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STATES' RIGHTS AND FEDERAL PROCEDURE

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RULE 1 REWRITTEN

I am for States' Rights too. But I choose to belabor the proposition that any States' Rights extension of the doctrine of *Erie R. Co. v. Tompkins*[1] into the field of federal procedure cannot be successfully defended. The major premise is axiomatic—States' Rights end where the authority of Uncle Sam begins. Perhaps the objection comes too late because *Erie* unlimited, as applied in recent United States Supreme Court cases, requires litigants to paraphrase Rule 1 of the Federal Rules of Civil Procedure to read as follows:

> These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions (*expressly*) stated in Rule 81, *and with the further exception that in an action in which jurisdiction is based on diversity of citizenship the District Courts shall follow the applicable state law of procedure, provided in a given case the difference between the Federal and the state rule is asserted to be of substantial importance to the party claiming the benefit of the state rule.*
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> Note: (By the Court) All litigants are warned that the original purpose of providing a uniform system of procedure has been repudiated, and *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1940) is overruled. The Court will accept a litigant's assertion of substantial harm without inquiry into the merits of the claim.

The pertinent questions are four:

1. If Congress and the Supreme Court of the United States do not have power to regulate the law of procedure in the federal district courts, who has that power?

2. If Congress and the Supreme Court of the United States have that power, what language is necessary to indicate a clear intention to exercise it?

3. If the Supreme Court wishes to change its Rules of Procedure, should it do so by decision or by formal amendment?

4. If the Federal Rules of Civil Procedure are "procedure" when applied in the administration of federal law, by what magic do they become "substance" when applied in the administration of state law?

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1. 304 U. S. 64 (1938).

A BRIEF HISTORY OF THE FEDERAL RULES OF CIVIL PROCEDURE

In 1934, Congress passed an act giving to the Supreme Court of the United States

> power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

The act further provided that if the rules contemplated one form of action and procedure for cases in equity and actions at law, the right to a jury trial "shall be preserved to the parties inviolate," and "Such united rules shall not take effect until reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."[2] On June 3, 1935, the United States Supreme Court entered an order declaring its purpose to be to provide for a unified system of general rules in equity and at law, yet to maintain inviolate the right of trial by jury, and not alter substantive rights.[3] The Court appointed an Advisory Committee, which sub-

2. 48 STAT. 1064 (1934), 28 U. S. C. § 723(b), 723(c) (1940).

3. The Rules themselves provide:

38(a):

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

82:

> These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

81(c):

> These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer.

In the 1948 Revision of the Judicial Code Congress restates the Rules of Decision Act, 28 U. S. C. § 1652 (Cong. Serv. 1948), as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Revised Code, 28 U. S. C. § 2072 (Cong. Serv. 1948), also provided:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common

mitted a proposed final draft of the Rules in the fall of 1937. The Court on December 20, approved the draft and transmitted it to the Attorney General for submission to Congress. That session of Congress having adjourned without taking affirmative action on the matter, the Rules became effective September 16, 1938. It had been held that the Federal Rules of Civil Procedure superseded the Conformity Act,[4] but in any event the 1948 revision expressly repealed it.[5] The Act of 1934 was also repealed but it is repeated in substance with the exception that all Supreme Court Rules must now be reported to Congress as the uniting of common law and equity procedures was deemed executed.[6]

Only a limited number of cases calling for an interpretation of the Rules has reached the Supreme Court. The Court has met a direct challenge as to their validity in only two cases. Nevertheless, the most recent cases have applied an extended version of the doctrine of *Erie* as against the Federal Rules; and those cases appear to warrant the broad statement that in a diversity case, in the event of a conflict between a state rule of procedure and the Federal Rules of Civil Procedure, the federal district court must apply the state rule and not the federal rule if the state advantage is claimed to be one of "substantial importance." It appears to be conceded on all fronts that in litigation involving federal law the Federal Rules of Civil Procedure are to be administered under the usual standards of interpretation. They are procedure in those cases; yet they are "substance" in a diversity case.

The Supreme Court Interprets the Rules

The first challenge to the validity of the rules was made in *Sibbach v. Wilson & Co.*[7] In this diversity case a federal district court had ordered the plaintiff to submit to a physical examination and, under Rules 35[8] and 37,[9] had punished the plaintiff for contempt because of a violation of the order. On appeal it was argued that because under the law of Illinois (in which district court the action had been begun) a physical examination was not proper, the

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law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session and until after the close of such session.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

4. Moore's Federal Practice § 1.02 (2d ed. 1948).

5. 28 U. S. C. Rev. Notes p. 1650 (Cong. Serv. 1948). The Conformity Act was 1 Stat. 73 (1789), 17 Stat. 196 (1872), 28 U. S. C. 724 (1940).

6. 28 U. S. C. Rev. Notes p. 1897 (Cong. Serv. 1948).

7. 312 U. S. 1 (1941).

8. This Rule provides for a compulsory physical examination.

9. This Rule provides penalties for a refusal to make discovery.

Federal Rule was invalid. A majority of the Court held Rule 35 to be a rule of procedure and, therefore, not within the Rules of Decision Act.[10] It expressly repudiated the argument that the procedural disadvantage involved was "substantive," "important" or "substantial" and held Rule 35 to be a rule of procedure, stating that it did not violate the Act of 1934 by invading the plaintiff's substantive rights. The Court said:

> If we are to adopt the suggested criterion of the importance of the alleged right we would invite endless litigation and confusion worse confounded. The test 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.

The Court further emphasized that Congress had not disapproved the Rule in question although it had been there challenged.[11] While the *Sibbach* case has not been distinguished or discussed in the more recent cases, a realist would be compelled to conclude that it has been overruled.

Four years later, in *Mississippi Publishing Corp. v. Murphree*,[12] the Court again in a diversity case accepted the orthodox distinctions between substance and procedure. There the publishing company had been admitted to do business as a foreign corporation in Mississippi, and maintained an office and place of business in the Southern Federal District of Mississippi. An action was brought against it in the Northern District, and in compliance with Rule 4(f)[13] it had been served in the Southern District with summons to answer the plaintiff's complaint. The publishing company challenged the validity of the Rule, but the Supreme Court held that the Rule did not invade the fields of jurisdiction and venue and that it was, therefore, a rule of procedure because it related only to the manner of giving notice. The Court had this to say as to the effect of federal procedure upon substantive rights:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeable to rules of practice and procedure, have been brought before a court authorized to determine their rights. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the District Court for Northern

10. 48 STAT. 1064 (1934), 28 U. S. C. § 724 (1940).

11. The judgment was reversed for the reason that under Rule 37 the plaintiff could not be punished for contempt, the proper penalty being a dismissal of his action. Mr. Justice Frankfurter dissented and Justices Black, Douglas and Murphy concurred in the dissent. The dissenting opinion is not without ambiguity but it appears to rest on the proposition that such a rule invaded one's constitutional liberties and freedom.

12. 326 U. S. 438 (1945).

13. Permitting the service of a summons "anywhere within the territorial limits of the state in which the district court is held."

> Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to "the manner and the means by which a right to recover . . . is enforced." In this sense the rule is a rule of procedure and not of substantive rights, and is not subject to the prohibition of the Enabling Act.

In several cases the Supreme Court has departed sharply from this orthodox distinction between substance and procedure, and has purported to apply the *Erie* doctrine. Yet most of these cases can be considered correct in their result, either because the interest involved is properly classified as substantive rather than procedural, or because the pertinent provisions of the Federal Rules would achieve the same result.

In *Guaranty Trust v. York*,[14] a diversity case in equity, the Supreme Court held that the New York statute of limitations was a defense. Previous federal decisions in equity cases were certainly inconsistent with *Erie,* the federal courts having even administered English equitable principles in some instances. The federal common law jurisdiction, however, was quite different. It was to be expected that *Erie* would require the federal courts to give effect to the state substantive law of equity whether it be in statutory or decisional form.[15] Under orthodox doctrine a Statute of Limitations is substantive *as it is a defense on the merits.* True, the limitation is stated in terms of the beginning of an action but translated into realistic language this means that a claim is a valid claim for the term prescribed and no claim after the limitation has expired. The fact that for other purposes (notably to create a "moral" obligation to support a promise to pay an obligation "barred" by the Statute of Limitations) it has been said that the obligation still exists and only the remedy has been foreclosed should not mislead one to another conclusion. If it strikes the fancy of the experts in the field of "valuable consideration" to explain a desirable result in the law of contracts in fictitious terms, the fiction need not be extended to cover another wholly unrelated problem.

Again, in *Angel v. Bullington*[16] the Court held that the federal courts could not render a deficiency judgment after a mortgage foreclosure where the pertinent state law prohibited that result. The state law was in terms of the jurisdiction of the courts, but again when translated into realistic terms the intended result was that such a claimant had no further substantive right against his promisor and mortgagor.

Cohen v. Beneficial Industrial Loan Corporation[17] involved a minority stockholder's action in the District Court of New Jersey. A New Jersey

14. 326 U. S. 99 (1945).
15. 2 MOORE'S FEDERAL PRACTICE § 2.09 (2d ed. 1948).
16. 330 U. S. 183 (1947).
17. 337 U. S. 541 (1949).

statute provided that a plaintiff who asserted such a claim was liable for all expenses incurred in the defense of the action if the action was unsuccessful. It further required the plaintiff to furnish a surety bond as against the possible liability. The Court held the statute applicable to an action brought in the federal courts for the reasons that the statute was not in conflict with Rule 23 of the Federal Rules of Civil Procedure,[18] and that under *Erie* effect had to be given to the statute even assuming it to be procedural. On the merits the result reached is sound. The statute in question created a cause of action for malicious prosecution or abuse of civil process beyond the common law rules on the subject and further required the giving of security for the possible claim. The fact that it is in terms making it a condition precedent to the bringing of an action does not deny its substantive character. It is quite realistic to regard the defendant's interest as a substantive right to the security. A state frequently conditions the privilege of a bank to receive a deposit of public funds on the giving of security against a possible loss. No one should deny that the requirement is substantive. The fact that the condition relates to a claim asserted in court does not call for a different result.

In *Woods v. Interstate Realty,*[19] the Court applied the *Erie* doctrine to achieve the same result the Federal Rules would dictate. The action was begun in a federal district court in Mississippi by a Tennessee corporation which had not complied with the Mississippi foreign corporation statute, under which compliance was a condition precedent to a right to commence an action in the Mississippi courts. The Court rejected a pre-*Erie* decision[20] and held the defense valid in the district court. The Court studiously avoided any reference to Federal Rule 17(b) which would obtain the same result by providing:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held.* (Italics supplied)

The four preceding cases, then, achieved proper results although employing undesirable reasoning. In two other cases, however, the Court has applied the Erie doctrine in such a way as to arrive at patently erroneous conclusions. The first, *Ragan v. Merchants Transfer and Warehouse Co.,*[21] was a personal injuries action in the federal district court in Kansas. The complaint was filed within the Kansas Statute of Limitations but service of

18. This Rule regulates stockholders' actions.
19. 337 U. S. 535 (1949).
20. David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489 (1912).
21. 336 U. S. 917 (1949).

the summons was effected beyond the time allowed for the beginning of such an action. The law of Kansas is that an action is not commenced in order to defeat the Statute of Limitations until the complaint has been filed and a summons served. Federal Rule 3 provides that an action is commenced by the filing of a complaint. The Court held that the defendant was entitled to a summary judgment because the local law was applicable. On the merits one should not doubt that the Kansas Statute of Limitations is substantive and applicable. It does not, however, follow that a rule defining what constitutes the commencement of an action is also substantive, or that a variance between a state and federal rule on that point is a matter of substantial importance. Indeed, the Kansas statute which provides that an action is commenced by the filing of a complaint and the service of a summons is a part of the Kansas Code of Civil Procedure.[22] The title to this act is "An Act Concerning the Code of Civil Procedure." Kansas enjoys the usual constitutional requirement that the subject matter of a bill shall be expressed in the title, and subject matter extraneous to the title is void.[23] One at least is entitled to indulge in the presumption that the Kansas legislature thought the rule in question could properly be classified as a rule of procedure. If it is actually in the field of substantive rights it does not exist as it would be stricken from the Act because it is at variance with the title. At least considerable authority could be found to sustain that result.[24] But the question remains as to whether the Federal Rules defining the commencement of an action as consisting of something less than the Kansas definition is substantive or of substantial importance. It is noteworthy that the Advisory Committee when it recommended its final draft of the Federal Rules to the Supreme Court suggested that Rule 3 might be thought to involve a substantive problem.[25] The presumption must be that both the group of experts which drafted the Rule and the members of the Supreme Court which promulgated the Rule came to the conclusion that the Rule was procedural and not substantive.[26]

As contrasted with the *Ragan* case the Supreme Court in *Herb v. Pitcairn*[27] went to considerable length in defeating the application of the Statute

22. KANSAS LAWS, 1909, c. 182, § 19.

23. Wilkerson v. Belknap Sav. Bank, 52 Kan. 718, 35 Pac. 792 (1894). I would not choose to say that the Kansas Supreme Court might not well hold that the title "procedure" was used in a very broad sense, so as to cover this subject matter. If it did so, it would be on the liberal side as against what would normally be expected.

24. SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943, HORACK), § 1700-1720.

25. FED. R. CIV. P., 15(c), note to subdivision (c).

26. The Advisory Committee was particularly concerned about Rule 15(c) (dealing with the relation back of amendments in order to defeat the Statute of Limitations) and thought that the Rule as stated accomplished a very desirable reform. FED. R. CIV. P., 3, note 4. However, if Rule 3 is ineffective when a state law on the same subject presents a variance it would clearly follow that Rule 15(c) is equally ineffective.

27. 324 U. S. 117 (1945); 325 U. S. 77 (1945).

of Limitations contained in the Federal Employer's Liability Act. It held that an action begun in a state court which had no jurisdiction of the subject matter of the action and which, after the Statute of Limitations had run, transferred the case to a proper court had nevertheless been begun within the meaning of the Act. While a federal question was involved, the case is important because it emphatically held that whatever the Supreme Court of Illinois thought on the subject was unimportant. While at first blush the case may seem to be at odds with the general thesis, it is clear-cut authority for the proposition that the steps necessary to constitute the commencement of an action under federal law is entirely a federal question. There is no reason to believe that the federal power over interstate commerce is any greater than is its power over the federal courts. Thus what constitutes the beginning of an action in the federal courts is a federal question. At least the Supreme Court, in the case referred to, was genuinely concerned over the unfortunate harm which would accrue to the plaintiff if it accepted a narrow view as to what constituted the beginning of an action.

In any event, if one chooses to talk in terms of substantial importance, the result of the *Ragan* case simply was that the defendant, without regard to the merits, defeated a presumably proper claim, although the only thing which happened was that he was not served with a summons upon the filing of the complaint but presumably was so served very shortly thereafter. There is no indication that this in any manner prejudiced the defendant but it is quite clear that the plaintiff was accorded a very substantial disadvantage. He deserves considerable sympathy because any competent lawyer representing him would have assumed that Federal Rule 3 meant what it said.

Misapplication of the *Erie* doctrine again led to error in *Palmer v. Hoffman*,[28] where the Court ruled that in a diversity case a federal district court must follow the state rule as to the burden of proof on contributory negligence. It was assumed that the Federal Rules of Civil Procedure imposing the burden of pleading on the defendant had to be followed, with the result that the fact would not be in issue unless affirmatively pleaded by the defendant; but it was held that the jury should be instructed that the burden of proof was on the plaintiff if the state law placed it there. The explanation or rationale supporting this result is brief as the opinion simply states:[29]

> Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases

28. 318 U. S. 109 (1943).
29. *Id.*

(Erie R. Co. v. Tompkins, 304 U. S. 64) must apply. Cities Serv. Oil Co. v. Dunlap, 308 U. S. 208; Sampson v. Channel (C.C.A. 1st) 110 F.(2) 754, 128 A.L.R. 394. And see Central Vermont R. Co. v. White, 238 U. S. 507, 512.

The Court relied upon *Cities Service v. Dunlap,*[30] where the claimants to certain Texas land were a beneficiary and a purchaser from the trustee. The federal district court and the court of appeals held, on the issue of bona fide purchaser for value, that the federal court should follow what it regarded as the well established federal rule although the state rule imposed the burden of the pleading and proof upon the other party. The Supreme Court held this to be erroneous. The substance of the decision is contained in the following paragraph:

> We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title.

Cities Service v. Dunlap, however, was mistakenly cited as authority under the Federal Rules. That case was tried prior to the effective date of the Rules, and is not, therefore, a precedent as to the intention and purpose of the Federal Rules.[31]

The decision on burden of proof in *Palmer v. Hoffman,* however, was not controlling. The Court refused to reverse because the objection made to the instruction was found to be too broad. A conflict of laws problem was also involved. It was held that the federal court should follow the law of the state in which it sat in determining whether the matter in question was substance or procedure. Thus, although the decision on the principal point is a precedent, it was actually unnecessary to the result reached. It is to be noted that the Court, without noticing or disputing the inconsistency, applied what it called a "long standing rule of federal practice" requiring a specific objection to an erroneous instruction, but it studiously avoided any reference to Federal Rule 51, which expressly states that rule. The result is that a Rule regulating the burden of pleading is procedural; a Rule regulating the burden of proof is "substantive"; a Rule requiring specific objections to the instructions is procedural. Now where are we?

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30. 308 U. S. 208, 212 (1939).

31. Although the trial court did not publish an opinion, the Court of Appeals' opinion was filed December 8, 1938, 100 F.2d 294 (1938). This shows conclusively that the case was tried and disposed of in the trial court prior to the effective date of the Federal Rules of Civil Procedure (September 16, 1938).

This author concludes that, except for the language used, most of the cases can be accepted as correctly decided. The exceptions include the *Ragan* case and those involving the burden of pleading and proof.

Relationship Between Substance and Procedure: The Analogies

It must be clear, for the purposes at hand, that Congress and the United States Supreme Court thought that the entire field of the law could properly be classified into three categories: (1) jurisdictional rules, (2) substantive rules, and (3) procedural rules. Because they talked in those terms, one should assume that they had something in mind which was intelligible. In general, the concept of the law of jurisdiction has been defined as embodying that group of legal rules which has to do with the power of courts as such and the restrictions as to the proper exercise of that power as such. Substantive law is generally thought to include that body of rules which regulates the conduct and relationship of members of society and the state itself as among themselves apart from the field of litigation and jurisdiction. And, procedural law has been described as that body of law regulating the conduct and relationship of individuals, courts, and its officers in the conduct of judicial litigation.

In view of congressional and judicial insistence that there is a distinction between substance and procedure, what kinds of cases provide analogies? Use of the terms "substance" and "procedure" in other fields does not necessarily suggest workable analogies for the present problem. Prior to the present trend in favor of judicial as distinguished from legislative rules of procedure most of the litigation involving distinctions between substance and procedure was in the field of the conflict of laws. Here it was agreed generally that a state in recognizing and in enforcing a foreign cause of action would accept as controlling the substantive law of the jurisdiction where the cause of action arose but would apply its own procedure in the litigation of the case. Under this rule it became necessary to decide whether a given rule fell within the category of substantive law or procedural law. On the face of it, the same concepts and policies are involved as in the instant problem.

In the field of constitutional law a similar distinction was made when the validity of retroactive legislation was involved. The general rule developed has been that a legislature may properly give retroactive effect to a change in the law of procedure but may not give retroactive effect to a change which substantially modifies substantive ("vested") rights. In the field of criminal law the problem is complicated by the express constitutional prohibitions against *ex post facto* laws. In this latter field the decisions are not particularly pertinent, because the courts have rather obviously interpreted that particular constitutional restriction as prohibiting significant changes in pro-

cedural law. Apart from the field of criminal law, however, on the face of it, the constitutional distinction in the field of retroactive legislation is based upon the same concepts and policies as to substance and procedure which are involved in the present problem. It must be conceded, however, that both in the fields of the conflict of laws and constitutional law all of the decisions purporting to turn upon the distinctions between substance and procedure are not controlling in a satisfactory solution of the present problem, because all cannot be accepted as having adopted correct distinctions. In the field of conflict of laws, as in any other field, a court has the power to decide a case on what it regards as the merits of the situation and give as a reason any ground which seems to it to be persuasive. The same thing is substantially true in the constitutional law field. One will, therefore, most certainly find cases in both of these fields where the result may seem to be very proper and satisfactory but where the reason given is far from satisfactory.

The same thing is true of the decisions of the United States Supreme Court under the Commerce Clause of the Federal Constitution. This is important because some of those decisions have been given undue weight in recent litigation involving the validity and applicability of the Federal Rules. For example, in *Central Vermont R. v. White*,[32] the Court held that in litigation under the Federal Employers' Liability Act it was improper for a state court to apply its rule as to the burden of pleading and proof on the question of contributory negligence as against the accepted federal rule on the subject. It has been assumed that the reason was that such a rule was substantive and not procedural. The federal cases do not sanction that result. The fact is that the state rule in question was condemned because Congress had exercised its power under the Commerce Clause. It does not follow at all that if a state may not administer the rule challenged, it is because it is a substantive rule. The exercise of power by Congress to regulate the activities and relationships of persons engaged in interstate commerce excludes any state power. The problem is not whether the rule falls in the field of substantive or procedural law but whether Congress has in the exercise of the commerce power adopted a general rule concerning procedure. A state procedural rule may, therefore, be as invalid as a substantive or jurisdictional rule, and the federal cases on this point can be most properly explained on this ground.[33]

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32. 238 U. S. 507 (1915).

33. The exercise of judicial power by a state which is a "burden on interstate commerce" has been condemned as invalid for that reason. *See* Davis v. Farmers' Co-op Equity Co., 262 U. S. 312 (1923) and GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION §§ 165, 166 (1932). Procedural rules as such have been held invalid. *See* New Orleans & N. E. R. Co. v. Scarlet, 249 U. S. 528 (1919); Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531 (1919).

Since the above text was written the Supreme Court opinion in Brown v. Western Ry. of Ala., 70 Sup. Ct. 105 (1949) has been published. In this case it was held that a

Nor do state decisions on the constitutionality of the rule-making power afford help on the present problem, for none has turned upon the questionable character of the rule involved. All of the state cases involve situations where obviously the rule in question was a procedural rule and the validity of the rule was challenged on the ground that the power to promulgate the rule rested in the legislature and not in the court.

In considering the differentiation between substance, procedure, and jurisdiction under *Erie,* a principal difficulty arises out of the fact that rules in each of the three fields are sometimes stated in terms of the other two, or against a background of the other fields. Thus, for example, the so-called parol evidence rule is in form a procedural rule, and it is a procedural rule because it regulates the propriety of the introduction of certain types of evidence in the field of litigation. On the other hand, it involves the recognition and enforcement of a substantive rule. The substantive rule is that if parties have integrated their agreement into a written instrument which they have executed (without fraud, etc.), the rights and duties of the parties are determined by an objective interpretation of that to which they have agreed in writing. Parol evidence is inadmissible to vary the terms of the instrument, unless the instrument is reformed or rescinded in a proper equitable proceeding, because under the substantive law the written instrument objectively interpreted is "the contract" between the parties. The substantive rights of the promisee and the duties of the promisor on the subject matter covered are delimited by their written agreement, objectively interpreted (in general). The parol evidence rule is simply a specific application of the general rule of evidence which limits the admissibility of evidence to that which is relevant. In an action for damages for breach of promise evidence as to the actual intention of the parties is immaterial, in the absence of a proper equitable issue raising that point. What appears in form, therefore, to be a procedural rule is in truth a procedural rule; but it is one which is also in recognition and in

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state court, in an action brought under the Federal Employers' Liability Act, could not apply a state rule of procedure against the plaintiff which was less liberal than what the court thought was a proper rule on the subject. The exact point involved was the Alabama acceptance of the common law rule of strict interpretation against a pleader, as against the now generally accepted rule of liberal construction stated in Federal Rule 7(f). The language of the opinion is in terms of the invalidity of "strict local rules of pleading (which) impose unnecessary burdens upon rights of recovery authorized by federal law."

But in a diversity case the federal district court in Alabama would be required to follow the Alabama rule because of its substantial importance to the defendant, illustrating again that a procedural advantage to one party is by necessity a procedural disadvantage to his adversary. No one can formulate rules of procedure without resolving numerous conflicts of that character. It would seem to be a necessary inference that Congress authorized or empowered the Supreme Court to struggle with those problems, and could not be thought to have said anything less than that the final results would settle those issues. The power to legislate, in any form, includes the power to decide between competing interests and rules.

enforcement of an established substantive rule. To change the procedural rule and administer it as changed would necessarily change the substantive rule, with the result that a procedural rule of this character is not subject to change by a body having power solely to change the law of procedure.

Substantially the same situation exists as to the rule requiring that a plaintiff in his complaint state "the facts constituting his cause of action." Insofar as the rule deals with the writing of a complaint it is a procedural rule. The requirement, however, is finally administered as against a background of substantive law. The substance of what must be stated turns upon the question as to what facts are material and necessary in creating a substantive liability as between the parties involved. A body having the power to deal solely with rules in the field of procedure might change the rule insofar as its procedural aspect is concerned, but it could not change the substantive law which forms a necessary background of the rule. It would be within the province, therefore, of the Supreme Court of the United States to return to fictitious complaints, but this certainly would be inadvisable for obvious reasons. It could also provide by rule that any evidence as to the intention of the parties might be received in an action on a written contract. In the final decision of such a case, however, if the court gave effect to it, the substantive law would be changed. If it is not given effect it might better be excluded in the first instance. The court also, for example, could provide that in a case involving a claim brought by a guest of an automobile driver a sufficient complaint was filed if the complaint simply alleged negligence on the part of the defendant. The rule, however, properly could not have the effect of changing the substantive basis of the liability set out in the pertinent statutes on this subject; and before a court could properly render a judgment for a plaintiff in a case of this type there would have to be proof of "wilfull and wanton misconduct." A requirement that the terms of the statute must be met in the complaint, insofar as the rule deals with the form of the complaint, is procedural; and if a complaint is really to serve any good end, it should allege the facts required by the substantive standard upon which the final decision must rest. But the limitation is a practical, not a necessary one, and provides no reason for ignoring the distinction.

The Burden of Pleading and Proof

The first case involving burden of pleading and proof was *Francis v. Humphrey*,[34] decided by the District Court of Eastern Illinois. In this case the court held that despite the express provision of Rule 8(c) making contributory negligence an affirmative defense, the district court in Illinois was

34. 25 F. Supp. 1 (D. C. Ill. 1938). See notes on this case in 34 Ill. L. Rev. 106 (1939); 38 Col. L. Rev. 1472 (1938); 6 U. of Chi. L. Rev. 510 (1939); 24 Iowa L. Rev. 609 (1939).

bound to follow the Illinois rule to the contrary because the matter was one of substance and not procedure and the case was controlled by *Erie*. The court sustained a motion to dismiss the complaint for its failure to allege freedom from contributory negligence. While the Supreme Court, in *Palmer v. Hoffman,* disapproved the *Francis* decision and said that Rule 8(c) requires the defendant to plead contributory negligence, it held he could not be required to prove his answer. It is submitted that both the *Palmer* and *Francis* cases involve a common but obvious confusion as to the distinction between substance and procedure. It is certainly true that contributory negligence is, to start with, a concept of the substantive law and that under accepted doctrine in the law of torts there is no duty upon a person to pay damages for negligent injury if the injury was also caused by the contributory negligence of the injured person. Of itself that rule has nothing to do with the burden of pleading and proof. However, the rules on that latter subject clearly lie within the field of procedure.

For several centuries our law, for purely procedural purposes, has divided up the burden of pleading and proof between the plaintiff and defendant. The result is that the plaintiff's burden is to plead and prove a prima facie case and the defendant's burden is to plead and prove additional facts which, under the substantive law, are material to the question of final liability. The rules as to the writing of a complaint and as to the pleading of affirmative defenses must be read together. The complaint rule does not require the pleading of a substantive right as against every pertinent fact or exception, but only what has been held to be a prima facie case. Those rules concede that a so-called affirmative defense is material but they are designed to eliminate certain factors from the issues in a case until they are properly brought in issue by the defendant. For example, in the field of contract law conditions subsequent are as material to the substantive liability of the parties as are conditions precedent. If parties have agreed on a valid condition and it has not been performed there is no breach of the contract. The plaintiff, however, pleads and proves conditions precedent and the defendant pleads and proves conditions subsequent. The distinctions drawn are based entirely upon the practical consideration that such a rule makes a fair division of the burden of pleading and proof in that type of case. If a fact is not material to legal liability, it need not, and should not, be pleaded or proved by either party.

The *Francis* and *Palmer* decisions completely deny the existence and validity of the procedural concept of a prima facie case which may be destroyed by the pleading and proof of an affirmative defense. The *Francis* opinion is based entirely upon the proposition that, because under the Illinois law freedom from contributory negligence had to be pleaded in a complaint as against a demurrer or motion for insufficient facts, it followed that the matter was

entirely substantive and not subject to regulation by court rules. The fact is, however, that the substantive law of Indiana, in personal injury cases, is exactly the same as the substantive law of Illinois. The substantive law of both states is that the duty of due care which one member of society owes to another with whom he comes in contact is destroyed by contributory negligence on the part of the injured person. There is no right to damages for injuries if both parties were guilty of negligence which caused the injuries. The law of procedure in each state, however, is different. Illinois places the burden of pleading and proof on the plaintiff, and Indiana places it upon the defendant. For example, suppose, further, that in an action for trespass for assault and battery the Illinois law is that the plaintiff in his complaint must negative any privilege on the part of the defendant to commit the trespass and that the law of Indiana is that the burden of pleading and proof on a question of privilege is upon the defendant. Again the substantive law of both states would be the same. There would be no tort liability if the tort had been committed under the exercise of a lawful privilege. The difference would be entirely one of procedure in the presentation of the case. The burden of pleading and proof on the question of privilege in Illinois would be upon the plaintiff and in Indiana it would be upon the defendant. The rule would clearly deal with the conduct of the parties as such in the disposition of the litigation.

The decisions in the *Palmer* and *Francis* cases are certainly based upon a confusion which arises out of the proposition that because both substance and procedure are involved in the administration of a rule of this character the rule is necessarily one or the other. As has been pointed out above, this is not true. In administering the general rule to the effect that the plaintiff in his complaint must state the facts constituting his cause of action, reference is necessarily made to the substantive law background presented. That rule, however, cannot be dealt with except in the light of the further rule to the effect that the defendant shall plead so-called affirmative defenses. The two rules together require the plaintiff to state a prima facie case and the defendant to destroy this by so-called affirmative defenses. The concept and the distinction lie within the field of procedure. To emphasize the point it may be pointed out that the Illinois Civil Practice Act of 1933 made (in effect) the defense of res judicata matter in abatement.[35] Under Federal Rule 8(c) it is an affirmative answer. No one should doubt that res judicata is substantive law. Stated in substantive terms the rule is that a prior judgment between the same parties is "the legal right" between the parties. How the matter is to be brought in issue on the trial of a subsequent case, however, is clearly a matter of procedure. It falls outside of the usual definition of matter in abatement, but there is no reason why, as in Illinois, it cannot for the pur-

35. ILLINOIS CIVIL PRACTICE ACT ANN. § 48 (1933).

poses of procedure he so classified. If the Illinois rule, however, required the plaintiff to negative res judicata in his complaint, that rule would still be for the same reason a procedural rule, and in an action in a federal court in Illinois, where the Illinois substantive law was controlling, the Federal Rule requiring the matter to be pleaded affirmatively by the defendant would still be a valid procedural rule.

Another earlier case deserving consideration, as it is cited with approval by the Supreme Court, is *Sampson v. Channel*[36] wherein the *Francis* case to all practical purposes was followed by the Court of Appeals for the Fifth Circuit, although the reasons given are different. In this case an action had been brought in the federal district court in Massachusetts for personal injuries received in Maine. Under the law of Maine the burden of proof on the question of contributory negligence is on the plaintiff. Under the law of Massachusetts the burden is upon the defendant; and under the Massachusetts rule of conflict of laws the rule is classified as a procedural rule, so that the Massachusetts court would place the burden of proof on the defendant. The court held that under *Erie* the law of the state in which the federal court was sitting must be followed, and it, therefore, applied to the disposition of the case the Massachusetts rule. The same result would have been reached had Federal Rule 8(c) been applied. It was also argued that the result of the case could be sustained on the general proposition that it is not unusual for the law of pleading to require one person to plead a fact and require the adverse party to assume the burden of proof. The plea of payment is sometimes referred to as an authority for this proposition. Most certainly it does not sustain it. While it is true that a complaint on contract liability which does not allege nonpayment is subject to a demurrer for insufficient facts, the rule is that a denial of an allegation of nonpayment raises no issue. The defendant must affirmatively plead payment and the burden of pleading and proof is upon him. The situation does not involve an exception to the general rule that the burden of proof follows the burden of pleading, because the rule of pleading is that a denial does not effectively deny an allegation of nonpayment and there is no issue on that allegation in the plaintiff's complaint. The supposed analogy violates the rules of logic. After all, assuming it to be an exception, what *is* analogous between that situation and the answer of contributory negligence, or res judicata, or what have you? What is the similarity? In any event, one who would stretch an abnormal and exceptional rule, which concededly is based upon historical accident, into a general rule, can profit from a course in elementary logic.

It is true that the Federal Rules do not expressly state that the burden of pleading controls the burden of proof. That rule, however, is certainly stated

36. 110 F.2d 754 (5th Cir. 1940).

by implication. The Federal Rules make a distinction between denials and affirmative defenses and the only purpose was to embody in them the accepted doctrine. There seems to be no valid distinction between contributory negligence as an affirmative defense and any other defense so classified under the Federal Rules. If the recent cases applying the *Erie* doctrine to matters of procedure are accepted as correct, the result is that instead of the Rules accomplishing the purpose intended of providing for a uniform system of procedure in all of the federal district courts throughout the country the uniformity is entirely a formal one and in the trial of a case a district court pays no attention to the issues as they appear to be raised by the pleadings but tries the case as if the pleadings had conformed to the state practice. The avowed purpose of the Rules is thus repudiated and because of the erroneous application of the concepts of procedure and substance, the practice in the federal courts is worse than it was under the Conformity Act, because the pleadings are wholly misleading and inconclusive.

Congressional and Judicial Intention

It is a fact that the Federal Rules were under consideration and were promulgated at substantially the same time that *Erie* was decided. It is, therefore, an inescapable conclusion that the Supreme Court saw no conflict between that decision and the Federal Rules.[37] *Erie* and the Federal Rules of Civil Procedure in their entirety can be administered in the light of the orthodox distinctions between "substance" and "procedure" without substantial harm to any litigant.

The Act of Congress under which the Supreme Court acted gave it power to regulate by general rule "the practice and procedure of the district courts." It has been authoritatively stated that the Advisory Committee and the Supreme Court were more than conscientious in deciding that no Rule proposed or accepted should invade substantive rights.[38] While it is true that the Federal Rules of Civil Procedure accomplished many notable reforms and are "modern" in their approach, their principal purpose was not to reform but to supersede the Conformity Act and the Federal Equity Rules and to provide for a uniform procedure in civil actions throughout the federal court system.[39] The Conformity Act has in fact now been repealed.[40] In achieving uniformity

37. Certiorari in the *Erie* case was granted Oct. 11, 1937 (302 U. S. 671). The case was argued January 31, 1938, and the opinion filed April 25, 1938 (304 U. S. 64). The final draft of the Federal Rules was published by the Advisory Committee in April, 1937, and recommended to the Supreme Court in November, 1937. They were formally transmitted to the Attorney General as adopted on December 20, 1937, and reported by him to Congress on January 3, 1938. They were not disapproved by Congress and became effective September 16, 1938.

38. 2 Moore's Federal Practice 30 (2d ed. 1948).

39. 2 Moore's Federal Practice 6-8 (2d ed. 1948).

40. See note 3 *supra.*

the "better rules and views" were accepted, but the quality in some instances was concededly of an arbitrary nature. One of several conflicting rules on some points was accepted, not because it was more meritorious than its competitors, but because the conflict had to be resolved and a uniform rule established. As a matter of fact great emphasis was placed on the fact that rules of procedure are but a means to an end, and should be so regarded. Federal Rule 61 states a broad principle of harmless error. It states it to be true that a correct result can be reached, and a fair trial had, although the procedures followed were unorthodox. It is a complete denial of the "substantial importance" of one procedure as against its alternatives. When the Rules were formulated and promulgated it was thought that substance, procedure, and jurisdiction were different things, and that uniformity in the federal practice was to be achieved, even at the expense of the repudiation of many traditional notions about the respect due a state rule of procedure, and procedure in general.

Apparently no one thinks that the states have any power over federal judicial jurisdiction and the law of procedure in the federal courts. The reason why there is now state control of substantive rights is because the Supreme Court repudiated, in *Erie,* the notion that the state courts could be mistaken about their own common law rules. Under the dual form of government the state controls its own substantive common law. Uniformity of state substantive law is not required by any constitutional limitation, and lack of uniformity is beyond federal control. Thus the immediate problem resolves itself into the question as to whether a rule regulating the burden of proof is "substance" or procedure. If it is not procedure, then nothing is.

Federal Rule 8(c), concerning affirmative defenses, admits of no valid interpretation other than the obvious one that it was designed to regulate the burden of pleading and proof. Indeed, the reason why the broad provision of the Code (that the defendant must plead any new matter constituting a defense) was stated only at the end, after a number of common situations were expressly catalogued as requiring an affirmative answer, was to settle what the Federal Rule was rather than to settle by the painful process of decision the questions bound to arise because of inconsistent state and federal cases.[41] Had the Supreme Court concerned itself with the legislative history of the Rule it would have discovered that Rule 8(c) assumed the form it has for the express purpose of resolving the numerous conflicts in the ficld of what constitutes a prima facie case and the correlative affirmative defenses. Rule 84 and Form 10 say that a complaint for personal injuries which does not negative contributory negligence is a good complaint; Rule 8(c) says

41. 2 MOORE'S FEDERAL PRACTICE 1686, 1687 (2d ed. 1948).

that the defendant shall plead contributory negligence. Could the "intention" of the law-maker be any plainer?

ERIE: THE ANOMALY OF "SUBSTANTIAL IMPORTANCE"

On what valid basis can there be a determination by the court that a procedural matter is of "substantial importance" so as to fall within the *Erie* doctrine? For example, no federal case has held that Federal Rule 12(h), which provides that defenses not raised by motion or answer are waived, does not mean what it says. Indeed, it has been consistently held that the matters catalogued as affirmative defenses may not be proved or relied upon in the absence of an answer raising the issue.[42] It probably is true that in many instances Rule 8(c) states a rule identical with the state rule. But if there is inconsistency, how does one spell out of Rule 8(c) exceptions based on an undefined philosophy of legal realism? How substantive is a procedural advantage or disadvantage? When one shifts the burden of pleading and proof from one party to his adversary the action necessarily confers a benefit on one and a burden on the other. If it is substantial to one party, it must be equally substantial to the other. Did not the Supreme Court decide that issue when it promulgated the Rules? As a matter of fact, the dividing line between a plaintiff's prima facie case and a defendant's affirmative defense frequently has been drawn on a pretty arbitrary basis. History has had much to do with it. One must be impressed with the fact that preference for one rule or the other seems to depend on whether one represents the plaintiff or the defendant. If the Supreme Court has not settled the question by its Rules, where are we if a state procedural advantage must outweigh the federal advantage to the other party?

In *Palmer v. Hoffman* it was the burden of proving contributory negligence that was held to be of "substantial importance." Many, many of the Federal Rules involve matters of greater significance to litigants than does the Rule as to contributory negligence. How is one to sustain the Federal Rules on discovery as against state rules which seriously restrict discovery procedures? Is not the defendant's or the plaintiff's procedural advantage under the state rule substantial? More than a few lawyers think it is, and they have thought out loud on the subject.[43] And in Indiana many questions must be raised by answer in abatement and they are waived if the defendant joins with them any attack on the merits. Must the Indiana rule be applied in the federal court where such joinder is not a waiver? Under the Indiana rule a plaintiff may have acquired jurisdiction over the person of the defend-

42. 2 MOORE'S FEDERAL PRACTICE 2327-2333 (2d ed. 1948).

43. Probably no portion of the Federal Rules excited so much complaint and litigation. One heard much of the impropriety of "fishing" expeditions.

ant which if denied under the Federal Rules means he will have to go to a distant state in order to acquire jurisdiction of the defendant. Is not that a pretty substantial advantage? In Indiana and many states the third-party practice is not recognized. What a substantial advantage a third-party defendant in the federal courts has if the Federal Rule cannot be applied against him! One trained in the school of philosophy which believes substance and procedure to be one and the same "thing" would have no trouble in multiplying these examples, and almost anyone would think that the more decisive a procedural advantage or disadvantage is, the more "substantial" it becomes.

Burden of proof is of *less* "substantial importance" than many other procedural matters. Cases such as *Palmer v. Hoffman* show how a uniform practice in the federal courts has been rendered impossible by federal courts applying a principle which supposedly will give identical results in state and federal courts. But how often is burden of proof material in the result of a case? Probably on no other point is the jury more often over-instructed than it is on that point. Assuming that the trial judge gives a correct instruction placing the burden of proof on the plaintiff and then violates his duty and overrules the defendant's motion to direct a verdict for insufficient evidence, he must disregard a verdict not supported by the evidence and enter a contrary judgment, or grant a new trial. Any result other than that can not be sustained on appeal. A correct final decision gives effect to the plaintiff's burden of proof and holds that the verdict is not supported by the evidence.[44] In the federal courts no careful and prudent lawyer would fail to make a proper motion to direct a verdict.

It is now almost ancient learning that "burden of proof" means several things. It determines which party makes the first opening statement, and has the "right" to open and close the argument; and which party offers the first evidence. When the "right" to open and close the argument is involved, one finds the parties contending that each had the burden of proof and is, therefore, privileged to close the argument. It is thought to be an advantage and not a burden!

A plaintiff having the burden of proof on a given issue, because he has asserted a fact to be true and the defendant has denied it, must prove the fact by evidence which is admissible under the law of evidence. If he cannot thus prove it he loses, or if he cannot produce evidence from which the judge or jury would reasonably find in his favor he also loses. The defendant need do nothing other than make the proper objections and motions. Where a fact cannot be proved the burden of proof decides the case, in the absence of some presumption in favor of such a party. Thus, if the fact cannot be proved and there is no presumption as to which of two reciprocal

44. *See, e.g.,* Prudential Ins. Co. v. Van Wey, 223 Ind. 198, 59 N. E.2d 721 (1945).

heirs died first in a common disaster, the rights of the claimants of their property will be determined by which one has to be plaintiff. If the beneficiary of an accidental death insurance policy cannot begin to prove accidental death he loses. The result is the same if an affirmative defense is involved. The burden of producing the first evidence is on the defendant, and if he cannot prove what he has alleged, the defense fails. But it is an unusual case where no proof can be made or there is by mistake a total failure of proof. In such a case the burden of proof is decisive. If one settles those cases by the use of some presumption the result is equally arbitrary.

A negligence case presents no such situation. There is normally some evidence from which negligence and freedom from contributory negligence can be reasonably inferred, with the result that a defendant's motion for a directed verdict at the conclusion of the plaintiff's evidence in chief is properly overruled. If the burden as to contributory negligence is on the plaintiff, a verdict would be directed against him if his evidence in chief warranted a conclusive inference of contributory negligence. It is unlikely that the plaintiff will admit or prove his own fault. If he does he loses, *but the result would be the same* if the burden of pleading and proof on contributory negligence were on the defendant, under the rule that one whose complaint or proof clearly establishes an affirmative defense must take the consequences. Once such a plaintiff establishes a prima facie case the defendant may undertake to disprove it, and also to avoid it by proof of an affirmative defense. At the end of the rebuttal evidence in a jury case the court, on a motion by the defendant to direct a verdict in his favor, is called upon to decide that the jury under all of the evidence could or could not reasonably find for either party. *It makes no difference which party produced what evidence.* If the court decides that under the evidence the jury could not reasonably find the defendant guilty of negligence, contributory negligence is unimportant and the court directs a verdict for the defendant. If it decides against the defendant on that issue, but decides that the jury could not reasonably find that the plaintiff was free from contributory negligence, the court directs a verdict for the defendant. In a proper case the court (unless bound by an ironclad rule against directing a verdict for the plaintiff) might properly direct a verdict against the defendant on the issues of negligence and contributory negligence because the jury could not reasonably find in his favor, and submit to the jury only the issue of the amount of damages.

The burden of proof has nothing to do with decisions on motions for directed verdict once a trial has been completed and the jury is to be instructed, the burden of producing the first evidence of reasonable quality having been satisfied or overlooked. A party is entitled to the benefit of evidence in his favor which was introduced by his adversary. This is true even if the trial

court erroneously has overruled the defendant's motion to direct a verdict at the conclusion of the plaintiff's case in chief. Uniformly the ruling is waived by the defendant's introduction of evidence and Federal Rule 50(a) expressly so provides. After a case has been fully tried it is, therefore, only where the evidence is thought to be of equal weight that the burden of proof becomes important. It appears to be customary to instruct the jury that if they so find they should decide against the party having the burden of proof on the issue involved. Such an instruction is surplusage and is in fact misleading. It does not often happen that the conflicting evidence and inferences are of equal weight. If they are, there is nothing for the jury to decide, and if it decides contrary to the usual instruction, its verdict cannot be sustained. By definition the evidence pro and con is equal; the jury cannot reasonably decide that the fact has been proved one way or the other; the case, therefore, must be decided on the arbitrary basis that the party having the burden of proof loses. That is necessarily a court question and not a jury question; the jury can only decide in conformity to the requirement that its verdict be sustained by evidence reasonably supporting it. Evidence which is of equal conflicting weight does not prove anything.

While an erroneous ruling on the burden of proof which deprives a party of his right to open or close the argument or which results in the dismissal of a plaintiff's case because of his failure to produce any evidence on an issue he was not obligated to produce evidence on, is prejudicial and reversible error, an erroneous instruction on this point is not always reversible error. Indeed if the evidence reasonably supports a verdict one way or another a "correct" instruction is misleading and beyond the evidence. Such a case cannot be decided on the burden of proof, as there is no failure of proof and it makes no difference which party has made the proof. But if the evidence is of equal conflicting weight and the court has erroneously instructed the jury that the defendant had the burden of proof and, therefore, the jury should decide against the defendant on that issue if it finds the evidence to be of equal weight and there is a verdict for the plaintiff, how substantial is that error? The verdict cannot be sustained. Regardless of how the jury was instructed the error is unimportant; the verdict cannot be sustained on the merits; there is insufficient evidence to support it. Even assuming the burden to be properly on the plaintiff, to tell the jury that the burden of proof is on the plaintiff, and if they find the evidence of equal weight they should decide against him, has all of the vice of any instruction which deals with a point not supported by the evidence. It is misleading as it indicates to the jury that the judge thinks the evidence can be found to be of equal weight, when he has decided and it is a fact that that is not true. If he should give such an instruction he should have sustained the defendant's motion to direct

a verdict, and in the federal courts that ruling forms the final basis of appellate review. The result is that if one is dealing with evidence of equal weight and the court erroneously overrules a motion to direct a verdict and also erroneously instructs the jury that the burden of proof is on the defendant, such an instruction may well have influenced the verdict, but the defendant's substantial question is not that, it is the failure of the evidence to support a verdict in favor of the plaintiff had the jury been properly instructed. He would be silly to insist on a new trial when he is entitled, under the federal practice, to a judgment in his favor.

Certain it is, therefore, that one who categorically states that an erroneous instruction, imposing the burden of proof on the defendant, has deprived him of a substantial right will have difficulty in convincing others that that is so. If the resulting verdict is not sustained by the evidence his substantial question is that; if it is sustained by the evidence the erroneous instruction is surplusage and should not be held to be reversible error. Presumably the jury has also been instructed that it must decide the issue in the light of all of the evidence, regardless of which party produced it. It is inconsistent and misleading to also instruct the jury that the burden of producing the first evidence was on the plaintiff or the defendant as to the various issues involved and what the penalties would have been had there been a failure of such proof. If the evidence is quite conflicting and the proper decision is not easy an appellate court might properly hold such an instruction reversible error, whether it was correct or incorrect. Even if it was incorrect the evidence can be of such a quality that an appellate court should hold it to be not reversible error.

The less evidence one requires to support a verdict the less important becomes the burden of proof.

It has been suggested that the Supreme Court, in dealing with verdicts under the Federal Employers' Liability Act, has departed from the accepted standard. For example, in *Griswold v. Gardner*,[45] Judge Major reviewed the cases and came to the conclusion that, "In fact, it is difficult to conceive of a case brought under this act where a trial court would be justified in directing a verdict." In *Trust Co. of Chicago v. Erie R. Co.*,[46] Judge Minton stated, "We realize that the cases arising under the Federal Employers' Liability Act approach so closely the line which makes the railroad an insurer of its employees—that we tread on thin ice in upholding a district court that has directed a verdict under the Act, especially when we also realize that a strong minority of the Supreme Court supports the thesis that any common law case in which a jury may be demanded should never be taken from the jury, since

45. 155 F.2d 333 (7th Cir. 1946).
46. 165 F.2d 806 (7th Cir. 1948).

the jury must be deemed to be as capable of finding a correct answer as it could."[47] The majority opinion in *Wilkerson v. McCarthy*[48] denies the assertion made by Judge Major but states the test to be "whether fair-minded men may draw different inferences." Whether this is intended to create a legal animal above or below the "reasonable" man is not clear. As indicated above, some have thought it means something below normal. If that is so, the new standard must be applied also in diversity cases, because the "right" to jury trial in the federal courts is a federal question.[49] It is, of course, possible that the Supreme Court may find a state rule on this point to be of "substantial importance," which it clearly is. But it will be new law. And it will remain something of a mystery as to how it came about that Uncle Sam lost his power over a federal jury in diversity cases but retained it in the field of federal litigation.

If the Federal Rules and a state rule conflict as to the burden of pleading and proof how important is it that the party be given the benefit of the state rule? The jury should not be instructed on the point at all. The rule has become *functus officio,* or its application is only pertinent in passing on a motion to direct a verdict. A realistic appraisal of the situation results in the conclusion that to elevate such a rule to the status of "substantial importance" is similar to the effort of making a mountain out of a mole hill.

The burden of proof is procedure, pure and simple. The rules on the subject regulate the conduct of litigation. Clearly they fall in the same category as the rules of pleading and the rules of evidence. When their application is truly decisive there is, to be sure, an arbitrary result; but the opposite result would be equally arbitrary. The dividiug line between a prima facie case and an affirmative defense is none the less valid because it appears to be and is arbitrary.

CONCLUSION

It seems quite clear that the Congress and the Supreme Court which adopted the Federal Rules of Civil Procedure were speaking in orthodox terms. It is inconceivable that either group could have thought that a rule of procedure which when applied would have some bearing upon the outcome of litigation was to be classified as a rule of substance. The Court which promulgated the Rules so held in the first two cases decided. Neither group was ever accused of belonging to a school of philosophy which denies law as an abstract science and which gives importance only to so-called practical results.

One would think that the Court would approach the interpretation and

47. *Referring to* Galloway v. U. S., 319 U. S. 372 (1943). *See also* Lavender v. Kurn, 327 U. S. 645 (1946).

48. 336 U. S. 53 (1949).

49. Lowry v. Seaboard Air Line R., 171 F.2d 625 (5th Cir. 1948); 18 U. OF CIN. L. REV. 356 (1949).

construction of its own rules as it would approach the problem of statutory interpretation. Whether one accepts a completely objective standard or believes that legislative history is pertinent, he comes out at the same place. All concerned certainly thought that there were recognized distinctions between substance, procedure and jurisdiction, and there is no indication that the terms were not used in an orthodox sense. If one paraphrased the Federal Rules to state the results reached, there is, to say the least, a serious objection to them as a matter of policy. The Supreme Court insists that when Congress is legislating it use language which is intelligible and which rather clearly defines in unambiguous language what conduct is required or condemned. One would think that the Court would voluntarily accept a similar obligation. But if it says that its rules of procedure are applicable only in the event they turn out to be realistically unimportant to any litigant it can at least be argued that the standard asserted is unintelligible and unnecessarily ambiguous.

Apart from that, lawyers practicing in the federal courts find themselves in a very considerable quandary. They must hope or fear that the Supreme Court may finally decide that a conflict in the federal and state rules of procedure is of substantial importance. They must, insofar as possible, comply with both the Federal Rules and the state rules. When that is impossible they must guess as to the proper procedure. More unfortunately the defendant in particular, in order to protect his client's interests, must consume a considerable amount of time in urging on the federal judge every possible objection and maneuver which would find some sanction in the state practice. He can honestly comply with the requirements of Federal Rule 11,[50] because he can reasonably believe that if the burden of proof is a matter of substantial importance, then anything is.

One can find nothing in the history of the Federal Rules which countenances such a result. It was certainly thought that they had accomplished a uniform procedure in the federal courts regardless of the character of the action involved. It is impossible on any rational basis to conclude that they were not intended to be applicable in diversity cases. Indeed Rule 81(c) says they are applicable to "removed" actions, most of which are diversity cases. Presumably the present Supreme Court thinks that some constitutional doctrine or some higher policy of States' Rights calls for a repudiation of what the 1938 Court did. The original intention seems clear and the cases discussed do not rest on any asserted interpretation of what was then written. The Court cannot from time to time escape deciding a challenge to a specific rule on the ground that it is substantive and not procedural and the original decision on that score can be repudiated. But the recent cases "assume" the

50. "The signature of an attorney (to a pleading) constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." FED. R. CIV. P. 11.

challenged rule to be *procedural.* The result is Congress and the Supreme Court are found to be without power to regulate procedure in the federal courts in diversity cases, although they have that power as to other cases.

Erie rests on an interpretation of the Rules of Decision Act. Congress and the Court have never thought there was any conflict between that Act and the Conformity Act and the former Equity Rules of the Supreme Court. *Erie* dealt with substantive state rights. The Court which decided that case and promulgated the Federal Rules of Civil Procedure at practically the same time saw no conflict between that doctrine and its power to regulate procedure in the Federal Courts. · Congress in the 1948 Revision of the Judicial Code saw no conflict. It re-enacted the Rules of Decision Act, and the Rule-Making Act.

Never before has it been thought that there was a State Right to state procedure in the federal courts. If the federal courts have no power in this field, they are the most impotent courts in the country. Local pride and prejudice have been elevated to a new plane. But in any event it does not make sense to state the rule on the subject in terms of the federal acceptance of those state rules of procedure which are of "substantial importance." The result can only be chaos and a flood of unnecessary litigation. The Federal Rules of Civil Procedure should be amended to state what is intended, or better yet they should state that in all diversity cases the Rules are not applicable, and that the district courts should in those cases follow the state law of procedure. Nothing less than that will give proper recognition to a genuine State Right to state procedure; nor will it be intelligible. Many will regret that the Court feels compelled to repudiate the original purpose of a uniform system of procedure in the federal courts, and to attach to the rules of procedure an importance reminiscent of the common law veneration on the subject. If it is no longer true that procedure is but a means to an end, we have lost much ground.

It is to be hoped that when the United States Supreme Court is called upon to reconsider the problem it will not accept a litigant's challenge to the Federal Rules on the ground that they deprive him of substantial procedural advantages under state law without looking into the merits of the challenge. The record will most likely disclose it to be only a smoke screen, and that actually he was not harmed in the slightest. And finally, of course, it is to be hoped that the Court will say that the Supreme Court which promulgated the Federal Rules of Civil Procedure, having power so to do, decided the matter in controversy; it is res judicata because the "merits" of the conflicting rule now asserted was then found to be not that meritorious, or at least they were sacrificed to the controlling merit of a uniform system of procedure in all of the federal courts.

Maybe the better realism is that procedure is not that important after all.