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# A Landmark in Federal Procedural Reform

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# A LANDMARK IN FEDERAL PROCEDURAL REFORM

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THE WELCOME and far-reaching decision of the Supreme Court in *Hanna v. Plumer*,[1] handed down on April 26, 1965, has an importance and significance in the progress of procedural reform far beyond the precise point decided by it. Mr. Chief Justice Warren delivered the opinion for a unanimous bench with a concurring opinion by Mr. Justice Harlan. The case involved a civil action brought in the United States District Court for the District of Massachusetts. Federal jurisdiction was based on diversity of citizenship between the parties. The plaintiff sought to recover damages for personal injuries resulting from an automobile accident. The driver, whose negligence was claimed to have caused the injuries, was deceased, and the suit was brought against her executor. Service of the summons and complaint was made by leaving copies of the papers at the defendant's place of abode "with a person of suitable age and discretion then residing therein," in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure. A motion for summary judgment made by the defendant was granted by the District Court on the ground that the law of Massachusetts was applicable, which required service on an executor or administrator to be made by "delivery in hand." The Court of Appeals for the First Circuit affirmed the decision of the District Court.[2] The Supreme Court unanimously reversed the judgment and held that the Federal Rules of Civil Procedure controlled service of process even in actions based on diversity of citizenship and that consequently the state law did not govern.

The wide-spread ramifications and the numerous implications of this ruling can best be realized and appreciated by setting it in its proper place in the history of the development of the reformed federal civil procedure. The present practice was adopted in 1938. It has become so ingrained in our law that it is already being taken for granted. The younger members of the bar, as well as the current

† United States District Judge for the District of Columbia.

1. 380 U.S. 460 (1965). Because of the vital role that this case is likely to play in molding Federal civil procedure and because it does not seem to have attracted the attention that it should receive, an invitation on the part of the Editors of the VILLANOVA LAW REVIEW to contribute a short discussion of the decision was accepted by me with pleasure.

2. 331 F.2d 157 (1st Cir. 1964).

generation of law students, are often not aware of the state of federal civil procedure prior to 1938, and of the epoch-making advance made by the Supreme Court in adopting and promulgating the present rules.

Mr. Justice Holmes aptly remarked that, "The history of what the law has been is necessary to the knowledge of what the law is."[3] Prior to the adoption of the present procedure, the federal courts maintained the historic division between law and equity. There was a uniform procedure for equity cases, governed by Equity Rules promulgated by the Supreme Court. On the other hand, in actions at law the district courts were required by the Conformity Act of 1872[4] to follow the practice of the state in which the federal court sat, "as near as may be." The practice varied from state to state. A few states, as well as the District of Columbia, still clung to common law pleading with all its casuistries and sophistries, thereby forcing it on the federal courts sitting in those jurisdictions. In 1934, after many years of travail on the part of far-sighted leaders of the bench and bar, the Congress enacted the statute which authorized the Supreme Court to regulate by general rules the pleading, practice and procedure of the district courts in civil actions.[5] The Supreme Court first resolved to unite law and equity and to abolish the procedural distinctions between the two. A formal public announcement to that effect was made by Chief Justice Hughes. The Court then appointed an eminent Advisory Committee to draft the proposed Federal Rules of Civil Procedure.[6] In due course the rules were drafted and eventually adopted and promulgated by the Supreme Court. The result was the creation of a uniform, simple civil procedure for all the federal courts completely disconnected from that prevailing in the states. It constituted a major achievement and notable landmark in the history of American jurisprudence. The new procedure was outstanding, not only because it was uniform throughout the federal judicial system, but also because it was simple and expeditious. It eliminated technicalities and provided broad and liberal discovery, thereby facilitating decision of cases on their merits. The advantages of the reformed federal procedure are vividly demonstrated by the fact that it has been gradually adopted by many of the states.

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3. HOLMES, THE COMMON LAW 37 (1881).

4. REV. STAT. § 914 (1875).

5. Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 2072 (1958).

6. Former Attorney General William D. Mitchell was the Chairman, the late Judge Charles E. Clark was the Reporter and Edgar Tolman the Secretary of the Committee.

Almost simultaneously with the adoption of the Rules, the Supreme Court decided the case of *Erie Railroad Co. v. Tompkins*,[7] which held that there was no federal common law and that in civil actions in which federal jurisdiction was based on diversity of citizenship, the applicable substantive law of the state should determine the rights of the parties. The result was that in all civil actions, procedure in the federal courts was governed by uniform federal rules and was the same throughout the federal judicial system, while questions of substantive law in actions founded on diversity of citizenship were determined by state law and, therefore, might vary from state to state. The disposition of substantive rights was to be the same in both federal and state courts. It has been said at times that the end to be achieved was that the outcome of a law suit should be the same irrespective of whether it be brought in a federal or state court. This generalization is not entirely accurate. It is correct as to rulings on questions of substantive law. On the other hand, it is possible for differences of procedure occasionally to lead to different results of the litigation. For example, liberal discovery permitted by federal procedure may enable a party to prove his claim or to establish his defense, which he may be unable to do in a state where the scope of discovery is more limited.

While the basic principles, at first blush, seem simple, doubts at times began to arise as to what constituted procedure and what was comprehended in substantive law. There is a twilight zone. Gradually by the traditional case-by-case method, the penumbra was contracted and the area of uncertainty was diminished. The *Hanna* case takes an important step in this direction.

One of the early decisions in this field was *Sampson v. Channell*,[8] determined by the First Circuit. In that case there was presented the question whether the burden of proof on the issue of contributory negligence in an action to recover damages for negligence, was to be governed by state law or by the Federal Rules of Civil Procedure, which by Rule 8(c) required contributory negligence to be pleaded as an affirmative defense. In some states the local law imposes on the plaintiff the onus of establishing freedom from contributory negligence. Such proof is considered an element of the cause of action. In other jurisdictions contributory negligence is regarded as an affirmative defense and, therefore, the burden of proving it is cast on the defendant. In an elaborate and well considered opinion by Judge Magruder, the

7. 304 U.S. 64 (1938).

8. 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

court held that the burden of proof as to contributory negligence should be classified as a matter of substantive law rather than procedure. The court pointed out that the incidence of burden of proof in such an instance may determine the outcome of the case, and that the situation seemed to call for the application of the rule of the *Erie Railroad* case. The opinion also dealt with another topic, namely, whether the law of the forum or the law of the state where the cause of action arose, was applicable, but this subject is outside of the scope of the present discussion.

Later the Supreme Court in *Palmer v. Hoffman,*[9] approved the ruling of the *Sampson* case, stating that, "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." In an analogous decision, *Cities Service Oil Co. v. Dunlap,*[10] the Supreme Court held that the burden of proof on an issue of *bona fide* purchase without notice was not within the category of practice and procedure but was a question of substantive right. The Court observed that the matter involved a valuable assurance in connection with titles to property. The conclusion was reached that under the doctrine of the *Erie Railroad* case, the subject was governed by state law and not by the Federal Rules of Civil Procedure.

Decisions thus far reviewed constitute important steps in the direction of clarifying the distinction between substantive rights on the one hand, and practice and procedure on the other, and the relation of the doctrine of the *Erie Railroad* case to the Federal Rules of Civil Procedure. Any matter that was involved in the cause of action itself or in a defense to it, was to be regarded as substantive and therefore governed by local law. The result did not encroach or infringe in any respect upon the predominance of the Federal Rules of Civil Procedure in all procedural matters.

In *Sibbach v. Wilson & Co.,*[11] the Supreme Court had occasion to delineate and define the scope of the rule-making power as concerned federal civil procedure. Apparently for the first time the validity of one of the federal rules was attacked. Rule 35 providing for physical examinations was assailed as being outside of the orbit of the authority conferred on the Supreme Court by Congress to regulate pleading, practice and procedure in the district courts. It was argued that the rule abridged substantive rights. This contention was overruled and the validity of the rule was sustained. The Court stated that the test

9. 318 U.S. 109, 117 (1943), *rehearing denied,* 318 U.S. 800 (1943).
10. 308 U.S. 208, 212 (1939).
11. 312 U.S. 1 (1941).

whether a matter was one of procedure or substantive law ". . . must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[12]

In this decision the Supreme Court helped to clarify the distinction between procedure and substantive law by protecting its power over the former and at the same time drawing a definite boundary line between the two. Its significance is silhouetted graphically by the dissenting opinion, which urged that the rule-making power did not extend to drastic changes in public policy as to vital matters, such as those affecting privacy. In answer to this argument the majority opinion emphasized the fact that the rule-making power comprehended important and substantial rights as well as those of lesser importance, as long as they were in the field of procedure. The fact that a rule might result in a major change of policy was held not to preclude the Supreme Court from adopting it.

In *Guaranty Trust Co. v. York*,[13] the Supreme Court held that the applicability of statutes of limitations was to be regarded as substantive rather than as procedural for the purpose here discussed, and, therefore, was to be governed by state law. While in some connections statutes of limitations have been deemed to be part of adjective law as being directed to the remedy rather than to the right, they actually determine the right to maintain an action because of the lapse of time and, therefore, for the purposes here involved are properly classified to be within the realm of substantive law.

In *Byrd v. Blue Ridge Rural Electric Co-op.*,[14] the Supreme Court held that in respect to distribution of functions between judge and jury, the federal courts were not bound by state law, but were required to follow uniform federal practice. While this case did not deal with the Federal Rules of Civil Procedure vis-a-vis the doctrine of the *Erie Railroad* case, it has a significance in the present discussion in that it demonstrates the wholesome desire of the Supreme Court to sustain control of uniform procedure in the federal judicial system, and to vindicate its complete independence of state practice.

At this point it is necessary to refer to two decisions of the Supreme Court which seemed to deviate from the line of cases just considered. In *Ragan v. Merchants Transfer & Warehouse Co.*,[15]

12. *Id.* at 14.
13. 326 U.S. 99 (1945), *rehearing denied,* 326 U.S. 806 (1945).
14. 356 U.S. 525 (1958), *rehearing denied,* 357 U.S. 933 (1958).
15. 337 U.S. 530 (1949), *rehearing denied,* 338 U.S. 839 (1949).

a tort action was brought in the federal court in Kansas, jurisdiction being based on diversity of citizenship. In accordance with the federal rules the suit was instituted by filing a complaint with the court and a summons was issued by the clerk. Service was had almost four months later. Kansas had a two-year statute of limitations applicable to tort claims. The statute had run between the filing of the suit and service of the summons and complaint. It was claimed by the plaintiff, however, that the filing of the complaint constituted the commencement of the action under the federal rules and that, therefore, the suit was not barred. A Kansas statute, however, provided that an action should be deemed to have been commenced on the date of the service of the summons. The Supreme Court held that the Kansas statute was applicable under the *Erie* doctrine, and that the federal rule as to the manner of commencement of the action was not determinative.

In *Cohen v. Beneficial Industrial Loan Corp.*,[16] the Supreme Court ruled that a state enactment requiring the plaintiff in a stockholder's derivative suit, where federal jurisdiction is based on diversity of citizenship, to post security for reasonable expenses of the defense as a condition of maintaining the action, is applicable in the federal court. In both the *Ragan* and the *Cohen* cases, the Supreme Court held that the state statute was not a mere procedural device but affected substantive rights. In each instance there were dissenting opinions.

It would seem that these two decisions created some uncertainty as to the boundaries of the twilight zone between procedure and substantive law in the field which we are discussing. They emphasize the importance of the recent decision in *Hanna v. Plummer*.[17] As has already been stated, *Hanna v. Plummer* held that service of process in actions in federal courts, even where jurisdiction is predicated on diversity of citizenship, is to be governed by the federal rules and not by local statutes which may prescribe a different manner of service. It would seem to follow as a corollary that the federal rules would be equally applicable to the manner of commencing an action in the federal courts and that, therefore, the *Ragan* case may be deemed to have been overruled. Mr. Justice Harlan in his concurring opinion in the *Hanna* case expressly stated: "I think that the decision [i.e. in the *Ragan* case] was wrong."[18] Whether in the light of the comprehensive discussion in the opinion of Chief Justice Warren in the *Hanna* case, the same solution should be reached in the problem in-

16. 337 U.S. 541 (1949).
17. 380 U.S. 460 (1965).
18. *Id.* at 477.

volved in the *Cohen* case, is no doubt a matter for future consideration if occasion arises.

The vital importance of the *Hanna* case and its felicitous augury for the future is that it ascribes an overriding force to the federal rules. They are to prevail as against any conflicting state statute or decision, even though the state law is based on considerations of public policy which differ from those reflected in the federal rules. The decision is a clear vindication of the potency and enduring permanence of the great reform in federal procedure that came into being in 1938. In the course of his opinion, the Chief Justice made the significant observation that "The Erie rule has never been invoked to void a Federal Rule."[19] He also remarked:

> . . . the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[20]

Again, he stated:

> *Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.[21]

Thus the Supreme Court has concluded that federal rules governing pleading, practice and procedure in the United States district courts are paramount, even within the area in which matters are rationally capable of being classified as either substantive or procedural, and even if the federal rules differ from state law on the same subject. The vigor and the broad scope of the federal rules are clearly established by the *Hanna* case.

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19. *Id.* at 470.
20. *Id.* at 472.
21. *Id.* at 473.