536, 550 (1900). See analysis of these and other cases by Pound, *supra* note 31; cf. Taylor, *The Fusion of Law and Equity* (1917) 66 U. OF PA. L. REV. 17.

36. It is true, as expressly provided in the codes of some states, that in case of variance between equity and law the rules of equity prevail. CLARK, CODE PLEADING (1928) 65, citing statutes of Connecticut, Idaho, Maine, New Mexico and England. POMEROY, CODE REMEDIES (5th ed. 1929) Preface. But this is just as true under the divided system; code practice merely makes simpler the reaching of a like result. "In a system which has, separately, law and equity, the doctrines of equity represent the real law." Beale, *Equity in America* (1921) 1 CAMB. L. J. 21, 25.

37. This was decided at an early date in New York, the original code state. *Phillips v. Gorham*, 17 N. Y. 270 (1858); See also *Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841 (1914); *Ely v. Early*, 94 N. C. 1 (1886); cases collected 35 C. J. 161-163. Scott, *Trial by Jury and the Reform of Civil Procedure* (1918) 31 HARV. L. REV. 669.

38. See *infra* pp. 415-422, 426, and notably *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235 (1922). Earlier cases had brought out that so long as the substance was preserved, the "mere manner" of presenting the questions might be changed. *Walker v. Railroad*, 165 U. S. 593, 596 (1896); *Ex parte Boyd*, 105 U. S. 647, 656 (1881): "... the remaining question, therefore, becomes . . . whether by the adoption of that instrument all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it." *Black v. Jackson*, 177 U. S. 349, 364 (1899); Pound, *supra* note 31.

The history of the procedural developments in the federal courts shows that there has not been great fear of possible constitutional restrictions in the past. In fact, when the first judiciary act was being passed, the anti-chancery party favored complete abolition of the equity jurisdiction. Section 16 of the act, declaratory of equity jurisdiction as then existing, providing "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law,"³⁹ was enacted only after one of the warmest contests arising over the judiciary bill. At one time the Senate amended the provisions of the original Draft Bill relative to trials of facts in the District and Circuit Courts to provide for a jury trial of facts "on any hearing of a cause in equity in a Circuit Court." This provision, which would have revolutionized equity procedure, was later deleted; but a successful attack was made on the modes of proof then prevailing in equity and admiralty, testimony being taken in such causes by depositions, and not by oral evidence. Proof by deposition was abolished except in cases of persons more than 100 miles from the Court, or on a voyage, or ancient or very infirm, and it was provided that:

"the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law."

And appeal to the Supreme Court in *all* cases was limited to questions of law.⁴⁰

It seemed not to have occurred to any one that the Constitution demanded an equity jurisdiction or an equity procedure of the orthodox type. Yet the hostility toward equity which was quite common among the colonists actually created a national system of equity jurisprudence and procedure.⁴¹ Conformity to state practice in law seems to have been demanded.⁴² But when the anti-chancery party was beaten and an equity jurisdiction established, it became necessary to follow the English equity procedure, because in a number of the states there was no equity

39. 1 STAT. 82, § 16 (1789), 28 U. S. C. A. § 384 (1926).

40. Warren, *History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 96-100. The provision on appeal was changed by the Act of March 3, 1803, c. 40, 2 STAT. 244, providing for appeals in equity and admiralty instead of writs of error.

41. Von Moschzisker, *Equity Jurisdiction in the Federal Courts* (1927) 75 U. OF PA. L. REV. 287. The author discusses the suggested reasons for the hostility toward equity. He considers as the fundamental explanation, the fact that equity was regarded as an appanage of the Crown's prerogative, and, therefore, inimical to the liberties of the colonists.

42. Charles Warren, *Federal Process and State Legislation* (1930) 16 VA. L. REV. 421, 426-7 has discussed the delicacy of the problem confronting the first Congress and cites the argument of David M. Barnes in *Brown v. Van Braam*, 3 Dall. 344, 351 (U. S. 1797),

procedure to which conformity could be had.⁴³ So, in the first process act we find it provided that:

"the forms of writs and executions, except their style, and modes of process⁴⁴ . . . in the circuit and district courts, in suits at common law, shall be the same in each respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law."⁴⁵

The permanent process act of 1792⁴⁶ reaffirmed this bifurcation, but, as we have seen, subjected the law, equity and admiralty procedure to regulation by the Supreme Court. In 1822, the Court promulgated the first set of equity rules,⁴⁷ and twenty years later the second set.⁴⁸ These did not create a new equity procedure, but were largely declaratory of the old. It was not until the present Equity Rules were promulgated in 1912 that equity procedure was thoroughly modernized. These rules borrowed extensively from the reformed English practice, which had swept away all distinctions between law and equity, and had made pro-

pointing out the difficulties in preventing "an injudicious clashing with the jurisdiction and practice of the State courts" which were avoided by adopting the local procedure.

43. "In New Jersey there is a court of chancery, which proceeds like ours, (New York) . . . In Pennsylvania . . . there is no court of chancery . . . and its common-law courts have equity jurisdiction. . . . Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia . . . In Georgia there are none but common-law courts . . . In Connecticut they have no distinct courts . . . of chancery . . . (but) their common-law courts have . . . to a certain extent, equity jurisdiction. In cases of importance their general assembly is the only court of chancery . . . Rhode Island is, I believe, . . . pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law (and) equity . . . are in a similar predicament." Hamilton, writing in *THE FEDERALIST*, No. 83, on Trial by Jury.

44. The act, as can be seen, was sketchy in character. But Chief Justice Marshall gave it a liberal interpretation by construing the term "modes of process" as applicable to every step taken in a cause. He found support for this construction for law actions in the second sentence of the act which, as he said, it had not been doubted regulated the whole course of proceeding in equity and admiralty causes. *Wayman v. Southard*, 10 Wheat. 1, 27-28 (U. S. 1825).

45. 1 STAT. 93, § 2 (1789).

46. 1 STAT. 276, § 2 (1792).

47. 7 Wheat v (U. S. 1822).

48. 17 Pet. lxi (U. S. 1842). Admiralty rules were promulgated after the act of 1842, which reaffirmed the rule-making grant, and again in 1920. The Supreme Court has since 1898, pursuant to 30 STAT. 554, § 30 (1898), 11 U. S. C. A. § 53 (1926), prescribed "all necessary rules, forms and orders as to procedure and for carrying (the bankruptcy act) into force and effect"; and since 1909, pursuant to 35 STAT. 1081, § 25 (1909), 17 U. S. C. A. § 25 (1926), has prescribed "rules and regulations for practice and procedure" under the enforcement section of the copyright law.

cedure distinctly subservient to the demands of the substantive law.⁴⁹ But in the common-law field the Court did not act. Possibly because of the public demand for conformity in law actions in 1789, the Court may have hesitated to exercise its power; possibly the task of creating an American common law absorbed its interest and time; and possibly for a number of years the Court may have regarded conformity to state practice as highly desirable.

It is to be noted that under the temporary process acts and the permanent act of 1792 conformity in law actions was to be to the state practice as it was in 1789. Procedurally this seems not to have been objected to; but much opposition did arise to a static conformity in the matter of attachments and executions. Many states had since 1789 passed laws on these subjects quite favorable to the debtor class; and if the federal district and circuit courts did not adapt their practice to the change, this class felt itself aggrieved. *Wayman v. Southard*⁵⁰ is a good illustration. A Kentucky statute, enacted subsequent to September, 1789, required the plaintiff to indorse on any execution taken out the statement that bank notes of the Bank of Kentucky would be received in payment, and, on his refusal, authorized the defendant to give a replevin bond for the debt. This statute was held inapplicable in the federal courts because the process act did not operate prospectively. To remedy this situation and to extend the process act to states other than Louisiana,⁵¹ which had been admitted since 1789, the process act of 1828 was passed. It directed that in each of these states that procedure proper should conform to that prevailing there in 1828, subject to alterations and additions by the lower courts themselves or the Supreme

49. Hopkins attributes such important rules as the following to English practice: Rule 18, Pleadings — Technical Forms Abrogated; Rule 20, Further and Particular Statement in Pleading May Be Required; Rule 22, Action at Law Erroneously Begun as Suit in Equity — Transfer; Rule 23, Matters Ordinarily Determinable at Law, When Arising in Suit in Equity to be Disposed of Therein; Rule 26, Joinder of Causes of Action; Rule 30, Answer — Contents — Counterclaim; Rule 31, Reply — When Required — When Cause at Issue; Rule 43, Defect of Parties — Resisting Objection; Rule 46, Trial — Testimony Usually Taken in Open Court — Rulings on Objections to Evidence; Rule 58, Discovery — Interrogatories — Inspection and Production of Documents — Admission of Execution or Genuineness. HOPKINS, *FEDERAL EQUITY RULES* (8th ed. 1933) 159-160, 164, 168-9, 174-5, 185, 209, 226, 247-8, 249, 267-9. And see generally his discussion on other important rules. Cf. the questions addressed by the draftsman of the Equity Rules of 1912, to Lord Chancellor Loreburn and answers submitted. Mr. Justice Lurton, *The Operation of the Reformed Equity Procedure in England* (1912) 26 HARV. L. REV. 99.

50. 10 Wheat. 1 (U. S. 1825). See also *The Bank of United States v. Halstead*, 10 Wheat. 51 (U. S. 1825). And see Warren, *Federal Process and State Legislation* (1930) 16 VA. L. REV. 421, 435-450, 546-557 for a general discussion of this subject.

51. In 1824 the process act had been extended to Louisiana. Conformity there would be as of that date. 4 STAT. 62 (1824).

Court of the United States. But relative to proceedings to enforce a judgment or decree, it was provided that in *all* the states conformity should be as of that date, with the proviso that the lower courts should have the power to adopt future legislative changes.⁵² This separation and somewhat different treatment of general procedure, and procedure relative to attachment and execution, are to be found also in the general judiciary act of June 1, 1872. The provisions in that act relative to attachments became Section 915 of the Revised Statutes, while the provision relative to executions became Section 916. These sections require conformity to state attachment and execution laws as of June 1, 1872, unless the district courts by rule adopt legislative changes. These two sections, it will be noted, create a static conformity. But presumably the district courts have acted to keep abreast of state laws on these matters, for there seems not to have been any agitation for change.

The Act of August 1, 1842, extended the provisions of the process act to courts held in states admitted into the Union subsequent to 1828;⁵³ and in order to avoid an impasse relative to states admitted subsequent to 1842, general provisions in the admitting acts and supplemental acts were construed to extend the provisions of the process act to the courts held in the newly admitted states.⁵⁴ Prior to the passage of the Conformity Act the general rule, then, for determining a question of general procedure was to ascertain: (1) whether Congress had specifically prescribed the practice; if not, (2) whether the court in which it arose had an applicable rule; and if not, (3) to inquire what was the practice upon the point in question in the supreme court of the state where the question had arisen, on September 29, 1789, or, if the question had arisen in a state admitted subsequently, what was the practice of the state court at

52. 4 STAT. 278 (1828). Section One provided that in the states admitted since 1789 there should be conformity in law actions to the state practice as of 1828, but proceedings in equity and admiralty should be governed by the rules and usages belonging to the federal courts, and all procedures were made subject to change by rule of the Supreme Court; Section Three provided that in *all* states writs of execution and other process issued on judgments and decrees, and proceedings thereupon should conform to the state practice as of 1828; Section Two accorded to defendants in the federal courts the same rights of imparlance against an adverse judgment as was given in the state courts; and Section Four excluded Louisiana from the operation of the act.

53. 5 STAT. 499 (1842).

54. "Iowa was admitted into the Union (Mar. 3, 1845) on an equal footing with the original states in all respects, and by the supplemental Act passed on the same day, it is provided that the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that State as elsewhere within the United States. Legal effect of that provision was, that the Process Act of the nineteenth of May, 1828, became applicable in the Federal courts of that State." *United States v. Council of Keokuk*, 6 Wall. 514, 516, 517 (U. S. 1868). Similar reasoning extended the act to Kansas. *Smith v. Cockrill*, 6 Wall. 756 (U. S. 1868).

the time the process act was extended to it.⁵⁵ But inquiry under subdivision (2) was usually fruitless, for there is little evidence that the circuit and district courts availed themselves of the opportunity to keep the federal procedure proper abreast of the state practice. One example, however, of continuing conformity does stand out. In Ohio the district court, when established in 1803, adopted the practice of the state courts by a single rule, and, when the seventh circuit was established four years later, the judge of the supreme court, who was assigned to that circuit, found the practice of the state courts adopted in fact into the circuit court. And further, the federal courts there seem to have considered that their practice changed with that of the state, unless deviated from by positive rules of their own making.⁵⁶

THE CONFORMITY ACT

So long as the state practice remained substantially the common law practice, static conformity seems not to have been particularly objectionable. But with the changes introduced by the codes such conformity became unduly onerous, for "while in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local code prevailed."⁵⁷ So to bring about uniformity in the law of procedure in the Federal and State courts of the same locality, we find in the general judiciary act of June 1, 1872, Section Five which has come to be known as the Conformity Act.⁵⁸ This reads:

"That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof."

55. Cf. CONKLING, U. S. PRACTICE (4th ed. 1864) 305, where it is stated that if the question arises in one of the states admitted since 1789 the practice of the state court on the first of May, 1842, should be consulted. In view of the various statutes this seems to be slightly erroneous.

56. *Fullerton v. The Bank of the United States*, 1 Pet. 604 (U. S. 1828). An exercise of the rule-making power is constitutional. *The Bank of the United States v. Halstead*, 10 Wheat. 51 (U. S. 1825); *Beers v. Haughton*, 9 Pet. 329 (U. S. 1835).

57. *Nudd v. Burrows*, 91 U. S. 426, 441 (1875).

58. 17 STAT. 196 (1872), 28 U. S. C. A. § 724 (1926), U. S. REV. STAT. § 914 (1878) (the wording is slightly different in the revision than as enacted). Sometimes the phrase "Conformity Act" is applied to Sections 914, 915 and 916 of the Revised Statutes. The two latter sections deal with attachment and execution. See *supra* p. 400.

This was carried forward into the revision as Section 914 with the proviso deleted. It has since remained unchanged.

To effect the purpose of the Act there was, then, to be a general conformity to the state practice in "whatever belongs to the three categories of practice, pleading and forms and modes of proceeding."⁵⁹

Possibly a literal interpretation of the Act would have placed the personal conduct and administration by the judge of his duties while on the bench within one of those categories. But bearing in mind the reason underlying the legislation, the Supreme Court's interpretation which exempted such matter from conformity seems justified. As the Court put it:

"No one objected, or sought a remedy in that direction. We see nothing in the act to warrant the conclusion that it was intended to have such an application. . . . The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither *practice*, *pleading* nor a *form* nor *mode of proceeding* within the meaning of those terms as found in the context."⁶⁰

So, it has been held that neither state statutes nor constitutions are binding on federal courts, which dispense with the requirement that exceptions to the charge be made while the jury is at the bar and before it retires;⁶¹ require that all instructions of the court to the jury shall be in writing;⁶² that these instructions shall be taken by the jurors with them in their retirement;⁶³ forbid the giving of additional instructions in the absence of counsel, after the jury has retired;⁶⁴ forbid the separation of a jury after the charge is given and before the verdict is rendered;⁶⁵ provide that the judge may be caused to require the jury to find specially upon particular questions of fact;⁶⁶ provide that the jury are the sole judges of both the law and the facts;⁶⁷ forbid judges in charging juries to express an opinion upon the facts.⁶⁸

59. *Amy v. Watertown*, 130 U. S. 301, 304 (1889).

60. *Nudd v. Burrows*, 91 U. S. 426, 442 (1875).

61. *Consumers' Cotton Oil Co. v. Ashburn*, 81 Fed. 331 (C. C. A. 5th, 1897).

62. *Lincoln v. Power*, 151 U. S. 436 (1894).

63. *Nudd v. Burrows*, 91 U. S. 426 (1875); *Western Union Tel. Co. v. Burgess*, 108 Fed. 26 (C. C. A. 6th, 1901), cert. denied 181 U. S. 620 (1901).

64. *Yates v. Whyel Coke Co.*, 221 Fed. 603 (C. C. A. 6th, 1915).

65. *Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co.*, 133 Fed. 713 (C. C. A. 6th, 1904).

66. *Indianapolis & St. Louis Rr. Co. v. Horst*, 93 U. S. 291 (1876); *United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100 (1889); *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483 (1896); *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302 (C. C. A. 6th, 1895); *Toledo, St. Louis & Western Rr. Co. v. Reardon*, 159 Fed. 366 (C. C. A. 6th, 1908).

67. *Herron v. Southern Pacific Co.*, 283 U. S. 91 (1931); *Seested v. Post Printing & Publishing Co.*, 15 F. (2d) 595 (D. Colo. 1926).

68. *Nudd v. Burrows*, 91 U. S. 426 (U. S. 1875); *Vicksburg and Meriden Rr. Co. v. Put-*

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits these questions to their determination."⁶⁹

It is believed that all interested in effective trial administration will recognize the soundness of the position taken by the Court.⁷⁰

What, then, was the scope of the Act? There was to be conformity as near as may be in the circuit and district courts to the state practice in *like* causes in civil actions at law.

"The conformity is required to be 'as near as may be,' not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.

"While the Act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory."⁷¹

This elasticity in the Act, for example, permitted a federal court to disregard a state practice that tended to defeat a federal substantive right.⁷² And in this connection, Section 918 of the Revised Statutes, which regulates the rule-making power of the district courts should also be considered. Referring to that section, the Conformity Act, and Sections 915 and 916 relative to attachments and executions, the Supreme Court said:

"that while it was the purpose of Congress to bring about a general uniformity in Federal and state proceedings in civil cases . . . yet it was also the intention to reach such uniformity often largely through the discretion of the Federal courts, exercised in the form of general rules adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."⁷³

nam, 118 U. S. 545 (1886); *St. Louis, Iron Mountain and Southern Ry. Co. v. Vickers*, 122 U. S. 360 (1887).

69. *United States v. Reading Rr.*, 123 U. S. 113, 114 (1887). To the same effect see *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 14 (1899); *Herron v. Southern Pacific Co.*, 283 U. S. 91, 95 (1931).

70. See Sunderland, *The Inefficiency of the American Jury* (1915) 13 MICH. L. REV. 302; Sunderland, *English Judge Completely Controls Trial* (1926) 12 MASS. L. Q. 32.

71. *Indianapolis & St. Louis Rr. Co. v. Horst*, 93 U. S. 291, 301, 302 (1876).

72. *Hills & Co., Ltd. v. Hoover*, 220 U. S. 329, 336 (1911).

73. *Shepard v. Adams*, 168 U. S. 618, 625 (1898) (rule of the federal district court requiring appearance within 10 days from service of summons held applicable in face of Colorado law giving 30 days).

This made it possible for the federal *nisi prius* courts to modify for themselves the practice which had been designed for the state, and which if carried bodily over into the federal courts would there have unduly incumbered the administration of justice.⁷⁴

Prior to the Act it was held that the state practice and procedure did not govern with regard to appellate review, which was regulated by the common law and acts of Congress, and that the earlier process acts were applicable only to district and circuit court proceedings.⁷⁵ And this continues to be the rule:

"The Conformity Act by its express terms refers only to proceedings in District (and formerly Circuit) Courts and has no application to appellate proceedings either in this (the Supreme) court or in the Circuit Court of Appeal. Such proceedings are governed entirely by the acts of Congress, the common law, and the ancient English statutes."⁷⁶

Since everything after judgment looking to review in an appellate court is outside the scope of the Act,⁷⁷ there is no change in the rule, well-established in federal courts prior to the Conformity Act, that the grant or refusal of a new trial rests in the sound discretion of the court to which the motion is addressed and hence cannot be made the subject of review, unless there is an abuse of discretion.⁷⁸

74. See *Ellicott Machine Corporation v. Vogt Bros. Mfg. Co.*, 267 Fed. 945 (C. C. A. 6th, 1920), application for writ of error, certiorari and mandamus denied 254 U. S. 607 (1920) (well illustrating the need for, and use of the rule-making power in the district courts).

75. *Phillips v. Preston*, 5 How. 278 (U. S. 1847); *Bayard v. Lombard*, 9 How. 530 (U. S. 1850); *Parks v. Turner*, 12 How. 39 (U. S. 1851); *Graham v. Bayne*, 18 How. 60 (U. S. 1855); *Hudgins v. Kemp*, 18 How. 530 (U. S. 1855); *Brewster v. Wakefield*, 22 How. 118 (U. S. 1859).

76. *Camp v. Gress*, 250 U. S. 308, 318 (1919).

77. *West v. East Coast Cedar Co.*, 113 Fed. 737, 741 (C. C. A. 4th, 1902).

78. *Newcomb v. Wood*, 97 U. S. 581, 583, 584 (1878) (the Court said referring to the federal rule: "We cannot think that congress intended by the act of June 1, 1872 . . . to abrogate this salutary rule."); *James P. Witherow Co. v. De Bardeleben Coal & Iron Co.*, 99 Fed. 670 (C. C. A. 5th, 1900). For the rule itself applied to a case of award of nominal damages for breach of a contract where the damage was substantial see *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474 (1933), discussed in Note (1933) 1 U. OF CHI. L. REV. 111; Comment (1933) 42 YALE L. J. 965; (1933) 46 HARV. L. REV. 852; (1933) 28 ILL. L. REV. 122. Cf. *Miles v. Rose*, 175 S. E. 230 (Va. 1934), holding that the smallness of the verdict cast serious suspicion upon the integrity of the jury's finding and required a new trial. And see *Schiedt v. Dimick*, 70 F. (2d) 558 (C. C. A. 1st, 1934), cert. granted 55 S. Ct. 75 (1934) (holding that the trial court did not have power to increase an inadequate verdict for the plaintiff, over his objection, although the defendant had consented thereto, but the only course open was to grant a new trial). Noted in (1934) 33 MICH. L. REV. 138.

But in ejectment actions federal courts follow a state statute which gives the losing party a new trial as a matter of right. *Equator Co. v. Hall*, 106 U. S. 86 (1882); *Smale*

In view of the historical divergence of the law and equity procedures and the language of the Act itself, it is not surprising to find that the code union of law and equity was not adopted: legal and equitable causes of action could not be joined by virtue of the Act;⁷⁹ nor could the defendant by virtue thereof plead an equitable defense in the law action.⁸⁰ The purpose of the Conformity Act was not to lessen the separation of two procedures, but solely to adopt the state practice in law actions in like causes. Construing the "like causes" clause, it was held in a revenue forfeiture case that the Act was not applicable, because there was no like cause in the state procedure. The action was in rem, and the court noted the fact that the practice as to the pleadings in suits of this character was well settled prior to the passage of the Conformity Act.⁸¹ A closer question is raised by an action of which the federal courts are given exclusive jurisdiction, but of a type common to state practice. An action at law for damages for infringement of a patent will serve as an illustration. There are decisions both ways on the proposition that it is a like cause to which the Conformity Act applies.⁸² Usually those holding that the state practice is not applicable are cases involving some point which the court might have decided on other and better grounds. Certainly there is no serious discussion of the problem, not present in the revenue forfeiture case noted above, whether a patent action

v. Mitchell, 143 U. S. 99 (1892) (even after an appeal has been decided by the Supreme Court). By abolishing the old action of ejectment that could be brought any number of times until equity would intervene, and by substituting therefor a limited number of attempts at law in the form of new trials, the state statute establishes a rule of property. This, it would seem, is given effect by the Rules of Decision Act, U. S. REV. STAT. § 721 (1878), 28 U. S. C. A. § 725 (1926), and is, therefore, not an exception to the federal procedural rule on new trials.

79. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641 (1890); *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684 (1927); *Egyptian Novaculite Co. v. Stevenson*, 8 F. (2d) 576 (C. C. A. 8th, 1925).

80. *Burnes v. Scott*, 117 U. S. 582 (1886); *Northern Pacific Rr. Co. v. Paine*, 119 U. S. 561 (1887).

81. *Coffey v. U. S.*, 117 U. S. 233, 235 (1886).

82. The section is applicable: *National Cash-Register Co. v. Leland*, 94 Fed. 502 (C. C. A. 1st, 1899); *Fischer v. Automobile Supply Mfg. Co.*, 199 Fed. 191 (E. D. N. Y. 1912); see *Campbell v. Haverhill*, 155 U. S. 610, 617 (1895); *Cheatham Electric Switching Device Co. v. Transit Development Co.*, 190 Fed. 202, 203 (E. D. N. Y. 1911). *Contra*: *Myers v. Cunningham*, 44 Fed. 346 (C. C. N. D. Ohio 1890); *Marvin v. C. Aultman & Co.*, 46 Fed. 338 (C. C. N. D. Ohio 1891). In the last case the court declined to give a default judgment for failure of the defendant to answer interrogatories annexed to the complaint, pursuant to the Ohio statutes. The decision is correct on the principle announced in *Ex parte Fisk*, 113 U. S. 713 (1885), and resort need not be had to the above rationalization. For other cases applying the theory of the *Myers* and *Marvin* cases to other fields where the federal courts have exclusive jurisdiction see *United States v. Southern Dredging Co.*, 251 Fed. 400 (D. Del. 1918); *United States ex rel. Electric Storage Battery Co. v. Boat Harbor Marine Ry. Co.*, 58 F. (2d) 366 (E. D. Va. 1932).

at law should proceed under the common law procedure of perhaps a century and a half ago, though the action is brought in a state where a code has been in effect for nearly a hundred years. Although a state court may not have jurisdiction of patent actions, nevertheless the action for damages is nothing more than an action on the case, and thus state proceedings may be followed without doing violence to the Act, and in the main it may be said that the pleadings and practice and modes of proceeding in such actions have conformed to the state practice.⁸³

Decisions under the pioneer process acts had settled the rule that jurisdiction, original⁸⁴ or appellate,⁸⁵ was not enlarged or impaired by their general provisions, and the Conformity Act has received a similar interpretation. Thus, although the state practice permits mandamus as an original proceeding under certain circumstances, such a practice will not be conformed to in federal courts, because this would enlarge their original jurisdiction.⁸⁶ Another and a more common type of case where the question has been raised is where jurisdiction is founded upon diversity of citizenship. For example, a defendant may wish to contest the validity of the service of process on him, contending that he is not within the court's jurisdiction for such purposes. A statute of the state provides that a special appearance for such purposes shall be deemed to be a general appearance at the next term; and although such a statute is constitutional,⁸⁷ nevertheless the federal courts have felt that a defendant ought to have an independent tribunal in which the question of the validity of the service can be raised, and that if the state statute or decisions were followed, the jurisdiction of the federal courts, not over the subject matter, but over particular defendants, would be greatly enlarged. Accordingly, they exercise an independent judgment concerning the validity of the service of process when the question is properly presented to them.⁸⁸

Subject to the qualification above discussed, state practice, by virtue

83. See 3 FOSTER, *FEDERAL PRACTICE* (1921) § 454m.

84. *Toland v. Sprague*, 12 Pet. 300 (U. S. 1838).

85. *Parsons v. Bedford*, 3 Pet. 433 (U. S. 1830); *Amis v. Smith*, 16 Pet. 303 (1842). To hold otherwise would render a process act unconstitutional in certain cases. *Parsons v. Bedford*, *supra*. This is true because the original jurisdiction of the Supreme Court is fixed by Art. III of the Constitution, as is its appellate jurisdiction, subject to such exceptions and regulations as Congress shall make. The original and appellate jurisdiction of other federal courts is fixed by Congress acting pursuant to and within the authority granted by the same article.

86. *Davenport v. County of Dodge*, 105 U. S. 237 (1881); *Chicaming v. Carpenter*, 106 U. S. 663 (1882).

87. *York v. Texas*, 137 U. S. 15 (1890).

88. *Southern Pacific Company v. Denton*, 146 U. S. 202 (1892); *Goldey v. Morning News*, 156 U. S. 518 (1895); *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437 (1910); *Cain v. Publishing Co.*, 232 U. S. 124 (1914).

of the Conformity Act, governs the law procedure in federal courts from the commencement of an action up to and through judgment, provided it is not violative of a constitutional right, and provided Congress has not legislated upon a particular matter of practice.⁸⁹ The theory back of the constitutional limitation is impeccable, of course, but it may lead to unfortunately rigid results, as in the famous case of *Slocum v. New York Life Insurance Company*. At common law, only a plaintiff was entitled to a judgment non obstante veredicto, and that, only in the special case where the defendant's pleading admitted the plaintiff's case, but set up matter in avoidance which on the pleadings was insufficient. In such a case plaintiff was entitled to judgment, despite a verdict for the defendant. In Pennsylvania, a statute had enlarged the device so that whenever either party moved for a directed verdict which was denied, the movant could subsequently ask the court to have all the evidence taken upon the trial certified and filed so as to become a part of the whole record and then move for judgment non obstante veredicto. The Pennsylvania Supreme Court held that the statute did not infringe upon the province of the jury, but merely gave the court the same power after verdict that it had before to direct a verdict for either party upon the whole evidence.⁹⁰ The utility of the device lay in avoiding new trials. A verdict could be taken, and then the trial court at its convenience and with time for mature deliberation could consider a motion for judgment non obstante veredicto. If it decided that a verdict should have been directed, a new trial was not necessary, but it could enter judgment for the other party; and whether the appellate court affirmed or reversed, a new trial was generally unnecessary, because upon the whole record before it the proper judgment could be entered. But the United States Supreme Court, by a vote of five to four, held that such a practice violated the Seventh Amendment guaranteeing jury trial as at common law.⁹¹

89. 6 HUGHES, FEDERAL PRACTICE (1931) c. 78; Note (1922) 35 HARV. L. REV. 602; Comment (1927) 36 YALE L. J. 853; O'Connell v. Reed, note, 5 C. C. A. 594 (1893); *Nederland Life Ins. Co. v. Hall*, note, 27 C. C. A. 392 (1898); *Diamond Coal & Coke Co. v. Allen*, note, 71 C. C. A. 110 (1905).

90. *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559 (1906).

91. *Slocum v. New York Life Insurance Co.*, 228 U. S. 364 (1913). After this decision a non obstante veredicto statute was sustained by the Massachusetts court against a constitutional attack, the court evidently preferring the more liberal minority doctrine of the *Slocum* case. *Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, 102 N. E. 665 (1913). Cf. the constitutional problem raised by *Schiedt v. Dimick*, *supra* note 78.

For adverse criticisms of the *Slocum* case see (1913) 38 A. B. A. REP. 561-567 (it is stated, p. 565, that "The point of the constitutionality of the Pennsylvania statute was not made in the record nor was it ever argued by counsel on either side."); Thorndike, *Trial by Jury in United States Courts* (1913) 26 HARV. L. REV. 732; Thayer, *Judicial Administration* (1915) 63 U. PA. L. REV. 585; Scott, *supra* note 37, at 688-689; Editorial,

It follows that, if a motion for directed verdict is erroneously overruled and a verdict improperly had in federal court, neither the trial nor appellate court can set aside the verdict and enter the proper judgment, but must grant a new trial. To avoid this waste, state statutes, as in Massachusetts, provide for the alternative verdict, whereby the jury may find for the plaintiff, subject to the court's ruling on matters of law, but agree to a verdict for the defendant if the court should rule that as a matter of law the plaintiff is not entitled to a verdict. The adoption of this practice in the federal courts, seems now to have met the approval of the Supreme Court⁹²—a most desirable result though not wholly consistent with the *Slocum* case.⁹³ Certainly some business-like method to avoid a new trial in such a situation is needed. Mr. Justice Hughes, dissenting in the *Slocum* case, has suggested that the common-law practice relative to the demurrer to evidence, employed at common law long prior to the adoption of the Seventh Amendment,⁹⁴ could be made workable in the situation. Thus the demurrant could be allowed to state orally that he admits every fact which the evidence of his adversary conduces to prove, and a transcript of the evidence could then be made a part of the record, on which the trial court would give judgment. If this judgment is erroneous, an appellate court has the power at common law to order the proper judgment entered, and is not obliged to commit the case for a new trial.⁹⁵ There are, however, certain disadvantages to this method which would hinder resort to it; the demurrant is precluded from laying any evidence before the jury, and relinquishes all possibility that the jury might find for him. For this reason the demurrer to the evidence is not as satisfactory as the alternative verdict, or the Pennsylvania practice. In the light of the later cases⁹² it seems not unlikely that

Superfluous New Trials and the Seventh Amendment (1914) 26 GREEN BAG 106; Comment (1914) 23 YALE L. J. 454.

For favorable criticisms see Schofield, *New Trials and The Seventh Amendment—Slocum v. New York Life Insurance Co.* (1913, 1914) 8 ILL. L. REV. 287, 381, 465; cf. (1913) 13 COL. L. REV. 544 (decision said to be sound under a strict interpretation of the constitution, but regrettable); (1913) 47 AM. L. REV. 906.

92. *Northern Ry. Co. v. Page*, 274 U. S. 65 (1927), where the practice is described and applied without apparent question of its validity; *Automatic Pencil Sharpener Co. v. Boston Pencil Pointer Co.*, 279 Fed. 40 (C. C. A. 1st, 1922), cert. denied 260 U. S. 728 (1922). The denial of certiorari in the latter case above might not have been considered decisive, for shortly before the *Slocum* case the Supreme Court had denied certiorari in *Fries-Breslin Co. v. Bergen*, 215 U. S. 609 (1910), though the Pennsylvania practice had been considered at length by the lower court, 168 Fed. 360 (C. C. E. D. Pa. 1909), and again considered on its affirmance in 176 Fed. 76 (C. C. A. 3d, 1909).

93. Cf. SIMKINS, *FEDERAL PRACTICE* (1934) 154-155.

94. See *Gibson v. Hunter*, 2 Bl. H. 187; but cf. Schofield, *supra* note 91, at 465-473.

95. See Mr. Justice Hughes' opinion in the *Slocum* case, *supra* note 91, at 418-419.

the Supreme Court may reconsider its unfortunate doctrine in the *Slocum* case.⁹⁶

Procedural Statutes Limiting the Conformity Act

Since the Conformity Act provided but a general rule, the natural interpretation of the Act would confine the adoption of the state practice to matters not specifically governed by congressional action. This is true whether the legislation preceded⁹⁷ or followed⁹⁸ the Act. Instances of such controlling federal legislation⁹⁹ are the statutes relating to: impaneling a jury and the number of challenges;¹⁰⁰ the power to issue writs of scire facias;¹⁰¹ the prevailing party in an action at law is entitled to the *entire* costs in the trial court;¹⁰² the right of an injured party to sue on a marshal's bond in his own name and for his sole use;¹⁰³ the sealing and signing of "all writs and processes issuing from the courts of the United States thereof";¹⁰⁴ defects of form, which must be dis-

96. Cf. *Ex parte Peterson*, 253 U. S. 300, 309, 310 (1920). "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. . . . New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." Per Brandeis, J.

97. See the decisions *infra* note 105 arising under 28 U. S. C. A. § 777 (1926), R. S. 954, derived from Act Sept. 24, 1789, c. 20, sec. 32, 1 STAT. 91.

98. See the decisions *infra* note 108 arising under 28 U. S. C. A. § 118 (1926), Judicial Code § 57, derived from Act of March 3, 1875, c. 137, 18 STAT. 472.

99. See also 3 FOSTER, FEDERAL PRACTICE (1921) 2204-2206.

100. 36 STAT. 1166 (1911), 28 U. S. C. A. § 424 (1926). *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 278 Fed. 370 (C. C. A. 7th, 1921); 6 HUGHES, FEDERAL PRACTICE (1931) § 3621.

101. 36 STAT. 1162 (1911), 28 U. S. C. A. § 377 (1926). The writ may be availed of, though the state in which the court is sitting has abolished it. *Universal Transp. Co. v. National Surety Co.*, 252 Fed. 293 (S. D. N. Y. 1918), *aff'd* in 256 Fed. 450 (C. C. A. 2d, 1919). The section also gives the courts power to issue all other necessary writs not specifically provided for by statute. *Hills & Co., Ltd. v. Hoover*, 220 U. S. 329 (1911).

102. U. S. REV. STAT. § 983, 28 U. S. C. A. § 830 (1926), held to confirm the long established practice at law. *Ex parte Peterson*, 253 U. S. 300 (1920).

103. U. S. REV. STAT. § 784 (1878), 28 U. S. C. A. § 500 (1926). *Hagood v. Blythe*, 37 Fed. 249 (C. C. D. S. C. 1889).

104. U. S. REV. STAT. § 911 (1878), 28 U. S. C. A. § 721 (1926). Accordingly it has been held that an action may not be commenced in the federal courts by a summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the courts of the state. *Martin v. Criscuola*, 16 Fed. Cas. No. 9,159, p. 892 (C. C. E. D. N. Y. 1872); *Peaslee v. Haberstro*, 19 Fed. Cas. No. 10,884, p. 71 (C. C. N. D. N. Y. 1879); *Dwight v. Merritt*, 4 Fed. 614 (C. C. S. D. N. Y. 1880); HOPKINS, FEDERAL EQUITY RULES (8th ed. 1933) 155, n. 4; but see *West Fork Glass Co. v. Innes-Weld Glass Co.*, 178 Fed. 205 (C. C. A. 4th, 1910) assuming that the state practice of notice and motion for judgment may be followed. In *Shepard v. Adams*, 168 U. S. 618, 624 (1898), cited *supra* note 73, the Supreme Court said that by virtue of Sections 787 and 788 Rev. Stat. the process and writs must be served by the marshal or his deputy, but it has been held that although

regarded and amendments allowed;¹⁰⁵ consolidation of cases of a like nature or relative to the same question;¹⁰⁶ when the right to litigate in forma pauperis exists;¹⁰⁷ when and how service by publication in law or equity may be had;¹⁰⁸ when process of a district court will run into another district;¹⁰⁹ in what district suit is to be brought;¹¹⁰ jurisdiction in the federal courts in law or in equity is not defeated by the suggestion that other parties are jointly liable with the defendants, provided such other parties are out of the jurisdiction of the court;¹¹¹ in a removed cause the defendant has thirty days within which to plead after filing the record in the federal court.¹¹² To avoid a capricious exception as to time, the latter provision might be changed so that a defendant in a removed cause would be required to plead within the usual time after the record is filed in federal court, since the action then proceeds as though

this is true in equity causes by virtue of Rule 15, that there is no federal statute requiring service in law actions to be made by the marshal, and hence that it may be served by any one authorized by the state statutes. *United States v. Mitchell*, 223 Fed. 805 (E. D. N. Y. 1915).

105. U. S. REV. STAT. § 954 (1878), 28 U. S. C. A. § 777 (1926). The statute is remedial in character and should be liberally construed, *Norton v. Larney*, 266 U. S. 511 (1925), *N. & G. Taylor Co. v. Anderson*, 275 U. S. 431 (1928), and see Comment (1927) 36 YALE L. J. 853, 855-6; will therefore prevail over state legislation impairing the right of amendment, *Mexican Central Ry. v. Duthie*, 189 U. S. 76 (1903); and may be supplemented by state legislation of a more remedial character, see *Mims v. Reid*, 275 Fed. 177, 179 (C. C. A. 4th, 1921), but cf. *American Mills Co. v. Hoffman*, 275 Fed. 285, 291 (C. C. A. 2d, 1921); *Berry v. Mobile*, 228 Fed. 395, 397 (W. D. Ky. 1915) and *Duvall v. Wabash Ry.*, 9 F. (2d) 83, 84 (W. D. Mo. 1923), to the effect that congressional legislation excludes all state legislation from the particular field.

106. U. S. REV. STAT. § 921 (1878), 28 U. S. C. A. § 734 (1926). *Baltimore & Ohio Southwestern Ry. v. United States*, 220 U. S. 94 (1911); *Butler v. Courier-Citizen Co.*, 127 Fed. 1015 (C. C. D. Mass. 1904).

107. 42 STAT. 666 (1922), 28 U. S. C. A. § 832 (1926). *Silvas v. Arizona Copper Co.*, 213 Fed. 504 (D. Ariz. 1914), rev'd on other grounds, 220 Fed. 117 (C. C. A. 9th, 1915).

108. 36 STAT. 1102 (1911), 28 U. S. C. A. § 118 (1926). *Bracken v. Union Pac. R. Co.*, 56 Fed. 447 (C. C. A. 8th, 1893); *Jennings v. Johnson*, 148 Fed. 337 (C. C. A. 5th, 1906).

109. *Toland v. Sprague*, 12 Pet. 300, 328, 329 (U. S. 1838): "... the process of a circuit court cannot be served without the district in which it is established; without the special authority of law therefor." So unless authorization is given by some statute, as for example, 28 U. S. C. A. § 115 (1926), Jud. Code 54, the process of a district court will not run into another district, even within the same state, although process of the state nisi prius court would run throughout the state. *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422 (C. C. A. 2d, 1916); *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288 (E. D. N. Y. 1916).

110. 43 STAT. 1264 (1925), 28 U. S. C. A. § 112 (1926), Jud. Code § 51, amended. *Southern Pacific Co. v. Denton*, 146 U. S. 202 (1892).

111. 36 STAT. 1101 (1911), 28 U. S. C. A. § 111 (1926), Jud. Code § 50. *Allnut v. Lancaster*, 76 Fed. 131 (C. C. D. S. C. 1896).

112. 36 STAT. 1095 (1911), 28 U. S. C. A. § 72 (1926), Jud. Code § 29. *Anders v. Security Mut. Life Ins. Co.*, 268 Fed. 677 (E. D. Pa. 1920).

originally there commenced.¹¹³ And the provision on costs, noted above, ought to be changed so that in the new unified procedure the trial court would have the general freedom that it now has in equity, to tax costs to the parties in the manner that it deems just. Otherwise this legislation, which aside from the first three instances covers both law and equity actions, is probably satisfactory and no modification is needed at this time. But the right and duty of the court to alter any statutory procedure not dictated by legislative policy, in case it becomes antiquated, should be recognized.¹¹⁴

On the other hand with respect to three important problems, a great deal of existing legislation must be scrutinized with care and new rules framed to adjust or supersede it, if a thoroughly modern procedure is to result. These are: trials to the court without a jury; evidence; and the recent statutory and court trend towards a coalescence of law and equity. Details of the changes which we feel should be made will be reserved for a later article. But we now turn for a discussion of these problems in the order listed.

Trials to the Court Without a Jury

The finding of issues of fact by the court upon evidence was unknown to the common law; and although the parties could try an action to the court without a jury, the judge was regarded as acting in the character of an arbitrator, and a writ of error reviewed only questions of law appearing on the face of the record proper—process, pleadings, and judgment.¹¹⁵ So, in order to preserve to the parties the benefit of a review or re-examination of questions of law raised in the trial it was

113. Under 36 STAT. 1095 (1911), 28 U. S. C. A. § 72 (1926), Jud. Code § 29, the party may file his petition and bond for removal within the time allowed to plead by the state practice; he then has 30 days within which to file the record in the federal court, and an additional 30 days thereafter in which to plead. Had the cause been originally filed in federal court he would have had only 20 days under equity rule 12 in case the cause was equitable, and such time, usually 15 or 20 days, as the state practice permits if the cause was legal, within which to plead. Why then after the action is removed and in the language of the statute is to be proceeded with "in the same manner as if it had been originally commenced in the said district court" is he given more than the usual time to plead?

114. Procedural statutes divide into two classes, viz.: (1) those properly dictated by a legislative policy, such as jurisdiction and venue; and (2) those which say how a matter should be handled before a court, as the form of a pleading. See *Hearing before Subcommittee of the Committee on the Judiciary on S. 2061*, 68th Cong., 1st Sess. (1924) 73.

Of the statutes enumerated we might single out two for further illustration of the above rule. For instance, when the right to litigate in forma pauperis exists would seem to lie on the side of a procedural statute dictated by legislative policy; the matter of consolidating cases would clearly lie on the other.

115. *Campbell v. Boyreau*, 21 How. 223 (U. S. 1859).

essential that there be legislation.¹¹⁶ The first general act authorizing parties to dispense with a jury, and try the issue of fact before the court, was in 1865.¹¹⁷ This legislation, appearing in the Revised Statutes as Sections 649 and 700,¹¹⁸ remained unchanged until 1930, when Section 649 was amended to permit review in cases where a jury is waived by an oral stipulation made in open court and entered in the record. Prior to the amendment, review under the section was limited solely to cases where there was a written stipulation. Whenever this section is complied with, a litigant may, by observing certain formalities,¹¹⁹ obtain a review substantially the same as though a jury had been had; if the finding is general it is equivalent to a general verdict;¹²⁰ if special it is treated as a special verdict,¹²¹ and as in a jury case, the parties have no right to require a special finding, this being a matter which rests in the discretion of the trial court.¹²² But if the record is such that the reviewing court

116. *Flanders v. Tweed*, 9 Wall. 425, 430 (U. S. 1869).

117. 13 STAT. 501 (1865). The Louisiana practice, which recognized judge trials, was adopted in the federal courts in that state by virtue of the act of 1824, *supra* note 51. For a discussion of a different treatment necessarily accorded to cases coming from that state, see *Campbell v. Boyreau*, 21 How. 223, 227 (U. S. 1859); and *Flanders v. Tweed*, 9 Wall. 425, 430-31 (U. S. 1869). And a special act authorizing judge trials in California and Oregon had been passed shortly before the general act. 13 STAT. 4 (1864).

118. U. S. REV. STAT. § 649 (1878), as amended May 29, 1930, c. 357, 46 Stat. 486 (1930), 28 U. S. C. A. § 773 (1934); U. S. REV. STAT. § 700 (1878), 28 U. S. C. A. § 875 (1926).

In construing these sections the Supreme Court held in *Fleischmann Co. v. United States*, 270 U. S. 349, 357 (1926), that: "A bill of exceptions is not valid as to any matter which was not excepted to at the trial. . . And it cannot incorporate into the record *nunc pro tunc* as of the time when an exception should have been taken, one which in fact was not then taken."

The above sections are independent of and displace state practice. *Flanders v. Tweed*, 9 Wall. 425, 430 (U. S. 1869); *Ford v. Grimmer*, 278 Fed. 140 (C. C. A. 5th, 1922).

119. A party may request the court to make special findings of fact, and if the court complies with this request, he may then except to any finding which he deems not sustained by any evidence. Probably an exception is not absolutely necessary in this situation. Or he may present propositions of law to the court and obtain rulings thereon to which he can except. He may also, by a motion for judgment in his favor, raise the question of law whether he is entitled to judgment upon all the evidence, and can except to an adverse ruling. SIMKINS, *FEDERAL PRACTICE* (1934) 84-86; 3 FOSTER, *FEDERAL PRACTICE* (1921) § 474.

120. *Fleischmann Co. v. United States*, 270 U. S. 349 (1926), cited *supra* note 118; *Bank of Waterproof v. Fidelity & Deposit Co. of Md.*, 299 Fed. 478 (C. C. A. 5th, 1924).

121. *McC Campbell v. New York Life Ins. Co.*, 288 Fed. 465 (C. C. A. 5th, 1923); FOSTER, *op. cit. supra* note 119.

The finding, whether general or special, is conclusive on the appellate court if sustained by any substantial evidence. SIMKINS, *op. cit. supra* note 93, at 84; see U. S. REV. STAT. § 1011 (1878), 28 U. S. C. A. § 879 (1926), which prohibits reversal on writ of error for any error in fact.

122. SIMKINS, *op. cit. supra* note 93, at 85 n. 20; and see *Dirst v. Morris*, 14 Wall. 484, 491 (U. S. 1871).

can see that the plaintiff in error is entitled to judgment, it can direct that judgment be entered below in his favor immediately, or after the assessment of damages by the trial court, instead of awarding a new trial,¹²³ as it would be obliged to do if there were a jury's verdict.⁹¹

But these statutes have not accorded to the litigants the freedom from technical difficulties which might reasonably be expected of this type of trial. A most recent decision, amply supported by Supreme Court decisions construing these statutes,¹²⁴ will illustrate. An action brought by a bank upon a note alleged to have been signed by the defendants, husband and wife, was tried to the Judge upon the sole issue of the wife's denial of the signing. The Judge made a general finding in favor of the bank. On appeal the reviewing court frankly conceded that the wife should have had judgment, her signature being a palpable forgery. But since there was no special finding, and the wife's counsel had not made a formal motion for judgment and excepted thereto on its denial, a majority held there was nothing an appellate court could review, and hence affirmed the judgment. On rehearing the court was urged to change its decision because of Section 269 of the Judicial Code which provides that:

" . . . On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."¹²⁵

But it adhered to its decision on the ground that most of the circuits had held that this did not enlarge the reviewing powers of the courts or dispense with necessary motions and exceptions, but was aimed at preventing reversals for "minor" errors.¹²⁶ The Seventh Circuit, however, had relied upon the statutory command to permit it to review a similar case on the merits. In an excellent discussion of the matter, which aptly applies to the instant case, it stated:

"But what is the purpose of a formal motion, or of an exception? It is to apprise the court of the litigant's position, that it may, in furtherance of justice, correct such ruling if convinced of its error. Where both parties have fully and

123. *Bank of Waterproof v. Fidelity & Deposit Co. of Md.*, 299 Fed. 478 (C. C. A. 5th, 1924); *FOSTER, FEDERAL PRACTICE* (1921) 2442.

124. *Fleischmann Co. v. United States*, 270 U. S. 349 (1926); *Eastman Kodak Co. v. Gray*, 292 U. S. 332 (1934).

125. Act of Feb. 26, 1919, c. 48, 40 Stat. 1181, amending sec. 269 of the Jud. Code, 28 U. S. C. A. § 391 (1926).

126. *Darby v. Montgomery County Nat. Bank*, 72 F. (2d) 181 (App. D. C. 1934), cert. denied 55 Sup. Ct. 92 (1934) (the statute in the District of Columbia governing the procedure in jury-waived trials is substantially the same as the sections under discussion).

fairly presented the evidence, as here, and argued the questions of law fully, it seems particularly appropriate that section 269 of the Judicial Code should be invoked to save litigants from the consequences of an oversight by counsel."¹²⁷

Two judges dissented in the principal case, though recognizing that they were "confronted by an apparently insurmountable rule of civil procedure." And one of these added:

"And the denial of a review here of a judgment acknowledged to be wrong here, because the trial court and counsel, in a common effort to dispatch business, omitted a futile formula of words, is to sacrifice the substance of justice to the shadow."¹²⁸

Here, then, is a part of the procedural field deserving of the most careful attention. Furthermore, it serves to illustrate the whole problem of judicial review. The practice of judge trials, designed to effect a most reasonable and desirable reform—the elimination of the cumbersome jury trial where the parties do not want one—may operate to add additional complications to the existing troublesome distinction between the review in law actions for errors of law only, and the equity review of both law and facts.¹²⁹ These distinctions should be eliminated so far as possible; for although the Seventh Amendment, by its restriction on review of facts found by a jury, does tend to hamper complete assimilation of all review to a single system, yet the limitation is more apparent than real. For the review, in any case, even one in equity, cannot to any real extent and should not in form be a revaluation of the testimony of witnesses who appeared in the court below; and the shadowy nature of the distinctions between questions of fact and questions of law, gives the reviewing court all the freedom it requires. And a greater emphasis on the spirit behind Section 269, quoted above, which is now the current English ideal, that the review should be to see that justice is accomplished, not that error has been committed,¹³⁰ will tend to the same result. In our later article, we hope to make certain concrete suggestions to this end.¹³¹

127. *Muentzer v. Los Angeles Trust & Savings Bank*, 3 F. (2d) 222, 223 (C. C. A. 7th, 1924); and see *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626 (C. C. A. 4th, 1930). In *Fleischmann Co. v. United States*, 270 U. S. 349 (1926) and *Eastman Kodak Co. v. Gray*, 292 U. S. 332 (1934), the Supreme Court's attention was apparently not directed to this section.

128. *Darby v. Montgomery County Nat. Bank*, *supra* note 126, at 187.

129. See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235 (1922).

130. Clark, *supra* note 19, at 221-223; Samuel O. Clark, Jr., *English Appellate Procedure* (1929) 39 YALE L. J. 76, 86. Cf. Sunderland, *Problem of Appellate Review* (1927) 5 TEX. L. REV. 126; (1929) 3 U. OF CIN. L. REV. 1; Sunderland, *The Scope of Judicial Review* (1929) 27 MICH. L. REV. 416.

131. In addition to the provisions dealing directly with appellate review, a procedure of automatic waiver of jury trial by failure to make seasonable claim therefor is most de-

Evidence

The question as to what rules now govern and what rules should govern the admission of evidence in federal actions at law is one both difficult and complex in the light of its history. Since the two parts of the question are so intertwined we are postponing detailed consideration of it until the later article. It may be said here, however, that in general and notwithstanding some inconsistencies, state rules of evidence govern, if at all, usually under the authority of the Rules of Decisions Act, although at times the Conformity Act is relied on. Whether the new rule-making act covers questions of evidence is not entirely clear, but a conclusion that it is included seems reasonable; and we plan to recommend provisions for a uniform and unified federal system of rules of evidence such as now exists in the equity and admiralty cases and under most recent decisions in the criminal law cases.¹³²

THE COALESCING OF LAW AND EQUITY

As we have seen, the change in procedure introduced by the codes caused the enactment of the Conformity Act; but we have also seen that this Act did not take over the code union of law and equity. Nevertheless it was inevitable that federal procedure along with substantially all other modern systems should eventually jettison the unseemly practice of turning a suitor out of court because he had come in at the wrong door; and that it should recognize that the fact-situations of life often embrace both legal and equitable issues which demand the simple practice of affording complete relief, legal and equitable, in one action. The evolution from two separate and distinct procedures toward a single one began in 1912, with the adoption by the Supreme Court of Rules 22 and 23 when the new Equity Rules were promulgated.

The latter rule provided that if a matter ordinarily determinable at law arose in an equity suit it should "be determined in that suit accord-

sirable. See Clark & Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration* (1934) 43 YALE L. J. 867, and literature referred to in note 1. "Such waivers (of jury trials) lessen expense to the litigants and to the government, expedite the trial of cases, and should not be discouraged." *Muentzer v. Los Angeles Trust & Savings Bank*, 3 F. (2d) 222, 223 (C. C. A. 7th, 1924). For a very recent case in which the parties were deprived of a review, save as to those questions which the old common-law writ of error would have raised, through failure to observe the prescribed formalities, see *Desha County v. Crocker First Nat. Bank*, 72 F. (2d) 359 (C. C. A. 8th, 1934).

132. See the later article; also Leach, *State Law of Evidence in the Federal Courts* (1930) 43 HARV. L. REV. 554; Sweeney, *Federal or State Rules of Evidence in Federal Courts* (1932) 27 ILL. L. REV. 394; and DOBIE, *FEDERAL PROCEDURE* (1928) 623. The recent cases dealing with the rules of evidence in criminal cases are *Funk v. United States*, 290 U. S. 371 (1933) and *Wolfe v. United States*, 291 U. S. 7 (1934) discussed in Note (1934) 47 HARV. L. REV. 853; Comment (1934) 43 YALE L. J. 849; (1934) 28 ILL. L. REV. 846.

ing to principles applicable, without sending the case or question to the law side of the court." Under the old practice, for instance, if a suit for partition was brought and one of the defendants set up title by adverse possession the practice was to suspend the equity suit until the plaintiff could bring his action at law.¹³³ But under the rule a law action is dispensed with, yet, nevertheless, the question of title is tried to a jury with the same effect as though a separate action at law had been brought.¹³⁴ So the practice of sending feigned issues to the law side is dispensed with, yet the parties are accorded the same privilege of jury trial as they were formerly accustomed to.

Rule 22 provided that: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." Formerly if defendant's objection that there was a plain, adequate, and complete remedy at law was sustained, the bill was necessarily dismissed;¹³⁵ now, if the objection is timely, it is transferred to the law side,¹³⁶ where it is regarded as a continuation of the litigation begun on the equity side, and thus a possible plea of the statute of limitations is avoided.¹³⁷

In connection with the matter of a sufficient remedy at law it might be well to refer again to Section 16 of the Judiciary Act of 1789,³⁰ which forbade equity suits when the remedy at law was "plain, adequate and complete." As originally introduced the section would have limited the equity jurisdiction to suits where there was *no* remedy at law, but as enacted the section was only declaratory of the law as it then existed,¹³⁸

133. *Clark v. Roller*, 199 U. S. 541 (1905).

134. *Southern Ry. Co. v. City of Greenwood*, 40 F. (2d) 679 (W. D. S. C. 1928); see *Colleton Mercantile & Mfg. Co. v. Savannah River Lumber Co.*, 280 Fed. 358, 362, 363 (C. C. A. 4th, 1922).

135. *Curriden v. Middleton*, 232 U. S. 633 (1914).

136. *Schoenthal v. Irving Trust Co.*, 287 U. S. 92 (1932).

137. *Friederichsen v. Renard*, 247 U. S. 207 (1918). Suit was begun in equity to cancel a land contract because of fraud. This charge was sustained by the trial court, but it ordered a transfer to the law side because plaintiff had cut considerable timber after discovery of the fraud, and was therefore not entitled to equitable relief. It then sustained a plea of the Statute of Limitations which was at that time pleaded in the law action. *Held*, that the law action was a continuation of the suit begun in equity; and that there was no election of inconsistent remedies. Cf. *Issenhuth v. Kirkpatrick*, 258 Fed. 293 (C. C. A. 8th, 1919), which seems inconsistent with the *Renard* case in holding that an election had been made; the only difference apparently was that the plaintiff had himself moved for a transfer, this time from law to equity, and was by the ruling forced back to law. See also *Minneapolis Nat. Bank v. Liberty Nat. Bank*, 72 F. (2d) 434 (C. C. A. 10th, 1934).

138. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215 (U. S. 1830); *Whitehead v. Shat-*

and served to prevent encroachment upon the common law right to jury trial, inasmuch as the Seventh Amendment had not been adopted at that time.¹³⁹ Prior to Equity Rule 22 the adequacy of a remedy at law was a stock defense, for it was "difficult and perhaps impossible" to find "any general rule which would determine in all cases, what should be deemed a suit in equity as distinguished from an action at law,"¹⁴⁰ and coupled with this uncertainty was the alluring possibility that if the contention was sustained, the plaintiff would be dismissed from court without any adjudication upon the merits, and often at a time when it would be too late for him to start over on the law side. This latter hazard, as we have seen, is eliminated by the rule.

In fairness to the earlier practice it should be noted that undue harshness was often prevented by holding that where the objection was not raised until the hearing, the court was not necessarily obliged to entertain it, even though if taken in limine it might have been worthy of attention.¹⁴¹ But there was authority that the court could of its own motion raise the objection.¹⁴² Rule 22 has not changed the law in that regard,¹⁴³ but probably has called attention to the folly of such action by the court unless the defendant desires a jury trial; for the tendency of the cases is to hold that there has been a waiver unless proper objection¹⁴⁴ is taken prior to trial.¹⁴⁵ And although an objecting party

tuck, 138 U. S. 146, 150-151 (1891); *Schoenthal v. Irving Trust Co.*, 287 U. S. 92, 94 (1932); *Denison v. Keck*, 13 F. (2d) 384, 386 (C. C. A. 8th, 1926); but cf. Note (1927) 27 Col. L. Rev. 66, 68, n. 7, for the suggestion that it is a real limiting phrase depriving the equity court of jurisdiction where the remedy at law is adequate.

139. Warren, *supra* note 40, at 96-97.

140. *Whitehead v. Shattuck*, 138 U. S. 146, 151 (1891) per Field, J.

141. *Wylie v. Cox*, 15 How. 415 (U. S. 1853); *Reynes v. Dumont*, 130 U. S. 354 (1889); *Kilbourn v. Sunderland*, 130 U. S. 505 (1889); *Perego v. Dodge*, 163 U. S. 160 (1896).

142. *Hipp v. Babin*, 19 How. 271 (U. S. 1856); *Lewis v. Cocks*, 23 Wall. 466 (U. S. 1874).

143. *Denison v. Keck*, 13 F. (2d) 384 (C. C. A. 8th, 1926); and see *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684, 690 (1927).

144. The following cases illustrate what is a proper objection: *Schoenthal v. Irving Trust Co.*, 287 U. S. 92 (1932) (application for transfer to law side and for a jury trial made a week before trial is timely); *Parkerson v. Borst*, 251 Fed. 242 (C. C. A. 5th, 1918) (Application for transfer made after answer filed but before trial is timely); but if no objection is raised until the case is peremptorily called for trial, a denial of defendant's motion for transfer is not an abuse of discretion, and the court may proceed in equity. *Strauss v. U. S. Fidelity & Guaranty Co.*, 63 F. (2d) 174 (C. C. A. 4th, 1933), cert. denied 289 U. S. 747 (1933). A motion to dismiss because of an adequate remedy at law made prior to trial has been held sufficient, though motion to transfer was not made. *Central Florida Lumber Co. v. Taylor-Moore Syndicate, Inc.*, 51 F. (2d) 1 (C. C. A. 5th, 1931), cert. denied 284 U. S. 661 (1931). A motion to transfer made long before trial, but not stating that the reason therefor was a desire for a jury trial, has also been held sufficient. *Edward Hines Lumber Co. v. Bowers*, 238 Fed. 782 (C. C. A. 5th, 1917).

145. *American Mills Co. v. American Surety Co.*, 260 U. S. 360 (1922); *Hicks Co.*

may be entitled to a jury trial, yet if the trial would be a mere formality as when the only question is the construction of a deed,¹⁴⁶ or when there is no disputed question of fact¹⁴⁷ the transfer need not be made; nor when the court can see there would be no jurisdiction on the law side,¹⁴⁸ or when from all the facts it is plain that a cause of action at law does not exist.¹⁴⁹

If the plaintiff is properly denied equitable relief, but stands on his bill and appeals, should the appellate court affirm the dismissal or order a transfer to the law side if it can see that he is probably entitled to legal relief? Dismissal has been affirmed on the theory that, since plaintiff did not ask to amend, he had waived the right to transfer.¹⁵⁰ On the other hand it has been held that the appellate court will order the transfer,¹⁵¹ or give the plaintiff the privilege of transferring his case to the law side and there proceeding.¹⁵² And a transfer has been ordered on plaintiff's motion made after the reviewing court had affirmed the decree of dismissal, but before the mandate had gone down.¹⁵³ Any of these

v. Moore, 261 Fed. 773 (C. C. A. 5th, 1919); *Chicago Bonding & Surety Co. v. United States*, 261 Fed. 266 (C. C. A. 7th, 1919); *Fay v. Hill*, 249 Fed. 415 (C. C. A. 8th, 1918); *Lyons Milling Co. v. Goffe & Carkener, Inc.*, 46 F. (2d) 241 (C. C. A. 10th, 1931); *Quality Realty Co. v. Warbash Ry. Co.*, 50 F. (2d) 1051 (C. C. A. 8th, 1931); *General Felt Products Inc. v. Saranac Mach. Co.*, 61 F. (2d) 857 (C. C. A. 2d, 1932). *Contra*: *Kelley v. United States*, 30 F. (2d) 193 (C. C. A. 9th, 1929); cf. *Denison v. Keck*, 13 F. (2d) 384 (C. C. A. 8th, 1926).

146. *Staub v. Staub*, 47 App. D. C. 180 (1918).

147. *American Trust Co. v. Butler*, 47 F. (2d) 482 (C. C. A. 5th, 1931); *Collins v. Bradley Co.*, 227 Fed. 199 (W. D. Wis. 1915). *Contra*: *Kelley v. United States*, 30 F. (2d) 193 (C. C. A. 9th, 1929); *Wood v. Phillips*, 50 F. (2d) 714 (C. C. A. 4th, 1931).

148. *White v. Sparkill Realty Corp.*, 280 U. S. 500 (1930); *Scott v. First Nat. Bank of Morris*, 285 Fed. 832 (C. C. A. 8th, 1922).

149. *Stevenson v. Holstein-Freisian Ass'n*, 30 F. (2d) 625 (C. C. A. 2d, 1929); *Shapiro v. Lyle*, 30 F. (2d) 971 (W. D. Wash. 1929); see *Pierce v. National Bank of Commerce*, 268 Fed. 487, 489 (C. C. A. 8th, 1920).

150. *Investors' Guaranty Corp. v. Luikart*, 5 F. (2d) 793 (C. C. A. 8th, 1925); cf. *Proctor & Gamble Co. v. Powelson*, 288 Fed. 299 (C. C. A. 2d, 1923); *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684, 689 (1927).

It has been held that in a suit for specific performance, proper equity practice does not permit the complainant to seek alternative relief by way of damages, and that if specific performance is properly denied the decree will be affirmed without prejudice to an action at law. *Rushing v. Mayfield Co.*, 62 F. (2d) 318 (C. C. A. 5th, 1932), cert. denied 289 U. S. 750 (1933). Cf. *Moon Motor Car Co. v. Moon*, 58 F. (2d) 90 (C. C. A. 8th, 1932).

151. *Diamond Alkali Co. v. P. C. Tomson & Co., Inc.*, 35 F. (2d) 117 (C. C. A. 3d, 1929); *Louisiana Agricultural Corp. v. Pelican Oil Refining Co.*, 256 Fed. 822 (C. C. A. 5th, 1919), cert. denied 250 U. S. 646 (1919).

152. *Universal Rim Co. v. General Motors Corp.*, 31 F. (2d) 969 (C. C. A. 6th, 1929).

153. *Sanderson v. Postal Life Ins. Co.*, 72 F. (2d) 894 (C. C. A. 10th, 1934).

latter methods seem preferable to the harsh rule that a plaintiff must correctly analyze a problem that is often difficult of solution, and then proceed at his peril.

A somewhat similar problem is presented when the plaintiff is erroneously granted equitable relief in the face of a motion to dismiss, and the appellate court reverses on the ground that there is a plain and adequate remedy at law. It would seem that, if the defendant was objecting merely to proceeding in equity, he should have moved to transfer under Rule 22, and that failure so to do was a waiver of his right to jury trial. But where the defendants, on the grounds of misjoinder, no cause of action, and an adequate remedy at law, moved to dismiss and the motion was overruled, the case heard on its merits, and a decree entered for the plaintiff, it has been held that the decree must be reversed because the third ground of the motion was well taken.¹⁵⁴ Certainly if such a technicality is sustained, a transfer should be ordered, instead of a dismissal of the bill. There are decisions both ways.¹⁵⁵ Clearly an improvement may be made by requiring both parties to thresh out the whole situation, legal and equitable, and then if either or both is dissatisfied, an appellate court will often be able to settle the entire matter without further ado. Of course if the lower court has erroneously deprived a party of a jury trial on a legal issue over a timely objection, that issue must be sent back for proper trial. This is a difficulty which inheres in a system guaranteeing jury trial, but should not be extended beyond its explicit mandate, which affects only the form of trial.

Finally, where the plaintiff is rightfully granted equitable relief, the well-established rule is that the court may at the same time give him damages.¹⁵⁶ Moreover, if at the time of the hearing, circumstances have changed so that the court in its discretion refuses the plaintiff equitable relief which was grantable at the time suit was brought, damages may none the less be awarded without submission of the issue to a jury,¹⁵⁷ although the court may, if it chooses, secure an advisory opinion from a jury.¹⁵⁸ But if the plaintiff, although having pleaded a

154. *Central Florida Lumber Co. v. Taylor-Moore Syndicate, Inc.*, *supra* note 144. Accord on proposition that motion to dismiss raises question of adequacy of remedy: *Carey v. McMillan*, 289 Fed. 380 (C. C. A. 8th, 1923).

155. *Central Florida Lumber Co. v. Taylor-Moore Syndicate, Inc.*, *supra* note 144, (transfer ordered); *Carey v. McMillan*, 289 Fed. 380 (C. C. A. 8th, 1923) (bill dismissed without prejudice to a law action).

156. *Chicago, M. & St. Paul Ry. v. United States*, 244 U. S. 351 (1916).

157. *Rice & Adams Corp. v. Lathrop*, 278 U. S. 509 (1929); *DuPont De Nemours & Co. v. Temple*, 272 Fed. 456 (C. C. A. 4th, 1921).

158. *Vosburg Co. v. Watts*, 221 Fed. 402 (C. C. A. 4th, 1915); *Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n.*, 8 F. (2d) 922 (C. C. A. 9th, 1925), cert. denied 270 U. S. 646 (1926) (trial administration was particularly effective).

proper case in equity, fails in his proof to establish grounds for equitable relief, it is held that the court of equity may not assess the damages;¹⁵⁹ but should transfer the case to the law side of the court.¹⁶⁰ The reason for the transfer, however, is to afford the parties a jury trial. So when they do not desire such a tribunal, or when they have proceeded in the equity trial, after becoming apprised of the situation, it would seem that the transfer is futile and should not be made.

The reverse side of the picture, namely the transfer of an action erroneously begun on the law side to equity, was not provided for until 1915, when Section 274a of the Judicial Code was enacted.¹⁶¹ Prior to that time a federal court did not have power to make such a transfer.¹⁶² And one of the first appellate cases to construe the section held that it did not authorize a transfer, but only provided that when an action was brought on the proper side of the court but with the wrong type of pleadings, these could be amended to conform to the proper practice.¹⁶³ This illiberal construction was expressly disavowed by the Supreme Court in *Liberty Oil Co. v. Condon National Bank*,¹⁶⁴ which held that an action, though properly begun at law, which becomes in effect an action of interpleader by virtue of subsequent pleadings, is to be treated thence-

159. *Linden Inv. Co. v. Honstain Bros. Co.*, 221 Fed. 178 (C. C. A. 8th, 1915); *American Falls Milling Co. v. Standard Brokerage & Distributing Co.*, 248 Fed. 487 (C. C. A. 8th, 1918).

160. *American Falls Milling Co. v. Standard Brokerage & Distributing Co.*, 248 Fed. 487 (C. C. A. 8th, 1918); see *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 225 Fed. 769, 775 (E. D. Pa. 1915). *Contra*: *Linden Investment Co. v. Honstain Bros. Co.*, 221 Fed. 178 (C. C. A. 8th, 1915) (complaint was dismissed without prejudice to an action at law; no attention was given to the point of transfer).

161. "In case any United States court shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." March 3, 1915, c. 90, 38 STAT. 956, 28 U. S. C. A. § 397 (1926).

162. *Waldo v. Wilson*, 231 Fed. 654 (C. C. A. 4th, 1916), cert. denied 241 U. S. 673 (1916). *Contra*: *United States v. Wells*, 203 Fed. 146 (E. D. Tenn. 1913).

163. *Waldo v. Wilson*, *supra* note 162; cf. *American Land Co. v. City of Keene*, 41 F. (2d) 474 (C. C. A. 1st, 1930), criticized in Note (1930) 40 YALE L. J. 311, for an equally illiberal interpretation of the statute and Equity Rule 22. Under its doctrine there need be no transfer unless, on the theory set forth, the action could be maintained on the other side of the court. See CLARK, CODE PLEADING (1928) § 43, and authorities there referred to on the theory of a pleading.

164. 260 U. S. 235, 241 (1922).

forth by trial and appellate courts as a proceeding in equity, and that a formal transfer is not necessary.¹⁶⁵

Where a plaintiff mistakenly sues at law when he should have sued in equity, the proper method of raising the objection is by motion to transfer and not by demurrer;¹⁶⁶ and hence a demurrer to a complaint should be sustained only when the pleading fails to state a cause of action either in law or equity.¹⁶⁷ It has been held that a motion made at trial to amend plaintiff's pleadings for the purpose of letting in proffered evidence to reform a policy sued on should be granted and treated in effect as a motion to transfer the cause to the equity side of the docket.¹⁶⁸ And if the defendant proceeds to trial without objecting that plaintiff's remedy is in equity, he is held to have waived the objection;¹⁶⁹ and though he may have insisted that he was entitled to an equity trial, yet if the court can see from the record that substantial justice has been done and the only effect of sustaining his objection would be to send the case back for transfer to the equity side, where it would be heard over again probably by the same judge and upon the same testimony, the judgment will be affirmed.¹⁷⁰ A still closer blend of law and equity is achieved by other courts, which adopt the more exact¹⁷¹ and correct technique¹⁷² of considering the case on appeal as one in equity, and thus

165. Cf. with the *Liberty Oil* case the Pennsylvania practice whereby a case properly begun in equity may be subsequently transferred to the law side. *Prudential Insurance Co. v. Stanulonis*, 11 Pa. D. & C. 201 (1928). The Pennsylvania practice was not followed in *Massachusetts Mutual Life Ins. Co. v. Hess*, 57 F. (2d) 884 (M. D. Pa. 1932).

166. *Great American Ins. Co. v. Johnson*, 27 F. (2d) 71 (C. C. A. 4th, 1928), cert. denied 278 U. S. 629 (1928); *Phillips v. West Production Co.*, 6 F. Supp. 631 (S. D. Tex. 1934) (plea in abatement and motion to dismiss treated as motion to transfer). The transfer to the equity side is a continuation of the original suit. *General Motors Corporation v. Blackmore*, 53 F. (2d) 725 (C. C. A. 6th, 1931). For the same result in the converse situation see *Friederichsen v. Renard*, 247 U. S. 207 (1918).

167. *Southern Surety Co. v. Plott*, 28 F. (2d) 698 (C. C. A. 4th, 1928).

168. *Hutchings v. Caledonian Ins. Co.*, 35 F. (2d) 309 (C. C. A. 4th, 1929).

169. *Mobile Shipbuilding Co. v. Federal Bridge & Structural Co.*, 280 Fed. 292 (C. C. A. 7th, 1922).

170. *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th, 1916), partially rev'd on other grounds 255 U. S. 257 (1918); *Mobile Shipbuilding Co. v. Federal Bridge & Structural Co.*, 280 Fed. 292 (C. C. A. 7th, 1922); *Fidelity & Casualty Co. v. Glen*, 3 F. (2d) 913 (C. C. A. 4th, 1925); *Great American Ins. Co. v. Johnson*, 25 F. (2d) 847 (C. C. A. 4th, 1928), on rehearing 27 F. (2d) 71 (C. C. A. 4th, 1928), cert. denied 278 U. S. 629 (1928) (a party must put in its proof and not rely on error in procedure). Cf. *Wood v. Phillips*, 50 F. (2d) 714 (C. C. A. 4th, 1931) with the two latter cases.

171. In *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th, 1916), partially rev'd on other grounds, 255 U. S. 257 (1918), each prevailing claimant would have secured a larger proportionate share of the amount due him if the case had been treated as one in equity.

172. *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235 (1922).

render the decree appropriate under the circumstances if the record is sufficient,¹⁷³ otherwise remanding it for further hearing in equity.¹⁷⁴

Where the plaintiff has erroneously proceeded at law and is nonsuited or suffers a directed verdict against him, should the reviewing court affirm or order a transfer? There are decisions both ways.¹⁷⁵ One of the cases ordering a transfer and refusing to affirm the judgment is worthy of attention, because it evinces a determination on the part of an appellate court to see that substance is attended to. Plaintiff sued at law on an insurance policy which first should have been reformed. In the declaration all of the facts of the case were set forth with great detail, but reformation was not sought. From a verdict, directed for the defendant because plaintiff's proof did not establish a case at law, plaintiff appealed; but since he had not moved the lower court to transfer the case to the equity docket he had no error to assign. The reviewing court, nevertheless, ordered a transfer, for an affirmance would have left the plaintiff remediless, since the policy contained a clause requiring suit to be brought within a time that had elapsed. Since courts exist to do justice, said the court, it would not deny a litigant relief, "to which upon his pleadings and proofs he is entitled, merely because his counsel have come in by the wrong door."¹⁷⁶

It is apparent from the above materials that the law and equity procedures have been drawn immeasurably closer by the device of transfer. But so long as a transfer is necessary, two procedures remain, or at least vestiges of them, to trouble a prompt despatch of court business. The case of *Denison v. Keck*¹⁷⁷ well illustrates what is meant, and

173. *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235 (1922); *Arkansas Anthracite Coal & Land Co. v. Stokes*, 277 Fed. 625 (C. C. A. 8th, 1922), cert. denied 259 U. S. 584 (1922); *National Surety Co. v. County Board of Education*, 15 F. (2d) 993 (C. C. A. 4th, 1926); *Irons v. Smith*, 62 F. (2d) 644 (C. C. A. 4th, 1933); *Jack v. Forrest*, 71 F. (2d) 263 (C. C. A. 10th, 1934); *Minneapolis Nat. Bank v. Liberty Nat. Bank*, 72 F. (2d) 434 (C. C. A. 10th, 1934).

174. *Hutchings v. Caledonian Ins. Co.*, 35 F. (2d) 309 (C. C. A. 4th, 1929); *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626 (C. C. A. 4th, 1930), noted in (1930) 9 N. C. L. REV. 82, which contains a good discussion of the cases decided by the Fourth Circuit under sec. 274a.

175. *For affirmance*: *Proctor & Gamble Co. v. Powelson*, 288 Fed. 299 (C. C. A. 2d, 1923). *For transfer*: *Moon Motor Car Co. v. Moon*, 58 F. (2d) 90 (C. C. A. 8th, 1932); *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626 (C. C. A. 4th, 1930); *Hutchings v. Caledonian Ins. Co.*, 35 F. (2d) 309 (C. C. A. 4th, 1929).

176. *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 634 (C. C. A. 4th, 1930).

177. *Supra* note 143; but cf. *Quality Realty Co. v. Wabash Ry. Co.*, 50 F. (2d) 1051 (C. C. A. 8th, 1931); *Williamson v. Chicago Mill & Lumber Corp.*, 59 F. (2d) 918, 921 (C. C. A. 8th, 1932) (cases by the same court). For criticisms of the *Denison* case see Note (1927) 27 COL. L. REV. 66; Note (1926) 25 MICH. L. REV. 196; Note (1926) 36 YALE L. J. 143.

emphasizes the need for one procedure. Plaintiffs, out of possession, brought a bill in equity to quiet their title to certain property, recover possession, and have an accounting for rents and profits from the defendants Denisons, and to cancel a mortgage given by the Denisons to the defendant Lowe. There was an appeal from a decree on the merits for the plaintiffs. "In the consideration of this case," said the court:

"our attention is challenged by a question *not raised in argument or in any way presented*, but which we deem important, and that is whether this action is not an attempt in equity to ascertain and establish rights properly cognizable at law. The distinction between legal and equitable actions is preserved in the federal courts. It is not a trifling distinction, to be brushed aside at the whim or desire of litigants, but is a fundamental and constitutional one, arising under the Seventh Amendment."¹⁷⁸

The court then concluded that the complaint stated two causes of action: one to quiet title, which should have been brought as ejectment at law; and the other to cancel the Lowe mortgage, properly brought in equity. So the decree was set aside, and the case remanded with instructions to permit the pleadings to be redrawn, and the ejectment action transferred to the law side of the docket. But as we have seen, parties are not obliged to try a law action to a jury, but may try it to the judge. So it is possible that the now two actions will be tried over again on the same evidence to the same judge, and two appeals taken to the same appellate court. And if all necessary form is observed, the court which invoked the Seventh Amendment against the litigants will at last be obliged to attend to the merits of their matter.¹⁷⁹

Raising the matter of adequate legal remedy by the court on its own motion should not be confused with such situations as (1) where the lower court, *sua sponte*, raises the objection that complainant has not exhausted his administrative remedies and hence should not yet seek to enjoin state action on the claim of unconstitutionality, as was done in *American Mutual Liability Ins. Co. v. McDonough*, 61 F. (2d) 558 (C. C. A. 7th, 1932), cert. denied 288 U. S. 602 (1932); or (2) where the court does not have jurisdiction, as in a special proceeding in the nature of a disbarment to restrain a surety company from acting as such in a certain court for a period of years, as in *Concord Casualty & Surety Co. v. United States*, 69 F. (2d) 78 (C. C. A. 2d, 1934). In the first situation it is politic so to act; in the second it is incumbent upon the court not to exceed the jurisdiction vested in it by Congress.

178. *Denison v. Keck*, 13 F. (2d) 384, 386 (C. C. A. 8th, 1926) (*italics ours*).

179. Cf. *Equitable Trust Co. v. Denver & Rio Grande Rr. Co.*, 250 Fed. 327 (C. C. A. 2d, 1918), cert. denied 246 U. S. 672 (1918), for an interesting contrast in methods. An action at law had been tried as a suit in equity and an appeal taken. It reviewed the case on its merits, *then* raised the procedural difficulty on its own motion and remanded the case to be transferred to the law side of the court, and as so transferred the judgment was to be affirmed. If it had raised the procedural difficulty first and ordered the transfer at that stage there could have been no review on the merits because the parties had not waived a jury pursuant to the law permitting appeals in such cases. In that situation it could not have affirmed, but would have had to remand the case for a new trial at law.

A companion section of the one we have been discussing is Section 274b of the Judicial Code, permitting equitable defenses and equitable relief in actions at law.¹⁸⁰ As we have seen, the Conformity Act did not adopt a state practice allowing the joinder of legal and equitable causes of action, nor the practice permitting equitable defenses.¹⁸¹ If a plaintiff had both a legal and an equitable cause of action it was necessary to file an action on the law side and one on the equity;¹⁸² and this is certainly the orthodox rule today,¹⁸³ since neither Section 274a nor 274b attempted to change that in an outright fashion. But in reality, by a devious way, a plaintiff often combines what would have been at common law legal and equitable causes of action. For example, plaintiff brings a legal action, the defendant pleads a legal defense, and then the plaintiff pleads equitable grounds in avoidance by way of replication. This he may do under Section 274b by the weight of authority.¹⁸⁴ The

Twist v. Prairie Oil & Gas Co., 274 U. S. 684 (1927). At that stage such procedure is thoroughly undesirable. *Quality Realty Co. v. Wabash Ry. Co.*, 50 F. (2d) 1051 (C. C. A. 8th, 1931).

180. "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of [sic] seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." March 3, 1915, c. 90, 38 STAT. 956, 28 U. S. C. A. § 398 (1926), § 274b Jud. Code.

Sections 274a, *supra* note 161, 274b, *supra*, and 274c (respecting amendments to show diverse citizenship) were enacted together and were known as the Law and Equity Bill. For a history of the measure, with some detailed discussion of § 274b, see Adams, *Federal Practice as to Equitable Defenses in Actions at Law* (1924) 10 A.B.A.J. 467; see also McBaine, *Equitable Defenses to Actions at Law in the Federal Courts* (1929) 17 CALIF. L. REV. 591. For a discussion of equitable defenses generally see Cook, *Equitable Defenses* (1923) 32 YALE L. J. 645; Hinton, *Equitable Defenses Under Modern Codes* (1920) 18 MICH. L. REV. 717; CLARK, CODE PLEADING (1928) § 96.

181. *Supra* page 405. But cf. *Moore v. Foster Lumber Co.*, 231 Fed. 1 (C. C. A. 5th, 1916); *Enelow v. New York Life Ins. Co.*, 70 F. (2d) 728 (C. C. A. 3d, 1934), cert. granted 55 S. Ct. 70 (1934); *Dushane v. Benedict*, 120 U. S. 630 (1887).

182. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641 (1889).

183. *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684 (1927); *Morris v. Texas Working Barrel Mfg. Co.*, 13 F. (2d) 977 (C. C. A. 5th, 1926).

184. *Plews v. Burrage*, 274 Fed. 881 (C. C. A. 1st, 1921), favorably noted by 20 MICH. L. REV. 680; Note (1922) 35 HARV. L. REV. 345, 477; *Union Pac. Rr. Co. v. Syas*, 246 Fed. 561 (C. C. A. 8th, 1917) (assumed without discussion); *Whitney Co. v. Johnson*, 14 F. (2d) 24 (C. C. A. 9th, 1926), cert. denied 273 U. S. 734 (1926); *Stamey v. U. S.*, 37 F. (2d) 188 (W. D. Wash. 1929). *Contra*: *Keatley v. U. S. Trust Co.*, 249 Fed. 296 (C. C. A. 2d, 1918), cert. dismissed on petitioner's motion, 254 U. S. 658 (1920). See *Houston v. Trower*, 297 Fed. 558 (C. C. A. 8th, 1924) (equitable matter set up in the rejoinder).

Second Circuit, which takes the position that he cannot, noting that the distinction between legal and equitable procedure had been jealously preserved heretofore, saw the drift of a holding that plaintiff could by replication plead equitable grounds to a legal defense. As construed by it, the plaintiff is limited in his replication to defensive matter when the answer sets up equitable grounds for affirmative relief. Learned Hand, J., dissenting, wrote:

"Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants', and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a Mitford or a Langdell would have used; but the purpose seems to me perfectly plain, and we ought, I think, to try to effect it if we can."¹⁸⁵

And to a defendant's contention that the statute, construed to permit an equitable defense in the replication in avoidance of a legal defense would be unconstitutional, the First Circuit answered: "The decision in *Scott v. Neely*, . . . so far as now pertinent, is merely to the effect that legal and equitable remedies cannot be so blended in equity suits as to impair the constitutional right to jury trial given by the Seventh Amendment . . . There is no constitutional guaranty of permanent circuity of action."¹⁸⁶

Viewed from another angle we shall see that in certain situations legal and equitable causes of action are blended. For instance, *A* sues *B* at law. *B*, let us assume, has both a legal and an equitable counterclaim arising out of the transaction sued on by *A*. Wherever the state practice permits a legal counterclaim to be pleaded in such a situation, as such practices usually do, *B* could plead the legal counterclaim by virtue of the Conformity Act, and he could plead the equitable counterclaim by virtue of Section 274b. Although *B* was originally a defendant, he is in reality a plaintiff so far as the counterclaims are concerned, and thus joins legal and equitable causes of action, though if he had attempted to sue *A* first he would have had to file his legal claim on the law side and his equitable claim on the equity side, since there is at the present time no provision for original joinder. But such a situation has seemed so capricious to one court that in one instance it has actually permitted such joinder. A landlord brought a bill in equity in the nature of a mandatory injunction against his tenants to require them to vacate certain property, and against the state's attorney to restrain the enforcement of the New York Housing Laws, alleging that the laws under

185. *Keatley v. U. S. Trust Co.*, *supra* note 184, at 299. Certainly the history of the measure bears him out. *Adams*, *supra* note 180, at 468.

186. *Plews v. Burrage*, 274 Fed. 381 (C. C. A. 1st, 1921).

which the tenants were holding and under which the state's attorney was purporting to act were unconstitutional. A special three judge court heard the matter on the merits, overruling the procedural objections that the bill was multifarious and that the landlord's remedy against the tenants was in ejectment. The court admitted the bill was multifarious, but held that it was authorized by Equity Rule 26 since the determination of the validity of the statutes would settle all questions. It also conceded the point relative to ejectment, but observed that since a decision on the constitutional question would determine the fate of both the action of ejectment at law and the bill in equity, it was an idle ceremony to separate the causes of action and send one to the law side of the court.¹⁸⁷

Another anomalous situation has arisen because of the lack of a provision authorizing a legal counterclaim in an equitable action. Thus *A* sues *B* in equity, for example, to cancel a bond, and *B* wishes to sue *A* for breach thereof. If *B* files his legal counterclaim in the equitable action and *A* does not object, then it can be adjudicated.¹⁸⁸ But are the parties entitled to a jury on the legal issue? The Supreme Court has held that *B*'s conduct is an election to proceed without a jury, and it would seem that if *A* proceeds thereon without objection that *A*, too, has waived a jury.¹⁸⁹ This result seems sound under the procedural system as it is now set up; but if, realizing that we now have virtual, albeit hybrid, union of law and equity, we provide for one form of action in which all issues, legal and equitable, may and must be adjudicated, then if either party desires a jury trial upon the legal issue raised by the counter claim it can readily be afforded him. But since there is now no provision for a legal counterclaim and because he would be deprived of a jury trial in an equity suit, the complainant may object by motion to strike out.¹⁹⁰ Yet this rule has been cast aside under the stress of unusual circumstances and a legal counterclaim, with the right to jury trial thereon, has been sustained against the objection of the complainant.¹⁹⁰

187. *Marcus Brown Holding Co. v. Feldman*, 269 Fed. 306, 311 (S. D. N. Y., 1920), *aff'd* in 256 U. S. 170 (1921) without discussion of the procedural points. Had the plaintiff been ordered to replead his legal cause of action in the nature of ejectment, no federal question would have appeared in an orderly statement of claim, *White v. Sparkill Realty Corp.*, 280 U. S. 500 (1930); *Joy v. St. Louis*, 201 U. S. 332 (1906), and although there was diversity and plaintiff could have sued in federal court, he could not have gotten before a three judge court with the right of direct appeal to the Supreme Court. See also *Clifton Mfg. Co. v. United States*, 3 F. Supp. 508 (W. D. S. C. 1933), where equitable ground to avoid waivers was alleged in the complaint at law.

188. *American Mills Co. v. American Surety Co.*, 260 U. S. 360 (1922).

189. *Elliott v. Nowata Oil & Refining Co.*, 37 F. (2d) 76 (C. C. A. 10th, 1929); see *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 365 (1922).

190. *Chase National Bank v. Sayles*, 30 F. (2d) 178 (D. R. I. 1927).

It may be well now to consider other matters that have arisen under Section 274b, so that a set of rules completely uniting law and equity may remedy the difficulties and anomalies existing in practice. An equitable plea in a suit at law, it has been held, may be filed any time before trial, on the theory that the defendant had the privilege before this enactment to file a bill in equity to enjoin the legal action any time before trial;¹⁹¹ but delay in filing may be set up as a defense to it.¹⁹² Since the defendant also had the right to file a bill in equity after the trial for the purposes of enjoining the enforcement of the judgment,¹⁹³ this theory that the defendant retains all the privileges that he had before the Act would permit the choice of pleading the equitable matter in the law action, or setting it up independently on the equity side by bill. There is authority for and against such a choice.¹⁹⁴ Privileges accorded by such theories are apt to be abused;¹⁹⁵ and since a prompt despatch of business demands that all known issues be tried in one suit, the parties ought to be required to bring them forward in the regular course of pleading, or show good cause for the delay.

Further, the section is not so broad in character as Equity Rule 30, which requires the pleading of equitable counterclaims arising out of the subject matter of the suit, and permits those which would be the subject of an independent suit; for the provisions of the section extend only to equitable matter of the former type. With this limitation the section extends to all matters which would have afforded ground for an action in equity between the parties under the old system;¹⁹⁶ and there is good

191. *American Cyanamid Co. v. Wilson & Toomer Fertilizer Co.*, 62 F. (2d) 1018 (C. C. A. 5th, 1933), cert. denied 289 U. S. 735 (1933); *Ford v. Huff*, 289 Fed. 858 (S. D. Fla. 1923), rev'd on other grounds, 296 Fed. 652 (C. C. A. 5th, 1924), cert. denied 266 U. S. 602 (1924).

192. *American Cyanamid Co. v. Wilson & Toomer Fertilizer Co.*, 62 F. (2d) 1018 (C. C. A. 5th, 1933), cert. denied 289 U. S. 735 (1933).

193. *Whitcomb v. Shultz*, 223 Fed. 268 (C. C. A. 2d, 1915).

194. Permitting a choice: *Fay v. Hill*, 249 Fed. 415 (C. C. A. 8th, 1918). *Contra*: *Sherman Nat. Bank of N. Y. v. Shubert Theatrical Co.*, 247 Fed. 256 (C. C. A. 2d, 1917); see *Lyons v. Empire Fuel Co.*, 262 Fed. 465, 467 (C. C. A. 6th, 1920).

195. See *American Cyanamid Co. v. Wilson & Toomer Fertilizer Co.*, 62 F. (2d) 1018 (C. C. A. 5th, 1933) (filing the plea and taking an appeal thereon served but to delay the adjudication of a case long over-delayed—the suit then being nine years old).

196. *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (1922) (interpleader); *Ford v. Huff*, 296 Fed. 652 (C. C. A. 5th, 1924), cert. denied 266 U. S. 602 (1924) (equitable defense of laches and estoppel); *Horbach v. Coyle*, 2 F. (2d) 702 (C. C. A. 8th, 1924) (fraud pleaded to set up equitable right of rescission); *Whitney Co. v. Johnson*, 14 F. (2d) 24 (C. C. A. 9th, 1926), cert. denied 273 U. S. 734 (1926) (fraud to avoid a release); *Schnaubert v. Tippet*, 29 F. (2d) 230 (C. C. A. 5th, 1928) (cross-action to quiet title); *Neff & Fry Co. v. Ashmead*, 36 F. (2d) 771 (C. C. A. 2d, 1929) (equitable defense of fraudulent inducement of contract); *Fish v. Kennamer*, 37 F. (2d) 243 (C. C. A. 10th, 1929), cert. denied 281 U. S. 744 (cross-bill to quiet title); *People of Porto Rico v.*

evidence that it has transformed matter which was only defensive in an equity suit, into a defense to the law action.¹⁹⁷ It would seem advisable to broaden the scope of the section along the lines of the equity rule, and at least permit the defendant to set up any equitable matter, whether arising out of the subject matter of the suit or not, and require him to do so when it does so arise, in the interest of an end of litigation.

At first there was a tendency to hold that all issues legal and equitable could be submitted to the jury;¹⁹⁸ but it is now well settled that the equitable issues are to be determined by the court,¹⁹⁹ and that, if a jury is utilized, it is only in an advisory capacity.²⁰⁰ And a number of courts have stated dogmatically that the equitable issues are to be determined first,²⁰¹ but this it would seem is a matter which should be left to the

Livingston, 47 F. (2d) 712 (C. C. A. 1st, 1931) (cross-action to quiet title), cert. denied 284 U. S. 642 (1931); *Donnelly v. Northeastern Life Ins. Co.*, 59 F. (2d) 46 (C. C. A. 5th, 1932), cert. denied 287 U. S. 638 (1932) (reformation of contract); *Cline v. Southern Ry. Co.*, 231 Fed. 238 (W. D. S. C. 1916) (fraud to avoid a release); *Burroughs Adding Machine Co. v. Scandinavian-American Bank*, 239 Fed. 179 (W. D. Wash. 1917) (fraudulent misrepresentation pleaded to defeat an action of assumpsit); *Upton Nut Co. v. American Shipbuilding Co.*, 251 Fed. 707 (N. D. Ohio, 1918) (reformation of contract); *Ohio Savings & Trust Co. v. Harman*, 276 Fed. 759 (E. D. Pa. 1921) (fraud pleaded to a suit on a note and cancellation sought); *Williams v. Mason*, 289 Fed. 812 (S. D. Fla. 1923) (plea that defendant did not execute the notes sued on, and that they be delivered up and cancelled).

In some of these cases reliance upon the statute was probably unnecessary, because many so-called "equitable defenses" were available in a law action prior to 1915. See Abbott, *Fraud as a Defense at Law In the Federal Courts* (1915) 15 COL. L. REV. 489.

197. *Banker v. Ford Motor Co.*, 69 F. (2d) 665 (C. C. A. 3d, 1934) (equitable defenses of laches and estoppel held to defeat a patent infringement suit at law on the ground that § 274b in terms authorizes equitable defenses in law actions theretofore applicable only in equity); *Ford v. Huff*, 296 Fed. 652 (C. C. A. 5th, 1924) (same defenses). *Contra*: *Thorpe v. Wm. Filene's Sons Co.*, 40 F. (2d) 269 (D. Mass. 1930).

198. *Manchester Street Ry. v. Barrett*, 265 Fed. 557 (C. C. A. 1st, 1920); see *Plews v. Burrage*, 274 Fed. 881, 884, 885 (C. C. A. 1st, 1921); *Breitung v. Packard*, 260 Fed. 895, 896 (D. Mass. 1919).

199. *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (1922); *Union Pacific Ry. v. Syas*, 246 Fed. 561 (C. C. A. 8th, 1917); *Enelow v. N. Y. Life Ins. Co.*, 70 F. (2d) 728 (C. C. A. 3d, 1934), cert. granted 55 S. Ct. 70 (1934).

200. *Donnelly v. Northwestern Life Ins. Co.*, 59 F. (2d) 46 (C. C. A. 5th, 1932); but cf. *Whitney Co. v. Johnson*, 14 F. (2d) 24 (C. C. A. 9th, 1926), cert. denied 273 U. S. 734 (1926). According to the doctrine of *Union Pacific Ry. v. Syas*, 246 Fed. 561 (C. C. A. 8th, 1917), the jury which decides the legal issues should not be permitted to advise the chancellor on the equitable issues.

201. See *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235, 242, 243 (1922); *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 364, 365 (1922); *Union Pacific Ry. v. Syas*, 246 Fed. 561 (C. C. A. 8th, 1917); *Enelow v. N. Y. Life Ins. Co.*, *supra* note 199. But cf. *F. C. Ayres Mercantile Co. v. Union Pacific Rr. Co.*, 16 F. (2d) 395 (C. C. A. 8th, 1926).

sound discretion of the trial court, for there is no inherent reason requiring settlement of the equitable issues first.²⁰²

The theory that all issues were to be tried to a jury caused one court to hold that third parties could not be brought in by the equitable answer, for "If the act be given the broad construction suggested, cases can easily be imagined which it would be impossible to try properly before a jury."²⁰³ Another without reference to the matter of the jury was of the opinion that the language of the section would not warrant it;²⁰⁴ but there is a contrary holding,²⁰⁵ and although the point was not contested, third parties were brought in in the case of *Liberty Oil Company v. Condon National Bank*.¹⁰⁰ But the same court which held that third parties could be brought in by the answer had earlier refused to permit the plaintiff to bring in new parties by his replication, although in the interests of a final settlement it would have been highly advisable.²⁰⁶ Clearly if all issues are to be disposed of in one suit, third parties must often be brought in by defendant's answer or plea, in the nature of an original bill in equity; and on analogy to Equity Rule 30 as amended plaintiff should be permitted to bring in third parties by his replication when their presence is necessary to complete relief.

When and how is appellate review to be sought? An order of transfer from the equity side to the law side under Equity Rule 22 or Section 274a is appealable if tantamount to an action which may then be reviewed under Section 129 of the Judicial Code, which governs the review of interlocutory decrees. For instance, an order transferring to the law side a suit in equity in which an injunction is prayed for, since in effect it is a denial of the injunction, comes within the section.²⁰⁷ In general, however, the order of transfer would be neither final nor interlocutory and hence not appealable.²⁰⁸ And this same reason applying, a like result follows relative to an order transferring a cause from the law to the equity side of the docket.²⁰⁹ But where the trial court has refused to

202. See *Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n*, *supra* note 158, for an expeditious handling of the matter; *Fiorito v. Clyde Equipment Co.*, 2 F. (2d) 807 (C. C. A. 9th, 1924). Some codes, such as Connecticut, provide, however, that equitable issues shall be tried first and if this settles the case no trial of the legal issues is had. CLARK, CODE PLEADING (1928) 64.

203. *Breitung v. Packard*, 260 Fed. 895, 896 (D. Mass. 1919).

204. *Sherman Nat. Bank of N. Y. v. Shubert Theatrical Co.*, 247 Fed. 256 (C. C. A. 2d, 1917).

205. *Duell v. Greiner*, 15 F. (2d) 726 (S. D. Fla. 1926).

206. *Williams v. Mason*, 7 F. (2d) 143 (S. D. Fla. 1925).

207. *Banco Mercantil Americano de Cuba v. Taggart Coal Co.*, 276 Fed. 388 (C. C. A. 5th, 1921); *King Mechanism & Engineering Co. v. Western Wheeled Scraper Co.*, 59 F. (2d) 546 (C. C. A. 7th, 1932).

208. *United States v. Amalgamated Sugar Co.*, 48 F. (2d) 156 (C. C. A. 10th, 1931).

209. *Weaver v. Atlas Oil Co.*, 39 F. (2d) 847 (C. C. A. 5th, 1930).

permit an equitable defense to be filed under Section 274b, an appeal has been permitted at that stage on the theory that the court might exercise its discretion by virtue of the provision of the section reading, "Review of the judgment or decree entered in such case shall be regulated by rule of court."²¹⁰ On the other hand an appeal from an order overruling the equitable defense and ordering the case for a law trial has been dismissed for lack of appellate jurisdiction on the theory that it was not an interlocutory order or decree within Section 129 of the Judicial Code, nor a final decision within Section 128 of the same code.²¹¹

No doubt it was anticipated that trouble would arise concerning the method of review, for Congress provided in Section 274b that the appellate court should have full power to render a "judgment upon the records as law and justice shall require," whether the review be sought by writ of error or by appeal. A case will illustrate how far we have progressed toward a union of law and equity in pleading, trial, and appellate review. Plaintiff sued at law to recover special damages arising from breach of warranty in a written contract; the defendant, answering that the contract excepted special damages, sought to recover the balance due on the account arising out of the sales contract; to this plaintiff replied that he signed the contract without reading it and in reliance on defendant's representation that it conformed to the prior oral agreement for a general warranty. "In this anomalous state of the pleadings," said the Circuit Court of Appeals in reviewing the action,

"without repleader or transfer to the equity side of the court and without any appropriate objection to procedure or evidence, there was a trial of all issues, including the equitable issues tendered by the reply. At the conclusion of the evidence the trial court determined the equitable issue adversely to plaintiffs, and directed a verdict for defendant for a balance of account by it claimed. All issues thus tried and determined, our review also ignores irregularities of procedure takes account of substance only, and, in compliance with statute, renders 'such judgment upon the records as law and justice shall require'."²¹²

The year following the enactment of Section 274b Congress extended

210. *American Cyanamid Co. v. Wilson & Toomer Fertilizer Co.*, 62 F. (2d) 1018 (C. C. A. 5th, 1933). (The court felt that because the case had been pending so long, it would be advisable to hear the appeal. There is a suggestion that the order denying the right to file an equitable plea is equivalent to a decree in equity refusing to enjoin the action at law); *Ford v. Huff*, *supra* note 196, (appeal considered but without discussion of the point).

211. *Emlenton Refining Co. v. Chambers*, 14 F. (2d) 104 (C. C. A. 3d, 1926), cert. denied 273 U. S. 731 (1926).

212. *Fiorito v. Clyde Equipment Co.*, 2 F. (2d) 807, 808 (C. C. A. 9th, 1924). Accord: *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (1922); *Union Pacific Rr. Co. v. Syas*, 246 Fed. 561 (C. C. A. 8th, 1917); *Arkansas Anthracite Coal & Land Co. v. Stokes*, 277 Fed. 625 (C. C. A. 8th, 1922), cert. denied 259 U. S. 584 (1922); *Maine Northwestern Development Co. v. Northwestern Commercial Co.*, 240 Fed. 583 (C. C. A. 9th, 1917).

the remedial provision of that section relative to appellate review to all judgments or decrees.²¹³ Hence an appeal when a writ of error was proper or vice versa became harmless;²¹⁴ the substance of the review was, however, not changed.²¹⁵ Nor has it been by the act of 1928,²¹⁶ which abolished the writ of error and substituted the appeal therefor, subject to all the procedural statutes relating to a writ of error.²¹⁷ But "informalities which were not fatal in appeals from decrees in equity or admiralty should now . . . receive equal leniency in appeals from judgments at law."²¹⁸

It is apparent that Congress has sought to secure appellate review on the merits.²¹⁹ So it would seem that we should go further and abolish the distinction between bills of exception and the equity method employed to bring evidence into the record. Archaic nomenclature which carries with it so much of formality and tradition ought to be abandoned.²²⁰ The equity practice as prescribed by the modern Equity Rule 75 is liberal and simple; the practice concerning bills of exception, established by decisions and usage dating back to 1285, has become technical in some respects. For instance bills of exceptions must be allowed within the judgment term, or some extension granted during that term,²²¹ but such a rule of thumb has not been applied in the equity

213. 39 STAT. 727 (1916); 43 STAT. 941 (1925), 28 U. S. C. A. § 861 (1926).

214. *Ana Maria Sugar Co., Inc. v. Quinones*, 254 U. S. 245 (1920); *Equitable Trust Co. v. Denver & Rio Grande Ry. Co.*, *supra* note 179; *Toyo Kisen Kaisha v. Hartman*, 253 Fed. 422 (C. C. A. 9th, 1918); *Moriyama v. Allen*, 13 F. (2d) 117 (C. C. A. 9th, 1926); *Howard v. Leete*, 257 Fed. 918 (C. C. A. 6th, 1919); *National Surety Co. v. County Board of Education*, 15 F. (2d) 993 (C. C. A. 4th, 1926).

215. *Ana Maria Sugar Co., Inc. v. Quinones*, 254 U. S. 245 (1920).

216. 45 STAT. 54 (1928), as amended, 45 STAT. 466 (1928), 28 U. S. C. A. §§ 861a, 861b (1929).

217. Appeal in a law case will raise only the questions that a writ of error would have raised. *Talent v. United States*, 32 F. (2d) 630 (C. C. A. 1st, 1929). And the necessity for exceptions has not been abolished. *Central Supply Co. Inc. v. Carter Clothing Corporation*, 35 F. (2d) 172 (C. C. A. 3d, 1929); *SIMKINS, FEDERAL PRACTICE* (1934) § 263. 39 STAT. 727 (1916), 28 U. S. C. A. § 861 (1926) may still be invoked to obviate any formalities. *Ringling Trust & Savings Bank v. Whitfield Estates*, 32 F. (2d) 92 (C. C. A. 5th, 1929), cert. denied 280 U. S. 573 (1929).

218. *Weinstein v. Black Diamond S. S. Corporation*, 31 F. (2d) 519 (C. C. A. 2d, 1929), cert. denied 283 U. S. 837 (1931).

219. See also 40 STAT. 1181 (1919), 28 U. S. C. A. § 391 (1926) which provided: "On the hearing of any appeal, certiorari, writ of error . . . the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

220. Bills of exception and assignments of error have become obsolete in English practice. "There are no abstracts, no condensations, or reductions to narrative form, . . . The appellate record is merely a copy of existing documents. There are no exceptions." *Sunderland, English Appeals Always Involve the Merits* (1926) 12 MASS. L. Q. 38.

221. *O'Connell v. United States*, 253 U. S. 142 (1920); *Exporters of Mfrs.' Products*

practice.²²² Essentially the purpose of each method is to certify up sufficient evidence for a proper review.²²³ And the prescribed form that that evidence shall take, however much it may be the subject of criticism, is now the same in equity and law actions. For equity practice prescribes a narrative record, subject to the exception that testimony may be set forth verbatim when necessary to a right appreciation thereof,²²⁴ and Rule 8 of the Supreme Court relative to bills of exception requires the narrative form, "save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."²²⁵

We have progressed to the point, then, where the procedures for review closely parallel each other in form. It would therefore be but a short step to provide one simple method whereby a case may be brought before the appellate court, and this court be charged only with the responsibility of seeing that substantial justice is done in the case, not with hunting for mistakes below.²²⁶

The recent case of *Smith Engineering Company v. Pray*²²⁷ may be used

v. Butterworth-Judson Co., 258 U. S. 365 (1922) (the parties stipulated to the extension); *Harris v. United States* 12 F. (2d) 982 (C. C. A. 4th, 1934); and see SIMKINS, *FEDERAL PRACTICE* (1934) § 152 for a discussion of the often troublesome question of extending time.

222. *Barber Asphalt & Paving Co. v. Standard A. & R. Co.*, 275 U. S. 372 (1928).

223. The record in equity must be certified by the judge. *Trust Company of Florida v. Gault*, 69 F. (2d) 133 (C. C. A. 5th, 1934). The signature of the judge is essential to a bill of exceptions. *Harris v. United States*, 72 F. (2d) 982 (C. C. A. 4th, 1934); SIMKINS, *FEDERAL PRACTICE* (1934) §§ 149, 150.

224. Equity Rule 75(b), as construed by *Barber Asphalt Paving Co. v. Standard A. & R. Co.*, 275 U. S. 372 (1928). It has been the subject of much criticism. HOPKINS, *FEDERAL EQUITY RULES* (8th ed. 1933) 307 n. 1; Lane, *Working under Federal Equity Rules* (1915) 29 HARV. L. REV. 55, 74-75; Lane, *Federal Equity Rules* (1922) 35 HARV. L. REV. 276; Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 HARV. L. REV. 483. In this last article it was suggested that the evidence be certified up verbatim, and each side required to state in the briefs a narrative summary thereof. It was thought that this would combine the advantages of both the question and answer, and narrative forms of records, and eliminate the contention now common when the record is being settled in the lower court.

At the present time the Supreme Court expects compliance with the rule, although it will not permit a Circuit Court of Appeals, which has been uniformly indulgent in allowing the testimony to be set forth in full, suddenly to change its attitude, refuse to consider the evidence, and affirm the decree. *Barber Asphalt Paving Co. v. Standard A. & R. Co.*, 275 U. S. 372 (1928); *Fairbanks, Morse & Co. v. American Valve & Meter Co.*, 276 U. S. 305 (1928).

225. The rule may be found in 286 U. S. 598 (1932). It must be complied with, and the parties cannot waive it. *Hursh v. Killits*, 58 F. (2d) 903 (C. C. A. 9th, 1932) (adopting the same attitude toward a verbose record in a law action as the Supreme Court had earlier adopted in the equity case of the *Barber Asphalt Paving Co.*) cert. denied 287 U. S. 640 (1932).

226. See p. 414, *supra*, and the later article.

227. 58 F. (2d) 926 (C. C. A. 9th, 1932), aff'd on rehearing 61 F. (2d) 687 (C. C. A. 9th, 1932), cert. denied 289 U. S. 733 (1933).

to sum up the case for a procedural union of law and equity. A contractor brought a suit in equity to foreclose a mechanic's lien, alleging that he had completed the contract as far as possible for him to do so, entire completion being prevented by the defendant-owner. The owner denied this, alleged abandonment and damages accruing therefrom, and also that the partial construction was defective. No affirmative relief was sought in the equity action, but the owner then brought an action on the law side of the court for breach of contract, and joined the surety on the contractor's bond. To the law action the contractor and surety set up by equitable plea the pendency of the equity suit, and the surety set up matter to reform the bond. The court pursuant to the first equitable plea enjoined further prosecution of the law action. Thereupon the court, on motion of the owner, the plaintiff in the law action, and over the objection of the contractor and surety, transferred the damage action to the equity side of the court, consolidated the two actions, and referred them to a special master. The contractor and surety then brought the instant case in the Circuit Court of Appeals to compel the lower court to proceed with a trial of the legal issues as at common law, after the trial of the equitable issues in the consolidated cases. Relief was denied on the theory that the contractor and surety, by invoking the power of the court of equity to suspend the trial of the legal action for the breach of the contract, had justified the consolidation of the actions in the court of equity and the subsequent treatment of the consolidated action as one in equity, and had thus waived their constitutional right to a trial of the legal issues by a jury. Factors that moved the court to its decision were these: The issues, aside from reforming the surety bond, were the same, i.e., the contractor was seeking recovery upon the theory that he had complied with certain covenants and the owner sought to recover for the breach of those very covenants; that if the equity suit were heard first and the court should find a breach of contract on the contractor's part, and the law case were then proceeded with, a jury might reach the opposite conclusion and find that there had been no breach; or if, as the petitioners contended, the breach would be established by the finding in the equity suit, the effect to be given to that finding in the event of an appeal in the equity suit was troublesome.

As we have seen, there is no provision for a legal counterclaim in an equity suit; and if the owner had filed it in the equity action and proceeded to trial thereon he would have been held to have waived the right to a jury, and on motion of the contractor and surety it could have been stricken out, because they were entitled to a jury trial thereon. The motion to consolidate on the part of the owner was, in the instant case, said to be a waiver by him of a right to jury trial, and in any event he seems not to have cared for the privilege, or he thought it advisable to

waive it in order to secure one trial of the entire matter. But why, when the owner files an action at law for damages, and the contractor and surety file equitable pleas, as they are entitled to do under Section 274b, are they held to have waived their constitutional right to jury trial? Surely no quarrel can be had with the consolidation of the actions—criticism directs itself to a system which not only permits but requires two actions; but if the owner's claim for damages is a legal one, as the court admits, then so long as we have the Seventh Amendment, a demanding party is entitled to a jury trial thereon.

Clearly there ought to be only one trial and one appeal. The factual situation is not unduly complicated, and the matter does not become complex until it is run through the maw of a procedural machine which breaks it up into equitable and legal segments, and then permits a fragmentary mixing of those same segments. To the foreclosure suit the owner should be permitted to counterclaim for damages, and bring in the surety as an additional defendant on that claim. And to that claim the surety would be permitted to plead facts entitling it to reformation. The case, then at issue, would proceed to trial before the judge as a chancellor, and a jury, the parties desiring one, to settle the legal issues. The evidence concerning performance and breach of the construction contract would be put in; and the jury directed to bring in two verdicts—one against the contractor and surety, assessing the damages, if any, sustained by the owner as a result of the alleged breach of the construction contract, another for the contractor and surety, with leave to the court to enter judgment on this one in the event that it decides that the contractor is entitled to a foreclosure. Either before or after this trial the issues concerning reformation of the bond could be heard to the court. The judge would then make his findings of fact and conclusions of law, and enter a decree and judgment accordingly. On appeal one record would be certified up, and the reviewing court could then affirm or enter the decree and judgment proper in the case, since the the whole record would be before it.

If ever there was efficacy in the division of law and equity certainly it is long since gone under a system where transfer from law to equity or vice versa is supposedly free, where equitable defenses may be filed in legal actions and where the other modifying devices discussed above are available. What is left is a collection of vestiges of the old forms which might be harmless except as we have shown that doubtful and disturbing anomalies inevitably creep in. Having gone this far the sensible course is to abolish the remaining formal vestiges for a completely unified system reflecting the best in English and American judicial procedure. In the succeeding article, therefore, we turn our attention to the practical details of the rules to achieve this end. As we shall see, the Federal

Equity Rules of 1912, in themselves an embodiment of this best practice, furnish the substantial model for the new Federal procedure of the future.²²⁸

228. The later article, dealing with the form which the proposed new rules should take, will appear in an early issue of the Yale Law Journal.