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This is one of the addresses which were delivered at the Judicial Conference of the Tenth Circuit Court of Appeals. The address of President Robert L. Stearns has been previously published in the *Rocky Mountain Law Review*. Other lectures will be printed in subsequent issues. Judge Alfred Murrah's address appears in the July issue of the *American Bar Association Journal*.

The Federal Rules are the vintage of 1938, the Colorado Code that of 1887. The latter was patterned largely on the Field Code of New York, which had been hastily drafted and rushed through the New York legislature to take advantage of a waning reform movement. The Rules are the result of three years study by a very eminent advisory committee selected by the Supreme Court of the United States, which was adequately financed in its research.

The Rules were adopted as a unit. So was the Code, but many amendments have been engrafted upon it by subsequent legislatures, as well as by the Supreme Court.

In 1938 the Colorado Bar Association voted to merge the Colorado Code, as far as practicable, with the Federal Rules. Since then a committee of the Colorado bar, with no funds except for printing and postage, has been wrestling with the problem. Its first draft has been completed, and early in July the second draft should be mailed to every member of the Colorado bar.

The Federal Rules are a combination of the old federal equity rules and statutes, the present English system and the state codes. The Colorado Code was a revolt against common law pleading. Yet despite statements therein that it was to be liberally construed, the influence of common law decisions was long evident in the construction of its provisions. That same tendency has been reflected in a few of the federal decisions on the Rules.

In considering the Federal Rules in relation to the Code, we must ascertain, first, whether or not the Federal Rules are all-inclusive; second, whether they themselves incorporate the state practice to any extent; and, third, whether certain state statutes or decisions not mentioned in the Rules are controlling irrespective of the Rules. Then we will consider the Rules and the state practice.

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Rule 1 would seem to answer all three of these questions. It states: "these rules govern the procedure * * * in all suits of a civil nature * * * with the exceptions stated in Rule 81." Rule 81 then specifically itemizes the excluded exceptions. So now we might state: "Here in these 86 Rules we have all the procedure."

However, we soon find that this is optimistic, because Rule 64 says, "all remedies providing for seizure of person or property * * * are available under the circumstances and in the manner provided by law of the state in which the district court is held." Therefore, in arrest, attachment, garnishment, replevin and similar remedies resort must be had to the state code of civil procedure. But this is not all. The state law also controls, by Rule 4, constructive service of process; by Rule 17 (b), capacity to sue or be sued; and by Rule 69 (a), execution and supplementary proceedings. Hence the Rules do refer to state provisions and require us constantly to refer to the Code in matters so identified.

We now come to our third question—are there any state statutes or decisions which are not mentioned in the Rules which control procedure? The answer is yes, there are many such, and each district will face its own set, which may be entirely different from those in any other district. This occurs when these statutes and decisions affect substantive law, and they control, even if in direct contradiction of the Rules. This is because the much discussed opinion in *Erie Railroad vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, was decided after the advisory committee had made its report, and in no way could this decision have been contemplated by it. This case holds that in matters of substantive law where the claim arises under the state law, not only are the federal courts bound by the interpretation placed by the state courts upon the statutes of the state, but are also bound by the state construction of the common and non-statutory law of the state.

Therefore, in drafting a complaint or answer based upon state statutes or practice, whether statutory or common law, the practitioner must first examine the decisions of the state to ascertain the substantive law, and then he should see that his complaint or answer sets forth the requirements thereof.

So far we have found only two places in Colorado where these matters of substantive law might apply to pleading. The first is the Colorado statute on libel and slander, Section 75 of the Code. It provides that the defendant in his answer may allege any mitigating circumstances to reduce the amount of the damages. This we believe to be substantive law, so we amended Rule 8 (c) on affirmative defenses, and added a sentence, "Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded."

The second instance is the difference between the statutes of limita-

tions on causes of action arising in Colorado and those arising in a foreign state. Rule 2 says that a civil action is commenced by filing a complaint, and the Colorado statutes on limitations in all causes of action arising in Colorado have something to the effect that the action is barred unless *commenced* in a certain number of years. Hence, filing a complaint would toll the statute, under either Rule or Code. But Section 17, Chapter 102, Volume 3, C. S. A., states, "when a cause * * * arises in another state or territory or in a foreign country, and by the laws thereof an action cannot be maintained against a person *by reason of the lapse of time*, an action thereon shall not be maintained against him in this state." If in that foreign state the law requires a summons to be served to bar the statute, the fact that it was not served must be pleaded, and then Rule 2 would not apply.

To the same effect we find the federal decisions holding that if any of the various affirmative defenses in Rule 8 (c) must, under state law, be negatived in the complaint, the state rule must prevail.

In Illinois and New York the statutes require the plaintiff in a damage suit to plead and prove his freedom from contributory negligence. This was held substantive law, which must be followed: *Francis vs. Humphrey* (D. C. Ill.), 1939, 25 Fed. Supp. 1; *Schoff vs. Muller Dairies* (D. C. N. Y.), 1938, 25 Fed. Supp. 20.

In matters of evidence and procedure therein, we likewise find that where substantive law enters in, the state decisions control. One Colorado rule comes to mind.

In an unbroken line of decisions, from *Knox vs. McFarren*, 4 Colo. 586, to *Fleming vs. McFerson*, 94 Colo. 1, the Colorado Supreme Court has held that a party has the right to rely upon a recorded deed, and that the burden of showing that he is not a bona fide purchaser for value is upon the one so asserting. This is the same as the Texas rule. And the Supreme Court of the United States, in *Cities Service Oil Co. vs. Dunlap* (1939), 84 L. Ed. 185, held in an action to quiet title by the holder of the recorded deed that the burden of proving those facts was on the respondent.

So much for the incompleteness of the Rules, and the necessity for outside study in certain cases.

Now let us look at the problem; can the Rules be merged with the Code under our state practice and customs so as to form one instrument? We attempted to answer this question by using the Rules as far as possible, but retained the Colorado provisions where we believed that the lawyers overwhelmingly prefer them to the Rules, or where the Constitution of Colorado so requires. Then we added the Code provisions omitted from the Rules and thus combined and merged the Rules and the Code into a complete plan for civil procedure. But this only applied to

civil actions. Special proceedings, in the main, are still left in a class by themselves, as at present under both Rules and Code.

Some of our problems, and objections to a complete merger, will readily become apparent upon an examination of the two procedures.

Rule 3 provides that the complaint shall be filed and thereafter, under Rule 4, the clerk issues the summons. But the lawyers of Colorado have always been empowered by statute to issue the summons themselves. About 1912 the Supreme Court made a rule limiting the issuance of summons to the clerk, and such a protest arose from the bar that it was quickly repealed. The advantage of the practice is that in case of an emergency a lawyer can forthwith get out a summons and serve the defendant, and this is of particular value in a large city or when the lawyer does not live in the county seat. Hence the Colorado practice was retained and the lawyer can issue the summons. However, despite the Code, many lawyers wonder about the constitutional right of a lawyer to issue a summons, which is a court process in the name of "The People of the State of Colorado."

Now for constructive service of process and those matters mentioned in Rules 17, 64 and 69, where the Rules follow the state practice. That was rather an easy job. All we did was to take these portions of the Code, attempt to harmonize their provisions with the other language of the Rules, and insert them in their respective places. Yet to our amazement no other state has handled this situation in this manner. Arizona, which has adopted the Federal Rules almost in toto, in its Rule 64 uses almost the exact federal words: "all remedies providing for seizure of person or property * * * are available under the circumstances and in the manner provided by *the law of the state.*" In their drafts Oregon says that these remedies are available as "now provided by law," and Rhode Island makes things easy with the expression "by the law of *this* state." Those three states, therefore, require the use of another volume to ascertain just what is the remedy, and thus their new Rules do not make a complete Code.

Rule 5 (b), on how service is made, leaves too much room for argument when it states that the paper may be left with "some person of suitable age and discretion." A fifteen-year-old boy might possess age but not discretion. The Colorado Code fixed fifteen years, but the committee changed it to eighteen years, hoping that both age and discretion would thereby be secured, but in any event stopping a possible dispute as to construction.

Now we come to a provision which has given us more trouble than any other, and that is Rule 5 (d), on filing and serving, and Rule 12 (a), (e) and (f), on defenses. The Rules fix most dates from the time of service. But this opens the door to disputes as to when service was

actually made. Hence the committee decided that time should be fixed by the date of filing, about which there could be no argument. This resulted in many amendments which in several instances took a lot of time to study and correlate.

Rule 8, "General Rules of Pleading," has been very much construed by the federal courts. Its subdivision (e) (1) has resulted in considerable conflict of decision and doubt as to whether the Rules permit pleading on information and belief and whether ultimate facts or conclusions of law can be set up either in the complaint or in the answer. This subdivision now reads:

> "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required."

To get away from the present uncertainty of decision, we have changed it to read:

> "Each averment of a pleading shall be simple, concise and direct. *When a pleader is without direct knowledge allegations may be made upon information and belief.* No technical forms of pleading or motions are required. *Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts, as distinguished from conclusions of law.*" (The italics are the additions.)

Rule 10 (a) states how parties shall be named, but makes no provisions for parties whose names are unknown or for unknown parties. We therefore added these sentences:

> "A party whose name is not known shall be designated by any name and the words 'whose true name is unknown'. In an action in rem unknown parties shall be designated as 'all unknown persons who claim any interest in the subject matter of this action.' "

Except possibly by inference, the rules make no provision for attacking an answer for insufficiency in law (our old demurrer practice). Hence we added to Rule 12 (f), which is captioned "Motion to Strike," these words:

> "The objection that an answer or separate defense therein fails to state a legal defense may be raised by motion filed under this subdivision."

Let us now take up the deposition and discovery provisions in Chapter V of the Rules. As far as we are advised, these are by far the most advanced steps taken to date in any jurisdiction. Yet we think they still have two very serious defects, as well as one which is too expensive for the average litigant.

Rule 26 allows unlimited right to take a deposition after answer, but only by leave of court before that time. Our committee believes that

this is an unnecessary and expensive practice. In Colorado if an attorney lives outside of Denver he would have the extra expense of a trip to the city to get this order. If the judge is absent, nothing can be done until his return, unless we bother one of the judges of the Circuit Court of Appeals. And in states where none of them is in residence that relief is not available. The speaker has known too many cases where service of a summons, accompanied by a notice to take deposition, has brought many a crooked defendant to time right now, where delay would have been fatal. That absolute right to take depositions at any time after the service of the summons is now in our Code and we have preserved it.

The second defect in Rule 26 is that we believe that it is applicable to "actions" alone, and not to "special proceedings." Our Code limits depositions in special proceedings so that they can only be taken after an issue of fact has been raised. But this is very unjust. The federal district courts do not have probate proceedings, but the state courts do. Under Colorado practice a will contest arises from a caveat to the petition to probate the will and the answer thereto. The issue of fact is only between the caveat and the answer. Suppose an important witness is at the point of death. No legal deposition can be taken until that answer is filed, and if the proponent of the will can successfully stall for time he wins his case by the death of the witness. Many other instances could be cited to show just as great a necessity for the immediate taking of a deposition in a special proceeding as in an action. Hence we have provided in Rule 81 that Rules 26 to 37 shall apply to all special proceedings so that the benefit of discovery is available to all litigants.

This, of course, raises the entire question of how special proceedings should be handled. We believe that so far as practicable they should be covered by the Rules. We have not yet been able to decide on the language to show when they are covered and when they are not. We expect to settle that matter at our three-day committee institute next week.

Now for an expensive section of the Rules. In small towns good stenographers are scarce, and hiring an outside stenographer at folio rates is always costly. Hence we felt that Rule 28 (c) prohibiting the taking of depositions by an employee of an attorney was an unnecessary hardship to litigants, and that portion of the subdivision was stricken by us. Under Rule 30 (b) parties have plenty of protection and can secure an order for another stenographer if they believe the one designated will be incompetent or unfair.

It is always much easier to criticize than to construct. And so while drafting a Rule is a very difficult job, finding flaws in it later, when a lawyer is called upon to determine the meaning of a Rule, is comparatively simple. The last word "therein" in the first sentence of Rule 36 (a) is an illustration of this.

> "At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth *therein.*"

Does this "therein" refer to the facts set forth in the documents or in the request? We believe it means the latter, so we have changed "therein" to "in the request."

Rule 43 (b) provides that the "managing agent" of a party may be called for cross examination. But that phase is not defined and hence is uncertain. Under *London Guarantee & Accident Co. vs. Officer,* 78 Colo. 441, 444, it was held that the term "managing agent" meant just one party, which is too narrow a construction. Hence, we defined the term in our Rule 110 by stating "a superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules." In Rule 43 (b) we also added to the list of employers whose employees could be cross examined the words "body politic," so that if a suit was by or against any municipality, county or state agency, cross examination of its officers or agents would be proper.

We very much preferred the appellate procedure of the Rules to the writ of error practice of the Code. But the Colorado Constitution provides for writ of error from the County Court to the Supreme Court, and for that reason in Colorado in 1912 writ of error practice was substituted for appeals. Hence we adhered to that practice rather than the federal procedure.

However, in Rule 75 the federal requirement in subdivision (b) for filing two copies of the stenographer's transcript needlessly enriches the court reporter, while the preparation of the record by the clerk under subdivision (g) is far more expensive than the state practice.

When we got through with the Rules we had to add the Code sections which were not covered. And now, except for the excluded special proceedings, which we will enumerate in Rule 81, our proposed Rules are a completed merger of the Rules and the Code. In the main we have made one system of practice for both courts, in the main both federal and Colorado decisions will be applicable to the subdivisions of the Rules because we have followed the same structural system, and in the main we believe that our proposed Rules will be a great advance on the present Code.

In any event, if adopted, the proposed Colorado procedure will be enacted, as were the federal measures, by rule of court, instead of by act of the legislature. If they work well, they will be retained; if they are faulty, they can easily be amended. And that step, the governing of procedure by the courts instead of the lawmakers, is the great move forward both in federal and state practice.

Yet there is one danger signal ahead of both sets of rules. The Federal Rules now are, and ours, if adopted, will be, based upon power allegedly conferred by the legislature. Personally, the speaker believes the court has this power inherently, but has been unwilling to exercise it. Passing that point, however, future legislation is very apt to be enacted both by Congress and state assemblies, contradictory of the Rule provisions.

One interesting case in point is the action of Congress in regard to patent procedure. In 1897 (Title 35, Sec. 69, U. S. C. A.) an act was passed which provided, among other matters, that

> "In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters."
>
> (Then follow five paragraphs, including fraud.)

This was still on the statute books when the Rules went into effect in September, 1938, and was repealed by them.

Yet on August 5, 1939, Congress re-enacted the same statute practically verbatim! We don't know why it was re-passed. But we do know that under that statute you simply deny infringement in your answer and then give notice, 30 days before trial, of what you are going to prove. The rules are different. Under 12 (b) you must assert every defense in the answer, and under 9 (b) fraud must be stated with particularity. We know of no decision on this point, but right now we are faced with the interpretation of this statute in a patent case in Nebraska. We hope we are right, as we followed the rule and disregarded the statute, on the theory that Congress, having delegated its power to control procedure to the Supreme Court, cannot indirectly reassume it.

But the fact that such a statute has been passed, and that many more will be passed in the future, illustrates the need for vigilance. The courts now have power, either inherently, as the Colorado Supreme Court has held in *Kohlman vs. People*, 89 Colo. 8, 32, or by the federal and Colorado statutes specifically conferring it, to control procedure. If this right rests upon statute alone, the bar must see that that power remains in the courts, the American bar must check the procedure enactments of Congress, and the state bars the procedure statutes of their legislatures. We have Rules which are intended to facilitate the rights of litigants at a minimum of cost. We, the bar, will endeavor to keep our legislators in line, not to overturn these Rules. And we, the bar, on behalf of ourselves and our clients, look to you, the judges who construe the laws, liberally to interpret these Rules so that in fact they will lend themselves "to secure the just, speedy and inexpensive determination of every action." (Rule 1.)