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Federal Procedure—Motion to Secure Costs—Effect of New Federal Rules

The effect of the instant holding in practice deserves consideration. If the register is to be assured of getting copies, it must apparently be by affirmative action on his part under Section 13. Lack of incentive to submit copies of works until required by the register or until suit is contemplated may be expected to result in inaction by many copyright owners. The dilemma that results is either a serious increase in the register's burden or a detrimental decrease in the notice value of the files. Moreover, a fiscal problem is involved, for the small fees that must accompany deposits contribute materially to meeting the expenses of the copyright office.

The decision seems open to serious question both upon orthodox principles of statutory construction and because of its probable practical consequences. C. J. D.

FEDERAL PROCEDURE—MOTION TO SECURE COSTS—EFFECT OF NEW FEDERAL RULES—[Federal].—In a case in the federal courts, defendant filed a motion for securing costs. Plaintiff resisted the motion on the ground that the newly-adopted Rules make no provision for costs and hence such motion is not available under the present procedure. Rule 12(h) provides: "A party waives all defenses and objections which he does not present either by motion as hereinbefore[1] provided, or if he has made no motion, in his answer or reply * * * ." *Held,* objection overruled on the ground that the long-established practice of the district courts in respect to motion for costs cannot be deemed to have been nullified by indirection in the manner suggested.[2]

The power of the federal courts to require security for costs before the adoption of the new Rules depended upon the existence of a provision therefor by the state law or a rule of court; without such authority no such power existed.[3] The effect of the adoption of the new Rules on the Conformity Act,[4] the Equity Rules,[5] and the rules of court of each district in force at the time of the adoption must be established before rulings as to the problems involved in the instant case can become consistent under the new procedure. There seems to be a division of opinion as to whether the Conformity Act and the Equity Rules have been superseded.[6] Little has

1. Rule 12(b) provisions for motions directed to (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.

2. Wheeler v. Lientz Manufacturing Co. (D. C. W. D. Mo. 1939) 25 F. Supp. 939. Accord: Alderman v. Whelan Drug Co., Inc. (D. C. D. C. 1939) 6 U. S. L. Week 869, where third party defendant was held entitled to security for costs.

3. 5 Longsdorf, *Cyclopedia of Federal Procedure* (1929) 175, sec. 1558; Sermons v. Kansas City Southern Ry. (1926) 11 F. (2d) 671, where it is said: "In absence of a federal statute or a rule of court upon the subject, the matter is governed by the state law. * * * it appearing therefore that there is no rule of court or statute, either state or federal authorizing the amounts of the motion in this case, the same should be denied."

4. (1872) 17 Stat. 197, (1928) 28 U. S. C. A. sec. 724.

5. (1842) 4 Stat. 499, (1928) 28 U. S. C. A. sec. 723 et seq.

6. That the Conformity Act has been superseded entirely, see April, 1937, Report of the Advisory Committee on Rules of Civil Procedure Appointed

been written of the present status of the former rules of the district courts, but it would seem that they are superseded only insofar as inconsistent with the new Rules.[7] To hold that all such rules have been nullified would be to force the district courts to readopt them under the power given in Rule 83,[8] which seems an unnecessary formality. Had the Supreme Court desired to review rules already promulgated, it could have provided that copies of the rules be forwarded to it. It is therefore arguable that the Supreme Court did not intend to require the readoption of rules of the district courts not inconsistent with the new Rules.

If the power of the District Court to grant the ruling in the instant case rests upon an antecedent rule of court,[9] there seems little doubt that the holding is correct. If such power is dependent upon the state practice,[10] the present status of the Conformity Act becomes important. If that Act is still in force, insofar as it has not been superseded, some procedural rulings are controlled by state practice "as near as may be." Other points not covered by the new Rules, but formerly controlled by conformity, may well

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by the Supreme Court of the United States 217; 1 Moore and Friedman, *Federal Practice* (1938) 36; but see 3 Moore and Friedman, op. cit. supra, 3719, n. 12, referring to the final report of the Advisory Committee striking proposed Rule 74 because government officials prefer to use state practice under the Conformity Act in regard to condemnations. That the Conformity Act is superseded only in so far as inconsistent with the new rules see Babbit, *The New Rules of Federal Procedure* (1938) 26; Schweppe, Survey of the New Federal Rules (1938) 13 Wash. L. Rev. 162, 164, n. 18. That the Equity Rules are entirely superseded, see 1 Moore and Friedman, *Federal Practice* (1938) 36, Babbit, *The New Rules of Federal Procedure* (1938) 26.

7. 1 Moore and Friedman, *Federal Practice* (1938) 37, "The Federal Rules superseded all District Court rules which are inconsistent with the Federal Rules. The first two sentences of Rule 83 permit each District Court to supplement the Federal Rules with local rules facilitating the transaction of its business."

8. "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

9. Such a rule is found in the Rules of the District Courts of the United States for the Eastern District of Missouri: "Rule XIX. Security for costs: a. Security for costs, except as herein otherwise provided, shall be given in every case by plaintiff or petitioner, by making a deposit of fifty dollars in cash with the Clerk at the time of instituting the action or suit. * * * c. The court, or judge thereof, may, upon proper showing, require any party to make an additional deposit as security for costs." The rules of court for the Western District of Missouri are not available.

10. See R. S. Mo. (1929) secs. 1237, 1238: " * * * or if in any case the court shall be satisfied that any plaintiff is unable to pay the cost of suit, * * * the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of costs in such suit."

arise, as the new Rules do not purport to cover every detail of procedure.[11] To follow state practice on such points would be to construct a new body of rules based on state acts, distinct and separate from the Rules. A primary purpose of the Rules was to eliminate that very situation.[12]

Approximate uniformity may be anticipated from employment of former rules of district courts, the new Rules and rules adopted by district courts pursuant to Rule 83.[13] The first two sentences of that rule are clear. The power delegated by the phrase "regulation of practice" in the third sentence apparently means that each judge may regulate questions of procedure not covered by any rule.[14] Unless this is its meaning the sentence would appear redundant; but oral rulings may, by usage and custom, become rules.[15] The rule-making power in the federal system has generally been embodied in statutes,[16] but it has been declared to be inherent in the courts.[17]

With the new Rules as a foundation, federal procedural law may be kept in relative uniformity through publication by district courts of necessary supplemental rules. Though the last sentence of Rule 83 apparently contemplates appropriate rulings by district judges in the absence of specific rules, this power should be exercised cautiously. Where it appears that similar circumstances are likely to recur, an appropriate rule should be formulated and published by a majority of the judges of the district. The court in the instant case seems properly to have had these factors in mind in stating that "it cannot be assumed that the rules long established by the district court under former authority and continued under Rule 83, * * * not inconsistent with statute or the spirit or objectives of the newly prescribed general rules of procedure, are nullified in the indirect manner suggested." F. H. B.

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11. 1 Moore and Friedman, *Federal Practice* (1938) 38, 39; 3 Moore and Friedman, op. cit. supra, 3443, 3444. Rule 83 upon its face anticipates details which have not been covered.

12. Hutcheson, The New Federal Rules of Civil Procedure, 13 Wash. L. Rev. (1938) 198, 202: "The second fundamental change is the substitution of the principle of uniformity for that of conformity—the substitution of a single uniform system in all the Federal courts, alike in every state, in law as well as equity actions, instead of the so-called Conformity Act of 1872."

13. Supra, note 8.

14. See 3 Moore and Friedman, *Federal Practice* (1938) 3443.

15. Duncan v. United States (U. S. 1833) 7 Pet. 435: "It is not necessary that any court in changing its practice should do so by adoption of written rules. Its practice may be established by a uniform mode of proceding, for a series of years, and this forms the law of the court." See also Fullerton v. United States Bank (1828) 1 Pet. 604; 5 Longsdorf, *Cyclopedia of Federal Procedure* (1929) 397.

16. Fullerton v. United States Bank (1828) 1 Pet. 604; Duncan v. United States (1833) 7 Pet. 435.

17. Rose, *Federal Jurisdiction and Procedure* (5th ed. 1938) 47; Pound, Regulation of Judicial Procedure by Rules of Court (1915) 10 Ill. L. Rev. 163, 172: "Indeed the power to govern procedure by general rules has been universally regarded as part of the judicial function and hence an inherent power of the courts of justice."