SIMPLIFICATION OF JUDICIAL PROCEDURE IN FEDERAL COURTS: HEARING; SIXTY-SEVENTH CONGRESS; SECOND SESSION ON S. 1011, 1012, 1546, 2610, AND 2870; FEBRUARY 20, 1922; N. P12-51

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649239023

Simplification of judicial procedure in federal courts: hearing; sixty-seventh congress; second session on S. 1011, 1012, 1546, 2610, and 2870; February 20, 1922; N. P12-51 by Various

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

www.triestepublishing.com

VARIOUS

SIMPLIFICATION OF JUDICIAL PROCEDURE IN FEDERAL COURTS: HEARING; SIXTY-SEVENTH CONGRESS; SECOND SESSION ON S. 1011, 1012, 1546, 2610, AND 2870; FEBRUARY 20, 1922; N. P12-51

Trieste

COMMITTEE ON THE JUDICIARY.

UNITED STATES SENATE.

KNUTE NELSON, Minnesota, *Chairman.*

WILLIAM P. DILLINGHAM, Vermont.
FRANK B. BRANDEGEE, Connecticut.
WILLIAM E. BORAH, Idaho.
ALBERT B. CUMMINS, Iowa.
LEBARON B. COLT, Rhode Island.
THOMAS STERLING, South Dakota.
GEORGE W. NORRIS, Nebraska.
RICHARD P. ERNST, Kentucky.
SAMUEL M. SHORTRIDGE, California.
CHARLES A. CULBERSON, Texas.
LEE S. OVERMAN, North Carolina.
JAMES A. REED, Missouri.
HENRY F. ASHURST, Arizona.
JOHN K. SHIELDS, Tennessee.
THOMAS J. WALSH, Montana.

SIMON MICHELET, *Clerk.*

MEMBERS OF THE SUBCOMMITTEE.

RICHARD P. ERNST, Kentucky, *Chairman.*

ALBERT B. CUMMINS, Iowa.
SAMUEL M. SHORTRIDGE, California.
JOHN K. SHIELDS, Tennessee.
HENRY F. ASHURST, Arizona.

GEO. L. TREAT, *Assistant Clerk.*
CARL W. BORDSEN, *Assistant Clerk.*

CONTENTS.

SIMPLIFICATION OF JUDICIAL PROCEDURE IN FEDERAL COURTS.

TUESDAY, FEBRUARY 20, 1922.

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 2.30 o'clock p. m., in the committee room in the Capitol, Senator Richard P. Ernst presiding.

Present: Senators Ernst (chairman), Nelson, Cummins, Colt, Sterling, Shortridge, Overman, and Walsh of Montana.

The subcommittee had under consideration the following bills:

[S. 1011, Sixty seventh Congress, first session.]

A BILL To amend the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 28 of the Judicial Code, approved March 3, 1911, is hereby amended by adding thereto the following:

"In all cases of removal where the defendant is not a resident of the State, district, or division of the district in which suit is brought, the district court of the United States for the proper district shall be the one having jurisdiction in the district or division thereof where suit is brought."

[S. 1012, Sixty-seventh Congress, first session.]

A BILL To amend the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Judicial Code, approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section, to be numbered 274D, as follows:

"SEC. 274D. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court, when there is an actual controversy between the parties, may make binding declarations of right whether any consequential relief is or could be claimed or not."

The Supreme Court may adopt rules for the better enforcement and regulation of this provision.

[S. 1546, Sixty-seventh Congress, first session.]

A BILL To amend the Penal Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 335 of the Penal Code be amended to read as follows:

"SEC. 335. All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

"No trial, plea, conviction, or sentence for any crime shall involve and carry with it the loss of citizenship or of civil rights, or make the accused a felon or infamous, unless the verdict of the jury or the sentence imposed upon the defendant shall expressly specify that loss of civil rights is to follow.

"All laws or provisions of law conflicting herewith are hereby repealed."

[S. 2610, Sixty-seventh Congress, first session.]

A BILL In reference to writs of error.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases civil and criminal is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

SEC. 2. That in all cases where an appeal may be taken as of right it may be taken by serving upon the adverse party or his attorney of record and by filing in the office of the clerk with whom the order appealed from is entered a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however*, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.

[S. 2870, Sixty-seventh Congress, second session.]

A BILL To authorize the Supreme Court to prescribe forms and rules, and generally to regulate pleading procedure, and practice on the common-law side of the Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law and in bankruptcy of whatever nature by the circuit courts of appeals and the district courts of the United States and the courts of the District of Columbia. That in prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits.

SEC. 2. That when and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.

STATEMENT OF SENATOR FRANK B. KELLOGG, OF MINNESOTA.

Senator ERNST. Senator Kellogg, we are now prepared to hear from you or these other gentlemen, as you prefer.

Senator KELLOGG. I introduced a bill (Senate bill 2870—"to authorize the Supreme Court to prescribe forms and rules and generally to regulate pleading, procedure, and practice on the common-law side of the Federal courts."

I wish to say just a few words on this bill, and then I will have to be excused, because there is a bill now pending in the Senate that I am interested in.

I think it would be very advantageous to the general practitioner if we could have uniform rules and procedure in law cases, the same as we have in equity cases. I think it was in 1912 or 1913, when I was president of the American Bar Association, or about that time, the bar association took hold of the subject of the equity rules, and the Supreme Court asked the courts of appeals of the various circuits—nine circuits—to appoint committees in each circuit to confer and suggest to the Supreme Court amendments to the equity rules to simplify procedure and practice in the Federal courts. I was a member of the committee from the eighth circuit, with Mr. Hegeman and Mr. Vaile, of Denver.

We gave a good deal of time to the subject, as did the committees in all the other circuits, and at a conference in Washington we agreed on a report, substantially agreeing on rules that we would recommend to the Supreme Court.

The Supreme Court took up the subject and gave very careful consideration to it, and promulgated new rules, which I think every lawyer will say greatly simplified the practice, wiped out the old system of equity pleading, and provided for an answer, and setting a case down for trial, and for taking testimony in open court, expediting cases, and they have worked very well.

I think the same thing ought to be done in relation to the rules of procedure and practice in actions at law. As it is now, the practice in law cases in the Federal courts is supposed to follow the practice in the several States, and, as you know, there

are a great many different systems of practice, varying in a great many instances. I will not attempt to go into the details, but they are not uniform. Neither do they follow uniformly the State practice. As a matter of fact, the practice now is partly Federal and partly State. Wherever the practice in actions at law is regulated by statute, that is uniform. Where it is regulated by the State practice, of course, it is not uniform; and it is difficult to tell now in any State exactly what the practice is.

Attached to the report of the committee on uniform judicial procedure of the American Bar Association, dated August 25, 26, and 27, 1920, is an appendix which gives instances in which the State practice does not apply, and if I may be permitted, I would like to make this report a part of my statement to the committee.

(The report referred to will be found appended to this hearing.)

Senator KELLOGG. You will find by examining that appendix that in a great many instances the practice does not follow the State practice. Now, the practice in the Federal courts is different than the practice in the State courts in many respects. Lawyers in every State practice in various circuits in the adjoining States. They have got to look up the State practice, the State statutes, the State rules, and then look up the Federal laws providing changes in the State practice; so that, as I said before, the practice is partly Federal and partly State, as adopted by the Federal statutes.

For instance, that a Federal rule of practice prevails regardless of a subsequent State statute altering the time in which a writ is returnable. That amendments of process and pleadings allowed by State statutes will not be followed when inconsistent with Federal statutes or amendments. That an equitable counterclaim can not be set up in a Federal court. That the granting or refusing of a continuance is a matter within the discretion of the court, notwithstanding a contrary State statute. That the selection of jurors does not follow the mode prescribed by State statutes. That a State statute permitting a party to be examined by his adversary in advance of the trial will not be followed.

The decisions, as I recall, in some of the circuits or districts were not uniform on that question until the decision of the Supreme Court of the United States, I think in One hundred and forty-first United States.

That the competency of witness depends upon section 858, Revised Statutes and not upon State statutes. That a State statute requiring instruction or a special verdict need not be observed. The granting and refusing of new trials is not controlled by State statutes. That the question of cost is not governed by State statutes. There are many other instances. So that we have a sort of a conglomerate practice now in these courts, partly regulated by Federal statutes and partly regulated by State statutes.

Senator COLT. Is that partly from the fact that the provisions of the Federal law are to be followed "as near as may be"?

Senator KELLOGG. Yes.

Senator COLT. That is, it is indefinite?

Senator KELLOGG. In many instances they follow it, but in many instances they do not follow it, and in many instances it is changed by Federal statute. It seems to me, in the interest of uniformity, so that the lawyers in one State may know what the practice in other States is, there ought to be a uniform practice in the Federal courts. The old equity rules have been wiped out, and we now have a uniform, simplified system in equity practice.

It has been stated that lawyers in the States are familiar with their own practice, and therefore they ought not to be required to become familiar with a Federal practice; but that applies to equity cases as much as to law cases. We have an entirely uniform and separate practice in the Federal courts of equity, and I do not see any reason why we should not have the same at law, and I think it would be very beneficial to the bar, generally, and would result in simplifying the practice, expediting cases, and would greatly benefit the administration of justice. That is all that I have to say.

Senator ERNST. We have these other gentlemen here now to be heard. Before we proceed further I should like to have put into the record the names of those who are present.

Mr. TAFT. The committee on jurisprudence and law reform consists of the following gentlemen, who are here: C. A. Severance, St. Paul, Minn.; Henry W. Taft, New York, N. Y.; T. J. O'Donnell, Denver, Colo.; Samuel T. Douglas, Detroit, Mich.; William Hunter, Tampa, Fla.; Merrill Moores, Member of Congress, Indiana; Nathan W. MacChesney, Chicago, Ill.; George E. Beers, New Haven, Conn.; Edward A. Harriman, Washington.

Mr. Thomas W. Shelton, chairman of the committee on uniform judicial procedure, is in charge of the bill which has just been read to you by Senator Kellogg a few minutes ago.

I am Mr. Taft, and am appearing instead of Mr. Everett P. Wheeler, and we have four bills in which we are interested, which are recommended by the bar association.

I expect that Mr. Shelton had better go on first, and then he will be followed by Mr. C. A. Severance, president of the American Bar Association.

Senator ERNST. Very well; proceed.

STATEMENT OF MR. THOMAS W. SHELTON, OF NORFOLK, VA.

Mr. SHELTON. I will take 10 minutes, if you will allow me.

Senator ERNST. Take longer, if you desire.

Mr. SHELTON. I recognize that Mr. Taft and his committee are here, and I do not want to take any more time. I would like to have half an hour if I could; but the statement made a few minutes ago by Senator Kellogg, the patron of this bill, who is thoroughly familiar with its spirit, I think puts before you the attempt, which is to vest in the Supreme Court of the United States the same power over the law side of the courts as it has always exercised on the equity side and that it has always exercised relative to admiralty and bankruptcy; and in fact, it has always been given the rule-making power whenever any new institution has been erected by this Congress.

I think you will find that it is the disposition of Congress to vest in every one of the organizations that it creates, the Interstate Commerce Commission or what not, the power to regulate its own internal machinery, and I think that is based upon the principle that the power to regulate the manner of doing a thing is the power to regulate the result. The feeling is, therefore, that Congress may have overreached a little bit in that respect, in regulating the minutiæ and the details, and therefore it will be more in line with its policy to invest in the Supreme Court the power to fix the details and minutiæ of rules for the operation of the trial courts. As was said by the Chief Justice in his speech in Chicago, I need not say to you that in vesting this power in the Supreme Court, that means really that you are trusting this great power to your fellow lawyers and judges throughout the country. That was made plain to you a while ago when they gave you control of the preparation of equity pleadings, and you saw how that was done.

I wish to say to you just what that means. Right now, under the present rules regulating the trial courts by statute, how many lawyers are making any endeavor to expedite the trial, or cheapen it in any way? For the simple reason that a statute regulating the proceedings of the court has almost the force and dignity of a statute creating substantive law. That being the case the lawyer, when he takes his oath of qualification, has to recognize that procedural statute just as much as he has to recognize the substantive law of the court. The result is that the lawyer can see injustice done right in his presence, with these inelastic rules, and he can not, to save his life, change it without appealing from the trial court to the Federal court; and the Federal court is obliged to recognize the statute has been violated, and that trial has got to be set aside. I can state to you, as statesmen who are keeping in touch with what is going on in the country, that this has more to do with the uneasiness among the people, and dissatisfaction, than any one other thing.

Now, what the lawyers have been representing to the people of this country for about nine years is, that if you do away with these statutes, you place upon the shoulders of the lawyers and judges the responsibility of creating these rules of court, and you will bring about the same condition in America that was brought about in England; you will have every judge and every lawyer become the agent of the law, and whenever he sees anything going wrong in the presence of the court he will immediately attempt to correct it; and that suit of his will go to the Supreme Court and the Supreme Court will have power to act upon it promptly.

Senator STERLING. Would you carry out that principle to the State courts, as well?

Mr. SHELTON. Oh, yes.

Senator STERLING. So that they would regulate the pleadings and procedure?

Mr. SHELTON. Yes; I will come to that in a minute. I will show you what ought to be done in this report that we have filed.

That means that you not only turn over to the lawyers and judges the responsibility of creating these rules of court, but you will go a little further than that, for the simple reason that it matters not how good a law you pass, its value is, at last, measured by the measure in which it is enforced; and therefore, if you have the courts enforcing laws as they should be, promptly, you will find that the very laws that you enact will be received better, for the simple reason that it will be done promptly and economically and in the manner in which you intend that it should be done. I am a little ahead on that.

To come to the suggestion of Senator Sterling about the States, when this question was first mooted, of course, there was some objection made. One of them was that