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I

THE determined effort on the part of the American Bar Association, which continued without relaxation for almost a quarter of a century, to place the regulation of federal trial court procedure in law actions under the control of the Supreme Court of the United States, has at last been successful. Senate Bill No. 3040, granting full rule-making power to the Supreme Court, became a law on June 19, 1934.

This Act gives to the Supreme Court of the United States "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." It provides that such rules shall be effective six months after their promulgation, and that "thereafter all laws in conflict therewith shall be of no further force or effect." [1]

The Act further provides that the Court may, at any time, unite the law and equity rules "so as to secure one form of civil action and procedure for both," but "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." [2]

Evidently there was more fear of the union of legal and equitable procedure than of judicial control of trial court procedure in law actions, for the Act granted the latter power without restriction, while it required rules unifying the practice in law and equity to be laid before Congress throughout an entire regular session before they

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[1] Sec. 1. See 1 UNITED STATES LAW WEEK, index p. 909 (June 12, 1934).

[2] Sec. 2. See 1 UNITED STATES LAW WEEK, index p. 909 (June 12, 1934).

should become operative. This was doubtless suggested by the provision in the English Judicature Act that all rules of court made thereunder must be "laid before Parliament." [3] In England, however, the rules go into effect immediately upon promulgation, subject to possible later annulment by order in council or by Parliament.[4]

II

In its inception, the movement for federal rule-making power in actions at law was not undertaken primarily for the purpose of substituting judicial for legislative regulation of federal procedure. Although the superior skill, knowledge and experience of the Justices, in dealing with procedural problems, was not overlooked by the American Bar Association as a sound reason in support of the proposal to place the whole matter under the control of the Supreme Court of the United States, nevertheless the primary purpose, as read from the records, was the attainment of local uniformity in trial court practice between the state and federal courts.

At the annual meeting of the American Bar Association held in Boston in 1911, Mr. Thomas Shelton, of Virginia, presented a resolution, reciting that, "whereas, . . . [the conformity act [5]] has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases," and "it is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court," therefore be it resolved, "that a complete uniform system of law pleading should prevail in the federal and state courts," that a system of rules for use in the federal courts and to serve as models for state adoption should be prepared and put into effect by the Supreme Court of the United States, that all federal statutes in conflict with such rules be repealed, and that for the purpose of advocating such reforms a committee of five members be appointed to be known as "The Committee on Uniform Judicial Procedure." [6] The resolution was adopted by the Association at its next meeting.[7]

As a result of this action a committee on Uniform Judicial Pro-

[3] Sup. Ct. of Jud. (Consol.) Act, 1925, secs. 99 (5), 100 (2), 15 and 16 Geo. 5, c. 49.

[4] Sup. Ct. of Jud. Act, 1873, sec. 68 (4), 36 and 37 Vict., c. 66; Sup. Ct. of Jud. (Consol.) Act, 1925, sec. 99 (5), 15 and 16 Geo. 5, c. 49.

[5] Rev. Stat., sec. 914 (1872).

[6] 37 A. B. A. REP. 434-435 (1912).

[7] 37 A. B. A. REP. 35 (1912).

cedure was created, with Mr. Thomas Shelton as chairman, which immediately prepared a bill to carry out the purpose of the Shelton resolution. This bill, H. R. No. 26,462, was at once introduced by Mr. Clayton, chairman of the House Judiciary Committee, in the 62nd Congress.[8]

The bill granted power to the Supreme Court to prescribe rules in law actions, but did not authorize rules to effect a union of legal and equitable procedure.

The bill died with the session of Congress in which it was introduced. It was promptly introduced again at the following special session, where it also failed to come up for consideration. It was then planned to introduce it in both Houses immediately upon the convening of the next regular session. The committee was very sanguine regarding its quick passage. In its report to the American Bar Association in 1913, the committee said: "It could become a law before adjournment for the Christmas holidays, unless there arises some unexpected and unforeseen lukewarmness or opposition." [9] The opposition did arise, and the "Clayton Bill" never came to a vote in either House of Congress.

For almost twenty years the Committee on Uniform Judicial Procedure continued its tireless efforts to secure rule-making authority for the Supreme Court in law actions. At every session of Congress a bill was presented under its sponsorship. Every year, with unflagging courage, it made its official report to the American Bar Association, noting the efforts which it had put forth, its successes and failures, and its plans for the future. Mr. Shelton, who was reappointed chairman of the committee year after year, until 1930, was neither discouraged nor deterred. Even Senator Walsh, the chief opponent in the Senate of rule-making power, acknowledged the vitality of the effort, which was renewed with undiminished hope in every Congress, when he declared that "It defies death." [10]

The reports of the Committee on Uniform Judicial Procedure during the period of Mr. Shelton's chairmanship, contain a dramatic portrayal of one of the most remarkable campaigns in the history of the United States to secure legislation. Pressure upon the judiciary committees of Congress to favorably report the measure was brought from every quarter. The influence of high officials in the federal and

[8] 38 A. B. A. REP. 541-545 (1913).
[9] 38 A. B. A. REP. 544 (1913).
[10] Sen. Doc. No. 105, 69th Congress, 1st Sess., p. 1.

state governments was sought and obtained. Eminent teachers and writers in the field of the law were drawn to its support. State and local bar associations in every part of the country were urged and induced to pass resolutions in favor of its enactment, and to create standing committees for the purpose of arousing professional opinion to an appreciation of the value of the proposed reform. Commercial associations and chambers of commerce endorsed the measure. Governors of States appointed committees to work in its behalf. The American Bar Association was kept informed at every annual meeting regarding the progress of the campaign, the obstacles which were encountered, and the causes of the repeated failures to bring the measure to a hearing either in the judiciary committees or upon the floors of Congress.

There was no relaxation in these efforts of the Committee on Uniform Judicial Procedure while Mr. Shelton directed its activities. In the last report which he made to the Association, in 1930, he showed not the slightest discouragement. He declared that while 18 years seemed a long time to have been fighting for a single bill, it should be remembered that the English fought for 50 years to secure the Judicature Act of 1873. His committee presented resolutions calling upon every member of the Association to make it his business to communicate with his senators and congressmen and to secure the aid of the secular press, and urging state bar associations to create state committees to carry forward the work.[11]

But with the passing of Mr. Shelton from the chairmanship of the committee, its activities came to a sudden and complete stop. The new chairman, Mr. MacChesney, reported that in view of the make-up of the Senate judiciary committee it was deemed wise to cease pressing for the enactment of the bill by general agitation over the country, that the Association should take no steps other than continuing to introduce the bill, and that the committee confine its activities for the present to merely keeping in touch with the situation.[12]

Two years later Judge McClintic, the then chairman, reported that the committee had unanimously agreed that nothing could or should be done relative to the passage of the bill. He expressed his personal opinion that uniformity of procedure in law actions by means of federal rules was inherently undesirable, that it was opposed by 90 per cent of the lawyers in his district, and that the bill ought

[11] 54 A. B. A. REP. 130, 514 (1929).
[12] 55 A. B. A. REP. 91 (1930).

not to pass.[13] In 1933, at the suggestion of Judge McClintic, and in the absence of any motion for its continuance, the American Bar Association allowed the Committee on Uniform Judicial Procedure to go out of existence.[14]

But apparently its work had been well done. Within 10 months after the Committee's decease the bill for which it had struggled for 20 years was enacted into law, under the sponsorship of the Attorney General of the United States. Senator Walsh had been right when he declared that the measure for federal rule-making power was one which defied death.

III

The bill underwent several changes during its long and checkered career before Congress. Its scope was at first restricted to procedure in the district courts of the United States.[15] It was later amended to include the courts of the District of Columbia.[16] A provision was then added that in prescribing rules, the Supreme Court should have regard to the simplification of procedure so as to promote the speedy determination of litigation on the merits.[17]

At the 1922 meeting of the American Bar Association, Chief Justice Taft, in an address upon "Possible and Needed Reforms in the Administration of Justice in the Federal Courts," suggested the entire feasibility of abolishing the distinctions, in the federal system, between courts of law and courts of equity, together with the procedural differences between legal and equitable proceedings. And he urged that if such a reform were to be undertaken, the work should be done by the Supreme Court rather than by Congress.[18] This suggestion met with the immediate approval of the Committee on Uniform Judicial Procedure, and the bill granting the rule-making power to the Supreme Court was amended to include a provision authorizing the promulgation of rules unifying legal and equitable procedure.[19] As finally enacted, it retained the first and last of these amendments, but not the amendment relating to simplification, doubtless for the reason that this was deemed to be superfluous.

[13] 57 A. B. A. REP. 118-119, 575 (1932).
[14] 58 A. B. A. REP. 110 (1933).
[15] 38 A. B. A. REP. 542 (1913).
[16] 39 A. B. A. REP. 571-572 (1914).
[17] 47 A. B. A. REP. 381 (1922).
[18] 47 A. B. A. REP. 260-261 (1922).
[19] 47 A. B. A. REP. 82 (1922); 49 A. B. A. REP. 485, 496 (1924).

IV

As already noted, the original purpose of conferring rule-making power upon the Supreme Court was alleged by its proponents to be the attainment of uniformity of procedure between the state and federal courts in actions at law. The failure of the Conformity Act of 1872 to bring about such uniformity was given as the fundamental reason for the new proposal.

There can, of course, be no question of the harmful consequences of the use of different rules of procedure in state and federal courts sitting in the same districts. The resulting difficulty and confusion imposes a burden upon the bar, in performing its difficult duties, which cannot be ignored or minimized. Procedural hazards are thereby increased, with disastrous effect upon the efficiency of the administration of justice. The ordinary lawyer, familiar with the state practice, is constantly in danger of overlooking some peculiar requirement of the federal practice whenever he appears before the courts of the United States. This hardship, for which the public ultimately pays, is quite independent of the merits of the rules followed in either tribunal. The mere fact of difference is itself a serious impediment, multiplying the procedural technicalities which constitute the chief cause of popular dissatisfaction with the courts.

Conformity can be obtained in only two ways. Either the federal courts must conform to the practice employed in the States wherein they sit, or the state courts must conform to the federal practice.

Conformity of the first type is entirely practicable. It could be accomplished by a single act of Congress or by a single rule promulgated by the Supreme Court under congressional authority. It could be made effective without placing any burden whatever upon the bar, for every lawyer who practices in the federal courts is also, and chiefly, a practitioner in his own state courts. Furthermore, every federal district judge was a state court practitioner before being elevated to the federal bench.

This has been the historic method of approach to the problem of conformity. When the federal courts were organized, and Congress was faced with the task of regulating their procedure, the obvious advantages of local uniformity of practice between state and federal courts, and the equally obvious impossibility of securing it by inducing the States to adopt rules identical with those which Congress might enact, led to the plan of fixing the practice of the federal courts in law actions in accordance with the practice then in operation in the

respective States in which those courts sat.[20] Power was given, however, to the several federal courts to make rules, from time to time, regulating their own practice in such manner as the ends of justice might require.[21] The state legislation that followed, which altered state practice without affecting that in the federal courts, together with the rules and adjudications of the federal courts, finally destroyed to a large extent the local uniformity originally sought to be established. To escape from the intolerable confusion which resulted, Congress passed the so-called Conformity Act in 1872,[22] which sought to re-establish uniformity between state and federal legal practice in each federal district by requiring federal conformity to the state procedure.

But the Act contained the seeds of its own destruction as a remedial device, for conformity was to be observed by the federal courts only "as near as may be." This opened the way to departures of many kinds from the state practice—a tendency strongly supplemented by a vast number of congressional statutes dealing with various phases of federal practice. As a result the differences between federal practice and state practice in the same districts became so great that Mr. Shelton, in drawing the resolution which he presented to the American Bar Association in 1911, was able to assert with substantial truth that the Conformity Act "has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases."

Conformity in the field of equitable procedure was never attempted by congressional legislation. It was only in law actions that Congress ever gave to state practice a dominating position in the Courts of the United States. This remarkable fact is difficult to explain, but demonstrates the tremendous influence upon the imagination of the legal profession exerted by the traditional distinction between law and equity.

There is no inherent reason, however, why conformity should not have been deemed to be relatively as desirable in equity as at law. The hardships resulting from divergence in state and federal practice are found in one field as well as in the other, though to a less extent in equity on account of its simpler and more flexible character. But long familiarity with different systems of equity practice in the state and federal courts has dulled the sensibility of the profession to their incon-

[20] 1 Stat. 93; *id.*, 276; Wayman v. Southard, 10 Wheat. (23 U. S.) 1 (1825); Bank of U. S. v. Halstead, 10 Wheat. (23 U. S.) 51 (1825).

[21] 1 Stat. 335, sec. 7 (1793).

[22] Rev. Stat. 914.

veniences and has obscured the possibilities of escape from the unnecessary complexities which they involve.

Conformity of the type now under discussion could easily be made to embrace both law and equity by means of a congressional statute or a rule promulgated under congressional authority. Such a conformity was, indeed, proposed and presented to the American Bar Association at the very time when the Shelton resolution came before it. The proposal came in the form of a resolution from a bar association in North Carolina urging the advisability of a federal statute requiring the federal district courts to follow the state practice in all cases both at law and in equity. But it failed to secure the endorsement of the Committee on Judicial Administration, to which it had been referred.[23] Instead, that Committee recommended the Shelton plan, and it was approved and pushed forward as an exclusive method for harmonizing federal and state procedure. No consideration was ever given by the Association to the practical possibilities of a conformity statute which would entirely eliminate federal practice as a separate body of procedural law, and would require the federal courts, both at law and in equity, to employ the same rules of procedure used by the state courts sitting in the same districts.

V

Conformity of the second type, by which state practice is brought into accord with that in the federal courts, is also possible both in law and equity. But it represents a much more complex and difficult problem than conformity of the other type. Its complete accomplishment would require the concurrent action of 48 sovereign commonwealths. This was the kind of conformity, however, to which the American Bar Association devoted its efforts. The entire program of the Committee on Uniform Judicial Procedure was directed toward the authorization of "a modernized, simplified, scientific, correlated system of federal procedure meeting the approval of the federal Supreme Court," to be put into operation in the federal courts, with a view to effecting conformity in the state practice "through the adoption of the federal system as a model." [24]

For ten years the conformity sought through a grant of rule-mak-

[23] 37 A. B. A. REP. 435-436 (1912).

[24] 5 A. B. A. J. 473 (1919); 6 *id.* 516 (1920); 46 A. B. A. REP. 467 (1921); 47 *id.* 378 (1922); 48 *id.* 351 (1923); 49 *id.* 493 (1924); 50 *id.* 549 (1925); 51 *id.* 515 (1926); 53 *id.* 510 (1928); 54 *id.* 521 (1929).

ing power to the Supreme Court was confined to actions at law. It was not until 1922 that section 2, as found in the present Act, was proposed, at the suggestion of Chief Justice Taft, as an addition to the bill being urged in Congress.[25]

In its original form the proposed bill was not only inadequate but utterly at variance with the prevailing procedural philosophy of the United States. It was only by accident that it failed of enactment in that form. At the 1916 meeting of the American Bar Association telegrams were read stating that the bill had passed both Senate and House. But when Mr. Shelton, the chairman of the Committee on Uniform Judicial Procedure, reached Washington in order to perfect arrangements for a ceremonial signing of the bill, it transpired that the wrong one had been enacted. It was then too late to correct the error before the final adjournment of Congress.[26]

That error may have been one of the most fortunate events in the history of federal jurisprudence. The mere grant of rule-making power in law actions, as a supplement to previous grants of power in equitable proceedings, would probably have perpetuated in the federal courts the distinctions between actions at law and suits in equity which had long been abolished in most of the States of the Union, were rapidly disappearing in others, and had entirely ceased to exist in England and her English speaking colonies. Notwithstanding the addition of Section 2 of the present Act, the Supreme Court may, it is true, still confine its action to the preparation and adoption of a system of rules for law actions, but it may, if it sees fit, promulgate a unified practice for law and equity in harmony with the almost universal modern trend.

No matter which course the Supreme Court may take, there will undoubtedly be a great improvement in the quality of federal rules of practice. Indeed, any codification of federal procedure in actions at law, whether made by legislation or by rules of court, would eliminate much of the intolerable confusion resulting from the medley of federal statutes, state statutes, state rules, rules of the common law and rules of the federal courts, which has long been a menace to the administration of justice in the courts of the United States.

But regulation by rules of court has peculiar and important advantages. The excellence of a procedural system depends upon the ease with which it operates, the adaptability of means to ends, and the elimination of unnecessary steps and useless distinctions. Competent and

[25] 47 A. B. A. REP. 82 (1922).
[26] 3 A. B. A. J. 521 (1917).

experienced experts in the use of legal machinery are much more likely to develop a system which will satisfy these requirements than are those who are unfamiliar with the methods and conditions of litigation. Court-rule procedure is usually simpler and more efficient than that provided by legislation because judges and lawyers are better able than the legislature to understand the character of the mechanism which is needed for the rapid, accurate and just solution of the problems dealt with by the courts.

VI

It is quite another question whether a national system of procedure for the federal courts will bring about conformity through general adoption by the States.

If, in executing the authority which the new Act of Congress has delegated to it, the Supreme Court confines itself to the first grant of power, and merely prepares and promulgates a system of law rules for the federal courts, there is no reason to suppose that such rules will exert any more influence upon state practice than the federal equity rules have done. The Supreme Court has regulated equity practice in the federal courts by general rules since 1792, but these rules have never served as models for state adoption. Even the Equity Rules of 1913, which were prepared after the most exhaustive study by eminent committees of the federal bar and by the Supreme Court itself, have not been adopted anywhere as rules of state practice.

This has undoubtedly been due, in part at least, to the fact that most States have largely abandoned the procedural distinctions between law and equity. A separate equity practice is out of harmony with American conceptions of judicial efficiency.

The same is true of a separate practice at law. No State is likely, in this period of procedural development, to make any change in its practice which will either establish or tend to perpetuate the outworn distinctions between legal and equitable methods of conducting litigation.

If, however, the Supreme Court undertakes to exercise the second grant of power, namely, to "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," there is, of course, a possibility of a resulting conformity through state adoption of federal rules.

But there are serious considerations militating against such an outcome.

The bar and the people in the several States are quite likely to feel that, to preserve their own judicial integrity and independence, control of the processes of their courts should be kept in their own hands. The amount of litigation carried on in the federal courts is insignificant compared with that transacted in the courts of the States. To permit the federal government to regulate the procedural rights and remedies administered in the state courts might seem too high a price to pay for the advantages to be derived from uniformity of procedure in the relatively few cases brought in the courts of the United States.

Furthermore, opportunities for experimentation are indispensable for developing and maintaining a satisfactory system of procedure. The 48 States are laboratories in which experiments are constantly going on. New methods which prove successful in one State are tried in others, so that each State is able to enjoy the benefit of the discoveries made by all the rest, so far as it cares to do so. This freedom of action has greatly facilitated and stimulated the improvement of American procedure. There has been a far more widespread activity and interest in securing a better administration of justice during the last 25 years in the United States than there has been in England. With its centralized judicial system, England was driven to the procedural revolution of 1873 in order to liberalize its technique of litigation. For fifty years thereafter comparatively little was done, in spite of much popular dissatisfaction. In this country we have developed and are actively and continuously employing a system of co-operative evolution among our States, the responsibilities of leadership being assumed now by one State, now by another.

The entire judicial council movement, which has already resulted in the creation of such bodies in twenty States, is evidence of a growing feeling of responsibility on the part of the profession for improving the administration of justice. The most recent council is that of New York. It has been given an annual appropriation of $50,000 for carrying on its duties which are defined by statute as follows:

> "(a) To make a continuous survey and study of the organization, jurisdiction, procedure, practice, rules and methods of administration and operation of each and all the courts of the state, including both courts of record and courts not of record, the volume and condition of business in said courts, the work accomplished and the results obtained.
>
> "(b) To collect, compile, analyze and publish the judicial

statistics of the state in compliance with article six, section twenty-two of the constitution.

"(c) To receive, consider and in its discretion investigate criticisms and suggestions from any source pertaining to the administration of justice and to make recommendations in reference thereto.

"(d) To keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.

"(e) To recommend from time to time to the legislature any changes in the organization, jurisdiction, operation, procedure and methods of conducting the business in the courts which can be put into effect only by legislative action and to recommend to any court or to any body vested with the rule making power for any court any changes in the rules and practice of said courts or the methods of administering judicial business therein which, in the judgment of the council, would simplify and expedite or otherwise improve the administration of justice therein.

"(f) To adopt and from time to time to amend and promulgate with the force and effect of law, rules and regulations not inconsistent with any statute with respect to the manner of keeping records of the business of any court." [27]

A vast amount of work of this kind is being done by judicial councils in many States. Similar functions have been undertaken in others by incorporated state bars or by voluntary associations.

It is probable that most of this activity would cease if the procedure employed in the States were to become identical with that prescribed by the Supreme Court for the courts of the United States. The initiative in judicial reform would pass to Washington, and the States would have no further responsibilities for improving the machinery employed in the administration of justice. The result might well be to seriously weaken the vitality of the jurisprudence of the States. Before incurring this risk, the value of the off-setting advantages of a court-rule system of regulation and of conformity between state and federal courts would require careful appraisal.

[27] Laws of N. Y., 1934, c. 128 (Mar. 29, 1934), amending sec. 1, c. 35 of Laws of N. Y., 1909, constituting art. 2*a* of c. 30 (secs. 40-48) of Consol. Laws. of N. Y.

VII

It is apparent that all the objectives which were sought through the grant of rule-making power to the Supreme Court cannot be reached with an equal degree of success by the same set of rules. In the order of importance, as indicated by the reports of the Committee on Uniform Judicial Procedure, these objectives are: (1) conformity between state and federal courts sitting in the same State, (2) the regulation of procedure in the federal courts by court rules rather than by legislation, and (3) uniformity in practice among all the various federal courts.

The first of these objectives, namely, conformity between the state and federal courts in the same State, will be most directly, positively and completely attained by rules of court which do no more than prescribe that every federal district court, in all civil proceedings both at law and in equity, shall follow the same practice and procedure which is employed in the courts of general jurisdiction in the State where such federal court is sitting.[28]

This method of executing the rule-making power will not, however, result in any of the advantages to be sought in a simple and well-co-ordinated system of regulation by rules of court, nor will it produce uniformity in practice among the several federal districts.

The second objective, namely, the substitution of rules of court for legislative regulation of procedure, will be most easily attained by a set of rules regulating the practice in actions at law. The practice in equity is already prescribed by rules of court. The full advantage of judicial control of procedure can therefore be enjoyed, under the new Act, without interfering in any way with the present system of equity rules.

Such a method of dealing with the problem, however, will not be likely to produce conformity between state and federal practice within each State because separate systems of procedure for law and equity are not in harmony with contemporary American views of procedural convenience. To increase the probability of state adoption of the federal system, the second objective might be sought more successfully

[28] Such a rule might, for the purpose of avoiding litigation to determine its meaning, designate in express terms what matters are or are not included within its general language. Moreover, where the peculiar position of the federal court is such that the terminology of the state rule is technically inappropriate, as, for example, the case of place of service of process, it might be advisable to specify how the state practice should be employed.

by abandoning the present equity rules and adopting a new system uniting both law and equity.

The third objective, namely, uniformity in federal practice between the several districts, could be reached by either of the methods suggested for the second objective. But, as in that case, the union of legal and equitable procedure in a single system would offer superior advantages because it would increase the probability of attaining conformity between the state and federal courts.

In the face of these conflicting tendencies, the problem will be to select that solution which offers the greater balance of advantage.

When the new rules are promulgated, however, the work will not be finished. Constant attention will be necessary to keep them adjusted to contemporary needs. Perhaps a national judicial council can be created to engage in a continuous study of the operation of the rules and to suggest to the Supreme Court, from time to time, such amendments as seem to be desirable.