Twelve Months Under the New Rules of Civil Procedure

By ALEXANDER HOLTZOFF *

In accepting the invitation kindly extended to me by the Senior Circuit Judge to discuss "Twelve Months Under the New Rules of Civil Procedure," I felt a considerable degree of delicacy. It seemed to me that it involves some presumption on my part to speak on this subject before this select group, for it is you and your colleagues throughout the Federal judicial system that have breathed the spirit of life into the new Rules and made them a vital and virile force. On the other hand, I am very much in the position of an observer reporting on the results of a battle to the generals who had borne the brunt of the fighting. In spite of my hesitation and misgivings, however, Judge Biggs' courteous invitation leaves me no alternative but to venture on this interesting and important topic.

In the history of law reform the year 1938 will mark a noteworthy epoch. The adoption of the new Federal civil procedure ranks in its importance and significance on a par with the abandonment of common law pleading in England as a result of the adoption of the Hilary Rules in 1834, and the inauguration of the present simplified procedure in that country in 1875. President Roosevelt has recently characterized this far-reaching step as a notable accomplishment and as "an outstanding milestone along the road to law reform."

The separation between law and equity, which persisted in the Federal Courts in spite of its abrogation in most of the States, and the many varieties of procedure in actions at law, which were necessitated by the Conformity Act, led to a bewildering complexity in the field of Federal civil procedure. The Third Circuit afforded a striking illustration of this condition. Each of the States comprising this busy jurisdiction has a different type of pleading and practice, which it was incumbent upon the Federal Courts to follow.

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The new Federal procedure has met with universal acclaim, as, in addition to possessing the virtue of uniformity, it may be said to constitute the quintessence of simplicity. Occasionally, a few lawyers, momentarily oblivious of the fact that the function of the Courts is to administer justice rather than to cultivate an artificial and useless science, have uttered sighs of regret because the Rules have cast into oblivion much abstruse and laborious learning relating to minute points embraced in such intriguing subjects as forms of actions, refinements of pleading, joinder of parties and of causes of action, counterclaims, and other similarly enlivening topics too numerous to mention. It is perhaps this general attitude, which is at times exhibited by some members of the legal profession, that Shakespeare had in mind when he put in the mouth of Rosalind this quip, in answer to the question, "With whom does time stand still?" "With lawyers in vacation, for they sleep between term and term, and then they perceive not how time moves."

The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as "the sporting theory of justice"; to provide efficient machinery for the ascertainment of truth; and to expedite a determination of each controversy on the merits. The watchword of the new procedure is found in Rule 1, which provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Anyone who has followed the application of the Rules during the first twelve months of their existence must inevitably reach the conclusion that this prin-

ciple has been kept in view and observed by the Courts. The Rules have been interpreted and administered in the liberal and flexible spirit contemplated by their framers. The Courts are entitled to strong commendation on the effective manner in which they have adopted and applied the new procedure. They are justified in feeling a sense of achievement.

The path of every outstanding reform and every notable innovation is, however, beset with pitfalls. The new Federal procedure was no exception. It was menaced by two serious dangers. First, there was lurking the possibility that the new Rules might be destroyed in a bog of technical decisions. The history of the New York Code of Civil Procedure stood out as a horrible example of what may eventually happen to a simple practice code. Fortunately, the Federal Courts have not exhibited any tendency of this nature, and so far this peril has been avoided. The second danger confronted by the new procedure was the possibility that such variations might gradually arise in the interpretation and application of the Rules in the 85 districts as gradually to cause a departure from the uniformity envisaged by the framers of the Rules and eventually lead to a development of 85 varieties of procedure, one of the serious conditions which the new Rules were intended to remedy. This hazard, however, has likewise been averted. The Courts, which have been piloting and steering the new craft, have charted a safe course. So long as there is no deviation from it, there is no danger that the ship may be stranded on the shoals of technicalities or wrecked on the rocks of divergent interpretations. Continued vigilance is, however, indispensable in order to preclude even a possibility of such a frustration of the purpose and objective of the new procedure.

It may be of interest to examine some of the principal problems that were presented to the Courts for solution during the first twelve months of the Federal Rules of Civil Procedure and to summarize some of their experiences, which may prove of general interest.

An inquiry has been occasionally propounded whether the Conformity Act is still in effect and may be enforced as auxiliary to the new procedure. Section 1 of the Act of June 19, 1934, however, which empowered the Supreme Court to promulgate

rules of civil procedure, clearly repeals the Conformity Act. The new Rules must be regarded as the sole guide to Federal civil procedure, except, of course, in respect to matters which are expressly excluded from the operation of the Rules by their very terms.

A topic that seems to be appropriate for consideration in this discussion is that of pleading. Brevity and simplicity of pleading is one of the principal objectives of the Rules. In order to assist in attaining this goal, illustrative forms are included in the appendix to the Rules. One of the questions that has arisen is, what constitutes a sufficient averment of negligence. Among the forms contained in the appendix is a complaint in an action for personal injuries caused by the negligent driving of a motor vehicle. It is alleged in the complaint that the defendant negligently drove a motor vehicle against the plaintiff, but no statement is made as to the negligent acts or omissions with which the defendant is charged. This form appears to have been a source of considerable perturbation. A doubt has been raised as to whether the form contains a sufficient statement of a couse of action, or rather a claim, for the term "claim" has happily superseded the phrase "cause of action." Curiously enough, it is a peculiar paradox that in this respect common law pleading was simpler than code pleading. At common law, an allegation of negligence without specification of the acts of negligence sufficed, while some authorities under the codes have insisted that such an allegation must be expanded, in order to indicate the particular negligent acts or failures to act of which the defendant was being accused. Last January, in the Southern District of Ohio, the form contained in the appendix to the Rules was sustained and a mere general charge of negligence without specification was held insufficient.[1] Subsequently, the Circuit Court of Appeals for this Circuit rendered a progressive opinion, approving a similar form, and sustaining the sufficiency of a general allegation of negligence,[2] thus allaying any doubt that may have existed on this point.

Another question that has aroused a considerable amount of interest in connection with pleading under the new Rules

[1] *Hardin* v. *Interstate Motor Freight System*, 26 Fed. Supp. 97.
[2] *Sierocinski* v. *E. I. du Pont DeNemours & Co.*, 103 F. (2d) 843 (C. C. A. 3rd).

relates to the subject of contributory negligence. Rule 8, Subsection (c) enumerates certain defenses that must be pleaded affirmatively. Among those listed is contributory negligence. It has, of course, been the general rule in the Federal Courts that in a negligence action the burden of pleading and establishing contributory negligence is on the defendant. On the other hand, in some of the States, New York and Illinois for example, the absence of contributory negligence must be pleaded by the plaintiff and proved as a part of his *prima facie* case. On April 25, 1938, almost five months after the Rules were promulgated, the Supreme Court handed down its opinion in *Erie Railroad Co.* v. *Tompkins,* which has already been a *cause celebre.*[3] It overruled the doctrine of *Swift* v. *Tyson*[4] that on matters of general jurisprudence the Federal Courts might develop their own common law and held that on all questions of substantive law the Federal Courts were bound to enforce the law of the States irrespective of whether it was statutory or common law.

This decision, as has been remarked by one District Judge, has "legally speaking turned the world upside down."[5] One of the necessary consequences of the doctrine of *Erie Railroad Co.* v. *Tompkins* has been a change in the Federal rule that contributory negligence is an affirmative defense. This, indeed, remains the rule applied by the Federal Courts in those States in which it constitutes the law of the State. In States like New York and Illinois, however, in which the opposite doctrine prevails, it becomes incumbent on the Federal Courts to require the plaintiff to establish the absence of contributory negligence as a part of his case. What, then, happens to the enumeration of contributory negligence as an affirmative defense in Rule 8? This subject was discussed at length in a well-considered opinion in the Eastern District of Illinois.[6] The conclusion was reached that in a jurisdiction in which the burden of showing the absence of contributory negligence was on the plaintiff, the defendant was not required to interpose contributory negligence as a defense, but where the burden of establishing contributory

[3] 304 U. S. 64.
[4] 16 Pet. 1.
[5] Wham, J., in *Francis* v. *Humphrey,* Eastern District of Illinois, 25 F. Supp. 1, 3.
[6] *Francis* v. *Humphrey, supra.*

negligence was on the defendant, it was necessary to plead it affirmatively. The Court suggests that this conclusion is not inconsistent with the plain meaning of Rule 8(c), since the Rule should be construed as merely requiring contributory negligence to be pleaded affirmatively whenever it is used as a defense, but not if it plays a different role in the litigation. In other words, if the defendant has the burden of proving contributory negligence, he must plead it affirmatively in order to avail himself of the defense, and is not at liberty to advance it under a general denial. He does not have to plead it where the plaintiff carries the onus of showing freedom from contributory negligence. This solution seems entirely reasonable and satisfactorily reconciles the doctrine of *Erie Railroad Co.* v. *Tompkins* with the provision of Rule 8(c).

Considerable debate has been engendered in regard to the proper scope and function of bills of particulars. It must be observed at the outset that there is a sharp differentiation between bills of particulars in the code States and bills of particulars under the new Rules. Under the codes, bills of particulars are generally ordered after issue is joined, for the purpose of furnishing information needed by the moving party in preparing for trial. Under the new Federal Rules of Civil Procedure, an application for a bill of particulars lies only before the answer is served. In fact, it has been held that under the new Rules motions for a more definite statement and motions for bills of particulars are interchangeable and coextensive. The purpose of such relief is to obtain only such information as is required by the moving party in order to enable him to plead. On the other hand, information needed in preparation for trial is secured by interrogatories. It must be borne in mind in this connection that procedure by interrogatories does not exist under some of the codes, and that,

therefore, liberal use of bills of particulars is essential in the local Courts in such jurisdictions.

This limitation on the employment of bills of particulars has been worked out in a number of cases decided under the new Rules, most of them in the Southern District of New York. It appears to be a desirable restriction, since it assists in expediting joinder of issue and thereby the trial. This result is due to the fact that a defendant who moves for a bill of particulars is not required to serve his answer until he receives the bill. Therefore, a liberal use of bills of particulars would tend to prolong litigation rather than to speed it. On the other hand, no prejudice results from circumscribing the scope of bills of particulars, since the desired information can readily be secured by interrogatories without postponing the joinder of issue.

My summary of the development of the law on this point would not, however, be complete were I to fail to observe that the cases are by no means in unison. Different Judges have reached divergent conclusions. Some decisions have been rendered which give to bills of particulars a broader scope than seems to accord with what I may perhaps denominate as the majority rule.

An important and far-reaching innovation in legal procedure is to be found in third-party practice, which makes it possible to avoid circuity of action by enabling a defendant to bring in as a third-party defendant either a person who is liable over to him on the plaintiff's claim or who is originally liable to the plaintiff. This procedure is not entirely a novelty in the Federal Courts, for it has been known in admiralty for a great many years. Morever, in those few States in which it formed a part of the State procedure, it was employed by Federal Courts in actions at law, pursuant to the requirements of the Conformity Act. The Rules, however, make third-party practice an inherent feature of Federal civil procedure.

At the very inception, a vital question arises in connection with the use of this contrivance, namely, is it necessary that there exist an independent ground of Federal jurisdiction for the third-party complaint? In other words, if the original suit is based on a diversity of citizenship, must there be a like diversity between the defendant and the third-party defendant?

The solution of this fundamental problem would seem in turn to depend on the answer to the query whether a third-party proceeding is to be regarded as ancillary to the main suit or as an independent proceeding. If the former, obviously an independent ground of Federal jurisdiction is not needed. If the latter, a third-party complaint may not be maintained unless the defendant can show Federal jurisdiction for the controversy as between him and the third-party defendant. Manifestly, if the narrow view were adopted, third-party practice could be but rarely invoked, especially in cases in which jurisdiction is based on diversity of citizenship. Frequently, there may be a diversity of citizenship as between a plaintiff and defendant without the existence of this element as between the defendant and some person who has agreed to indemnify him, or who is liable to contribution.

The Circuits Court of Appeals do not seem to have spoken on this matter as yet. The District Courts, however, guided perhaps by the inspiring judicial admonition that "we must let our minds be bold," fortunately are, one by one, adopting the view that a third-party proceeding is ancillary or auxiliary to the main action and, therefore, does not require an independent ground of Federal jurisdiction. This conclusion has been reached in two districts in this circuit, the Western District of Pennsylvania and the District of New Jersey.[7]

Third-party practice under the new Rules covers a more extensive field than third-party practice under some of the codes, for it is not limited to cases in which the third-party defendant is secondarily liable to the original defendant, but extends also to instances in which the third-party defendant is directly liable to the plaintiff. This distinction was comprehensively discussed in a case decided in the District of Columbia.[8]

The next topic to which I should like to advert is pretrial procedure. A wealth of experience elsewhere formed a substantial background for the introduction of pretrial procedure into the Federal Courts. In England, where it is known by the appellation of "summons for directions," it has been in vogue

[7] *Bossard* v. *McGwinn* (W. D. Pa.), 27 F. Supp. 412; *Kravas* v. *Great Atlantic & Pacific Tea Co.* (W. D. Pa.), 28 F. Supp. 66; *Satink* v. *Holland* (N. J.), 28 F. Supp. 67.

[8] *Crim* v. *Lumbermen's Mutual Casualty Co.*, 26 F. Supp. 715.

a great many years. Every case is regularly subjected to this process for the purpose of defining and restricting the issues to those actually in controversy. Some years ago it was introduced in the local Courts in Detroit with a view to reducing inordinate arrears and excessive congestion of the dockets. It proved highly successful and was transplanted to Boston, where it met with equally gratifying results. It has been particularly effective where the Court dockets are overcrowded and some expedient is needed for breaking the jam and speeding the disposition of cases.

Within a few weeks after the Rules went into effect, pretrial procedure was adopted as a regular feature in the District Court for the District of Massachusetts. The entire jury docket was called for pretrial procedure by one of the Judges, who was assigned to devote his entire time to this work. The session consumed three weeks. During that period 313 cases were filtered through this mechanism. The result was a final disposition of 130 cases, or over 40 per cent of the aggregate. As to the balance, stipulations in respect to facts, documents, and similar matters were frequently made, which considerably shortened the trials. The result was a substantial reduction in the congestion of the docket and in the waiting period for trial as regards cases that were ready for disposition. So successful was the experiment in respect to jury cases that this fall it is planned to extend the practice to nonjury cases.

The District of Oregon likewise adopted pretrial procedure for every case as a matter of ordinary routine. Its experience is equally favorable. Many other districts have invoked pretrial procedure to a greater or less degree. Among them is the District of New Jersey, where a very large percentage of all the cases on the docket has been subjected to the process. The universal conclusion, wherever this practice has been invoked, is that it invariably results, at the very least, in abbreviating trials and thereby expediting the progress of litigation through the judicial mill.

It may be of interest to observe that the District Court for the District of Columbia has recently adopted a rule on the subject and has announced that commencing this month a pretrial docket will be called as a regular feature of the business

of the Court, and that one Judge will devote his entire time to this activity. It is believed that the success thus far attained indicates that pretrial procedure has passed the experimental stage and is a device that may be adopted as part of the regular routine throughout the entire Federal judicial system.

One of the noteworthy features of the new Rules is found in their treatment of the subject of discovery. There is provided a veritable arsenal of different discovery weapons, all, however, fashioned to achieve the same end. Their field of usefulness is limited practically only by the ingenuity and resourcefulness of counsel. It will be recalled that these weapons are five in number: depositions, or "examinations before trial," to use the terminology of the Codes; interrogatories; production and inspection of documents and other objects; requests for admissions; and physical and mental examinations. The purpose of discovery is to afford a means not only for securing evidence which the moving party needs in support of his case or defense, but also for procuring information which may be of help in preparing for trial. Consequently, the moving party may take depositions not only for the purpose of obtaining evidence on issues on which he has the burden of proof, but also for the purpose of inquiring into matters relating to his adversary's case. Similarly, the mere fact that the matters regarding which discovery is sought happen to be within the knowledge of the moving party, is no objection to taking a deposition of the adverse party or filing interrogatories in respect thereto. The reason for this conclusion is obvious. Frequently, it is not sufficient for a party to have knowledge of the facts. It is necessary for him to transform them into such shape as would render them admissible in evidence. Moreover, it is manifestly useful and desirable, with a view to diminishing the expense of trials and the time consumed by them, to ascertain in advance to what extent the facts will be admitted by the adverse party.

Requests for admissions have a cognate purpose. If the party on whom such a document is served either is familiar with the facts or else has the facilities for readily ascertaining their accuracy, there is no reason why he should not admit the truth under penalty of being required to recompense the adverse party for the expense incurred in proving the facts at the trial.

The philosophy underlying this procedure is that a lawsuit should not be conducted as a controversy at arm's length, or as a game of chess, in which the most skillful player secures the palm of victory. On the contrary, it is assumed that litigation is to be regarded as an efficacious mode of determining the truth and adjudicating rights. Whatever pertinent information is in the possession of either party must be made available to his antagonist prior to the trial.

An interesting illustration of the use of requests for admissions is found in a case decided in the Eastern District of New York.[9] It involved an action brought to recover under the double indemnity provisions of a life insurance policy. Whether the plaintiff was entitled to receive double indemnity depended on whether or not the deceased died an accidental death, as alleged in the complaint. The insurance company took the position that the death was not accidental, but was the result of a participation on the part of the deceased in a fracas which had been caused by pouring too many libations to Bacchus.

In addition, the defendant contended that the policy had been obtained by misrepresentations, consisting of a concealment of the fact on the part of the insured that he had received considerable medical attention during a specified period preceding the presentation of the application for insurance. Counsel for the defendant served a request for admissions, composed of a long series of sentences or short paragraphs, each comprising a separate detail or distinct fact bearing upon these two issues. The Court upheld the propriety of this course.

I have just briefly epitomized the principal rulings that have been handed down on the subject of discovery during the past twelve months. There have, indeed, been a few decisions that have taken a somewhat narrower view of certain phases of the matter. I believe, however, that my résumé represents the predominant doctrines.

An ingenious approach on the part of the framers of the new Rules to the subject of evidence lends considerable interest to this vital topic. The person whose resourceful mind originated the idea embodied in Rule 43, that the Federal Courts should apply either the Federal or the State law of evidence,

[9] *Walsh* v. *Connecticut Mutual Life Insurance Co.*, 26 F. Supp. 566.

whichever happens to be the more liberal for the moment, is entitled to the gratitude of both the Bar and litigants. Naturally, as rulings on questions of evidence are made in the course of a trial, few opinions are rendered in this branch of the law by *nisi prius* Courts. The Circuit Courts of Appeals have not as yet been called upon to construe the new Rule on this point or to define its scope and application. Notice has been attracted, however, to the consideration given to the matter in the Southern District of New York during the protracted trial of the action brought by the Government under the Sherman Anti-trust Law against the Aluminum Company of America. On one occasion during the proceedings, when a close question of admissibility of a certain item of evidence was presented for decision, the presiding Judge observed:

> "Rule 43 does not deal with the law as to what testimony should be excluded. It deals only with what is admissible under the law of the United States or the law of the State in which the particular Court sits. It is intended to liberalize admissibility of testimony, but has nothing to do with what should be excluded."

It so happened that in that particular instance the State law required the exclusion of the evidence. The Federal cases had not settled the question or worked out a Federal rule. The Judge indicated that he was not bound by the New York rule, but that, since the question was an open one in the Federal Courts, he was free to develop a Federal rule on the subject. He concluded that, if the Federal rule evolved in this manner should admit the evidence, he was free to overrule the objection.

Among the important advances made by the new Rules is that relating to summary judgments. This is a practice that is thoroughly familiar to lawyers practicing in many of the code States. It has had a potent effect in discouraging defenses interposed solely for the purpose of delay and in enabling a party who can show that he is clearly entitled to recover and that there are no material issues really in controversy, to secure a judgment without waiting until the case can be set and reached for trial. The experience of the State Courts, as well as of the English tribunals, had established the usefulness of this device long before it was transplanted into the Federal judicial system. The Federal Courts during the past twelve months have readily

adopted this practice and permitted its utilization in a variety of instances. It has been invoked not only in cases in which the plaintiff was able to show by affidavits or other similar means that no material issues were raised by the answer, but also in instances in which the defendant interposed an affirmative defense, such as the statute of limitations or *res adjudicata,* and was able to show that the plaintiff could not successfully meet the plea. Incidentally, it was held in the Eastern District of New York in an action against the United States under the Tucker Act that the Government was subject to summary judgment procedure to the same extent that another defendant would be under parallel circumstances.

The new Rules have destroyed one of the traps for the unwary that theretofore beset the practitioner in the Federal Courts. I have reference to the metaphysical and esoteric doctrine that if both the plaintiff and the defendant move for a directed verdict, they must be deemed to have waived a trial by jury, although if only one of them makes such a motion, no waiver follows. Incidentally, this was one of numerous instances in which the Conformity Act did not rise to the rescue of the lawyer who practiced principally in the State Courts and entered the portals of the Federal tribunals only on rare occasions. Even in such jurisdictions as New Jersey, for example, in which under the State law no waiver of a jury trial was inferred from the fact that the parties had joined in a motion for a directed verdict, the Federal rule to the contrary nevertheless governed, presumably on the theory that the Conformity Act exacted conformity only "as near as may be." A great deal of satisfaction has been derived by the Bar from the change in Federal procedure in this respect. Needless to say, no deleterious effects have been observed as a consequence of its introduction into the Federal Courts.

Equally welcome was the Rule which permits the Court to take the verdict of a jury subject to a later determination of the questions of law raised by the motion for a directed verdict. The result is practically to introduce into Federal procedure motions for judgment *non obstante veredicto,* a practice that is, of course, especially familiar to Pennsylvania lawyers.

Rule 83 is perhaps worthy of some attention. It authorizes

each District Court to adopt local rules on all points not covered by the general Rules. Such a provision was obviously indispensable. And yet, it was not entirely lacking in a potential danger. Implicit in this Rule was the possibility that local rules might gradually lead to divergencies in procedure, one of the principal evils which the Act of June 19, 1934, sought to cure. There was also the possibility that some districts might adopt detailed rules dealing with minutiae, that might prove as cumbersome and as technical as some of the codes in the code States. The Judicial Conference a year ago noted the need for uniformity and simplicity in local rules. It expressed the view that such rules should be few, simple, and free from unnecessary technicalities. It created a committee composed of three district Judges to examine the various district rules and make recommendations in order that the greatest practical degree of uniformity throughout the country might be secured. The work of this committee is now in progress.

In the inauguration of any far-reaching reform, the period of transition and adjustment is likely to give rise to some temporary difficulties. In this connection, the principal problem confronting the Courts was, what should be done in resepct to pending actions that had been instituted prior to the effective date of the new procedure. The Supreme Court in Rule 86 provided that the Rules should govern "all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action pending when the Rules take effect would not be feasible or would work injustice, in which even the former procedure applies." In other words, as is usual with changes in adjective law, the new procedure is applicable to pending cases and is not restricted only to cases thereafter filed. It is only in the extraordinary case, in which it appear that the application of the new Rules would not be feasible, or might result in an injustice, that an exception is to be made.

The Courts have resolved the questions that have arisen in connection with pending cases in a manner that facilitated the transition from the old procedure to the new. Generally, it may be said that the validity of a proceeding in a pending action is dependent on the law as of the date that the proceeding was

taken. In other words, if the date was earlier than September 16, 1938, the action is to be tested by the law then existing; if subsequent to the effective date of the new Rules, the latter should govern. Pleadings filed prior to September 16, 1938, remain, and repleading has not been required merely for the purpose of conforming to the new Rules. On the other hand, pleadings filed subsequently, even in such an action, must conform to the new procedure, rather than that prevailing when the suit was instituted.

As a corollary of the general doctrine to which I have just referred, the sufficiency of pleadings filed previously to September 16, 1938, has been generally tested by the law in effect as of the date of filing. There is one exception to this course, however, in the interest of liberality and expedition. If a pleading would have been insufficient under the law prevailing as of the date of filing, but meets the requirements of the new Rules, it would seem futile to rule that such a pleading is defective. Such a decision would be but *brutum fulmen,* for obviously the party against whom it was rendered could immediately replead, in which event the sufficiency of the new pleading would be tested under the new Rules. Although the prevailing tendency has been in accordance with what seems to be the practical view, there have been a few decisions to the contrary.

It has been universally held that the new Rules relating to depositions and other forms of discovery should apply to pending cases. A salutary exception has, however, been evolved in respect to those few cases that had been pending for a long time and in which the taking of depositions under the new procedure would have the effect of postponing the trial for a considerable period.

It will be recalled that the new Rules abolished writs of mandamus. Nevertheless, it has been held by the United States Court of Appeals for the District of Columbia that mandamus proceedings instituted prior to September 16, 1938, may be maintained and brought to a final conclusion. This consummation is obviously desirable, since otherwise the relator would have had to dismiss his proceeding and institute a civil action under the new Rules, thereby losing considerable time and incurring needless expense. In this connection, it may be

observed that, although the new Rules purport to abolish writs of mandamus entirely, the Rules are intended for the guidance of the District Courts and do not affect the Circuit Courts of Appeals, except in respect to appeals. Consequently, in those cases in which Circuit Courts of Appeals issue original writs of mandamus, the writ still exists and should not be deemed abrogated by the Rule which provides for the abolition of the writ. For example, some months ago the Circuit Court of Appeals for the Fourth Circuit entertained and passed on the merits of an application for an original writ of mandamus directed against a district Judge.

Some questions have arisen in connection with appeals in pending cases. All of the Courts are inclined to adopt the principle that any appellate step taken, or which should have been taken, prior to September 16, 1938, must meet the requirements of the law then existing. Any step taken or to be taken subsequently to that date need conform only to the new Rules. For example, it has been held in the First and Ninth Circuits that compliance with the requirements as to severance is to be exacted in the case of an appeal taken prior to September 16, 1938.

A question of this type was presented to the Supreme Court in *McCrone* v. *United States,* which was decided last April.[10] It may be interesting to note in passing that this is the only decision thus far rendered by the Supreme Court in which that tribunal construed or interpreted the new Rules. It involved a contempt proceeding. A judgment finding the contemnor guilty and committing him to jail was rendered by the District Court. An appeal was taken in his behalf to the Circuit Court of Appeals for the Ninth Circuit. Deeming the contempt to be criminal, rather than civil, counsel filed a notice of appeal under the Criminal Appeals Rules, instead of filing a petition and securing an allowance of the appeal. The Supreme Court concluded that the contempt was civil, rather than criminal, and that, therefore, the appeal had not been properly taken. Counsel argued that, since the new Rules permitted civil appeals to be instituted by notice, he was within the Rules in any event. The Court called attention to the fact, however, that the notice

[10] 307 U. S. 61.

of appeal had been filed on May 2, 1938, when the controlling statute required a petition and allowance of an appeal in a civil case. It consequently held that the validty of the appeal depended on his compliance with the law then existing and could not be determined under the new Rules. The appeal was dismissed.

So satisfactory has the new procedure proved after it has been in operation for a short time that the Supreme Court in the Orders of Bankruptcy, which became effective last February, provided that the Rules shall be followed as nearly as may be in proceedings under the Bankruptcy Act. On September 1, the new Rules similarly became applicable to copyright suits, as the result of an amendment made by the Supreme Court to the Copyright Rules.

The great reform in Federal procedure has thus been safely launched and is successfully making rapid headway, due very largely to the sympathetic attitude on the part of the judiciary and the effective manner in which the members of the Bench have construed and applied the new Rules. While this outstanding measure is of momentous importance to the Federal judicial system, its significance extends far beyond its effect on Federal jurisprudence. Perhaps the greatest tribute that has been paid to this notable accomplishment is found in the fact that in numerous States movements are afoot and in some of them steps have already been taken to secure the assimilation of the new Federal Rules, or at least such of them as are appropriate, into the local Courts. One may well envisage the existence in a not too distant future of a simple uniform civil procedure throughout all the Federal and State courts. When that consummation is reached, inconsequential controversies over points of pleading, practice, and procedure, which hamper and retard the determination of substantive rights, and which rightly seem of no importance to the litigants, will be reduced to a minimum. The law will then be freed from some of the procedural fetters by which it has long been shackled.