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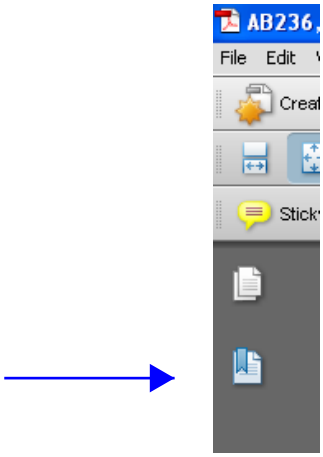

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LEGISLATIVE HISTORY REPORT AND ANALYSIS

Re: **Public Law 63-278, Chapter 90**
House of Representatives Bill No. 4545 of 1915
As signed on March 3, 1915
As codified in 38 United States Statutes 956

The legislative history of section 1653 of Title 28 of the United States Code as enacted by the Public Law referenced above is documented by materials itemized in one declaration.♦ The materials accompanying Exhibit B are itemized in this same declaration. The materials are organized as follows:

Exhibit A – House of Representatives Bill No. 4545 (Clayton – 1915)
Public Law 63-278, Chapter 90
Exhibit B – Sixty-Second Congress Predecessor Bills

As you have provided us with a section of focus, in our research of the public law noted, we have refrained from gathering a complete collection of the documentation available, such as copies of all bills introduced, reports, transcripts of hearings, and debate from the *Congressional Record* regarding every aspect of the public law. To do so would be to provide an excessive quantity of documents which, while relevant to the public law itself, may contain no reference to the section of your particular focus. Instead we provide for the public law, the *CIS/Annual* Legislative History and Abstracts, or a comparable source from 1915 of the enactment's history, which shows the various reports, hearings, debate available. (See Exhibit A, #2 and #4) In our research process, we review the legislative history and determine which materials are relevant to the section. We review all versions of relevant bills, reports and debates, extracting for you that which is pertinent to your section. We generally do not review hearings as they are usually very lengthy; instead we endeavor to provide abstracts. In this case, however, due to the wealth of information the hearings provided, we have included them for your review. (See Exhibit A, #7 and #8 and B, #7 and #8)

♦ For information on document numbers, research policies, request for judicial notice and more, please visit www.legintent.com and click on "**Research Aids and Policies**" and "**Points and Authorities**" at the bottom of the web page.

We will provide complete copies of any further documents, at your direction after a review of the materials we provide. Occasionally this additional research may necessitate further research charges; we will discuss this with you at the time of your call requesting additional information if this is the case.

PUBLIC LAW 63-278, CHAPTER 90
HOUSE OF REPRESENTATIVES BILL NO. 4545 OF 1915
AS SIGNED ON MARCH 3, 1915
AS CODIFIED IN 38 UNITED STATES STATUTES 956

Section 1653 of Title 28 of the United States Code was enacted in 1915 following congressional approval of House of Representatives Bill No. 4545 [hereinafter referred to as "H.R. 4545"]. (See Exhibit A, #1) As enacted, the title of this act was:

> Chap. 90 – An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March Third, nineteen hundred and eleven.
> (See Exhibit A, #1)

At this time, section 1653 of Title 28 of the United States Code was enacted in former section 274c of the former Judicial Code. (See Exhibit A, #1)

H.R. 4545 was introduced by Representative Henry De Lamar Clayton, serving at this time as chair of the House Committee on Judiciary, on May 1, 1913. (See Exhibit A, #3a and #9) H.R. 4545 was referred to the House and Senate Committees on Judiciary, both of which submitted reports thereon. (See Exhibit A, #3b, #3c, #5 and #6) Following Congressional approval, H.R. 4545 was signed by President Woodrow Wilson on March 3, 1915. (See Exhibit A, #1)

A brief summary of H.R. 4545 as reported by the Senate Committee on the Judiciary was provided in Senate Report No. 852 dated January 5, 1915 as follows:

> The bill proposes to add to the Judicial Code three new sections with relation to regulating practice and procedure in the United States Courts, viz: Section 274a, providing for correction at any stage of the proceeding of error in filing the suit on the law or equity side of the docket, as the case may be; section 274b, providing for interposition of equitable defenses in suits at law without filing a bill in equity; section 274c, providing for curing defects at any stage of the proceeding in original allegation of diverse citizenship where jurisdiction is based upon that fact alone.
> (See Exhibit A, #6, page 1)

Section 1653 of Title 28 United States Code
<u>As derived from former section 274c of the former Judiciary Code:</u>

As H.R. 4545 was introduced, it contained the proposal to add section 274c to the Judiciary Code. (See Exhibit A, #3a) We reviewed more than 45 bills from the Sixty-Third Congress and found that H.R. 4545 was the only bill from that Congress to propose this specific language.

House Report No. 162 by the House Committee on Judiciary put forth the following rationale for section 274c:

> The third section of the bill was drawn to meet a difficulty which sometimes arises in practice and has caused previous injustice. The plaintiff brings his suit and fails to allege in his pleading all the necessary jurisdictional facts. It has been held that it is necessary that the jurisdiction of the court should appear on the face of the pleadings, and actions have been dismissed after testimony has been taken and hearing has been has because of the failure to insert the proper allegations of citizenships. Indeed there are instances in which the defendant has not made the objection until after judgment and has then sues our a writ of error and succeeded in reversing the judgment, solely because of the failure of the pleading filed by the plaintiff to make the proper allegations of citizenship.
> (See Exhibit A, #5b, page 2)

More of the history of this particular section was discussed in the House Committee on Judiciary's Hearing transcript dated December 17, 1913:

> The other point involved in House bill 454 is the third section which provides that a judgment shall not be reversed because of a defective allegation of citizenship. The present strict rule sometimes works very great injustice. This portion of the bill was first proposed by the chairman, who had his attention called in his own circuit to some injustices that has been done by the present strict rule. I myself know of a judgment coming here to the Supreme Court which the court felt obliged to reverse solely on the ground of the defective allegation of citizenship. That would certainly seem unreasonable technical, and we welcomed the suggestion from the chairman that this section should be added to the bill as drawn by the [American] bar association, and it has been approved by the association.
> (See Exhibit A, #7, page 6)

The "chairman" referenced above, was Representative Clayton as referenced at the start of the hearing and as confirmed by Representative Clayton's Congressional Biography. (See Exhibit A, #7, page 3 and #9)

Due to the rush nature of this research project we were unable to look for any American Bar Association materials. If you would be interested in any further research in this area, please let us know.

Sixty-Second Congress Predecessor Bills:

As indicated above, no other bills from the 63rd Congress that we reviewed that were either introduced by Representative Clayton or on the topic of Judicial Reform proposed to add the language contained in former section 274c.

However, two bills proposed the language of this section in the 62nd Congress, H.R. 12365 and H.R. 18236, both authored by Representative Clayton. (See Exhibit B, #1 and #3) H.R. 12365 was introduced on July 8, 1911 and H.R. 18326 was introduced on January 18, 1912. (See Exhibit B, #1 and #3)

A discussion of the history behind these two measures was provided in the hearing before the House Committee on Judiciary, dated January 25, 1912:

> I desire to say in that connection that that bill was drawn by me last summer in the light and as a result of a year or more correspondence with two circuit judges, calling attention to the necessity for such legislation, and it seems somewhat in line with one of these bills on the same subject that the American Bar Association has had me to introduce and which has been referred to this morning. The bill which has been under discussion which I introduced at the instance of the American Bar Association has opposition. Former Senator Faulkner and others here are in opposition to that particular bill, but none of them have expressed any opposition, so far as I know, to this particular bill H.R. 12365. ...
>
> . . .
>
> I called attention to it so that it may go into the record that this bill H.R. 12365, which was introduced on July 8, 1911, and I reintroduced it on January 18 being now H.R. 18236, and made only he changes as you will observe in the second section of the bill, by striking out the word "circuit" before "courts" and inserting "districts to conform with the duties." That is the only change made.
> (See Exhibit B, #7, pages 19 and 20)

Your careful review of the documents enclosed may reveal helpful discussion on the issue before you. You should also be able to draw some conclusions based upon the assumption that the language was intended to be consistent with the overall goal of the legislation. A close reading of all of the hearings we include for your review should provide further insight. (See Exhibit A, #7 and #8 and B, #7 and #8)

As we indicated earlier in this Report, we will provide complete copies of any documents at your direction after a review of the materials we provide. We normally charge reproduction expenses which will be explained to you. If this additional research is lengthy, it may necessitate further research charges; we will discuss this with you at the time of your call requesting more information to be gathered if this is the case.

Any analysis provided in this report is based upon the nature and extent of your request to us, as well as a brief review of the enclosed documents. As such, it must be considered tentative in nature. A more conclusive statement of the impact of the legislative history in your case would be dependent upon a complete understanding of all of the factual issues involved and the applicable legal principles.

We appreciate the opportunity to provide this assistance and hope that these efforts will be of value to you.

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DECLARATION OF JENNY S. LILLGE

I, Jenny S. Lillge, declare:

I am an attorney licensed to practice in California, State Bar No. 265046, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the original enactment of section 1653 of Title 28 of the United States Code, former section 274c, by United States House of Representatives Bill No. 4545 of 1915 [hereinafter referred to as H.R. 4545]. H.R. 4545 was enacted by Congress as Public Law 63-278, Chapter 90, on March 3, 1915, at 38 United States Statutes 956.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on H.R. 4545 of 1915 as it relates to Title 28 United States Code section 1653, former section 274c. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc.

EXHIBIT A - PUBLIC LAW 63-278, CHAPTER 90, H.R. 4545 (CLAYTON– 1915):

1. Public Law 63-278, Chapter 90, March 3, 1915, 38 United States Statutes 956;
2. Excerpt regarding Public Law 63-278, Chapter 90 from the CIS US Congressional Committee Hearings Index: 23rd Congress-64th;
3. All available versions of H.R. 4545 (Clayton-1915);
4. Excerpt regarding H.R. 4545 from the *Congressional Record Index*, 63rd Congress, First, Second, and Third Sessions;
5. House Report No. 162, entitled "Judicial Proceedings in the United States Courts," prepared by the House Committee on Judiciary, to accompany H.R. 4545, dated December 22, 1913;

6. Senate Report No. 852, entitled "Amendments to the Judicial Code," prepared by the Senate Committee on Judiciary, to accompany H.R. 4545, dated January 5, 1915;
7. Hearings before the Committee on the Judiciary entitled, "Reforms in Judicial Procedure American Bar Association Bills," dated December 17, 1913;
8. Hearings before the Committee on the Judiciary entitled, "Reforms in Judicial Procedure American Bar Association Bills," dated February 27, 1914;
9. Excerpt regarding Representative Henry De Lamar Clayton from the Biographical Directory of the United States Congress, available online at: http://bioguide.congress.gov.

EXHIBIT B – 62ND CONGRESS PREDECESSOR BILLS, RELATED TO H.R. 4545:

1. All available versions of H.R. 12365 (Clayton-1911);
2. Excerpt regarding H.R. 12365 from the *Congressional Record Index*, 62nd Congress, First Session;
3. All available versions of H.R. 18326 (Clayton-1912);
4. Excerpt regarding H.R. 18326 from the *Congressional Record Index*, 62nd Congress, Second Session;
5. Excerpt regarding H.R. 18326 from the *Congressional Record of Proceedings and Debates*, 62nd Congress, House, February 7, 1912;
6. House Report No. 286, entitled "Judicial Proceedings in the United States Courts," prepared by the House Committee on Judiciary, to accompany H.R. 18236, dated January 30, 1912;
7. Hearings before the Committee on the Judiciary entitled, "Reforms in Legal Procedure," dated January 25, 1912 and January 29, 1913;
8. Hearings before a Joint Committee of Subcommittees of the Committee on the Judiciary entitled, "Procedure in the United States Courts," dated January 25, 1912;
9. Chapter 231, United States Statutes, 1911, excerpted regarding former section 274;
10. Superseded United States Code, 1946 edition, excerpted regarding former section 399.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 8th day of July, 2015 at Woodland, California.

JENNY S. LILLGE

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March 3, 1915.
[H. R. 4545.]
[Public, No. 278.]

CHAP. 90.—An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Judicial Code.
Vol. 36, p. 1164, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

Suits at law or in equity.
Correction if erroneously brought.

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

Amendment of pleadings.

Acceptance of testimony.

Equitable defenses.
Admissions of, in actions at law.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

Procedure.

Jurisdiction from diverse citizenship.
Amendment of defective pleadings admitted.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

Approved, March 3, 1915.

March 3, 1915.
[H. R. 12919.]
[Public, No. 279.]

CHAP. 91.—An Act To amend an Act entitled "An Act to provide for an enlarged homestead."

Public lands.
Enlarged homesteads.
Vol. 35, p. 639; Vol. 36, p. 532; Vol. 37, p. 666, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections three and four of the Act entitled "An Act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine, and of an Act entitled "An Act to provide for an enlarged homestead," approved June seventeenth, nineteen hundred and ten, as amended by an Act approved February eleventh, nineteen hundred and thirteen, be, and the same are hereby, amended to read as follows:

CIS US Congressional Committee Hearings Index

PART I

23rd Congress–64th Congress, Dec. 1833–Mar. 1917

Reference Bibliography, H1-1—(63-3) S.Doc. v.7 n.981

Congressional Information Service, Inc.
Washington, D.C.

H153-1

TO AMEND THE CODE OF D.C.
May 5, 1916. 64-1. 84 p. Y4.J89/1:D63/3.

Committee Serial 47.

Committee: House Committee on Judiciary

Subject descriptors: D.C. municipal law; D.C. courts

Bill: (64) H.R. 14974

Witnesses:
Covington, J. Harry, Chief Justice, DC Supreme Court, p. 5.
Hoehling, A. A., Jr., representing DC Bar Assn, p. 8.
Flannery, J. Spalding, representing DC Bar Assn, p. 10.
Sullivan, George E., representing DC Bar Assn, p. 29.
Easby-Smith, James S., representing DC Bar Assn, p. 31.
Tobriner, Leon, representing DC Bar Assn, p. 52.
Johnson, J. Altheus, DC, p. 83.

H153-2-A

REFORMS IN JUDICIAL PROCEDURE, AMERICAN BAR ASSOCIATION BILLS. Part 1
Dec. 17, 1913. 63-2. 12 p. Y4.J89/1:P94/3-1.

Committee Serial No. 8.

Committee: House Committee on Judiciary

Subject descriptors: Judicial reform; Criminal procedure; Civil procedure

Bills: (63) H.R. 4545; (63) H.R. 9991; (63) H.R. 7355; (63) H.R. 61; (63) H.R. 1875

Witnesses:
Wheeler, Everett P., chm, spec committee, ABA, p. 3.
Davis, John W., Solicitor Gen, Justice Dept, p. 6.
Howland, Frank, member, spec committee, ABA, p. 7.
Lawson, John D., member, spec committee, ABA, p. 7.
Irvine, Frank, member, spec committee, ABA, p. 10.
Smith, George R., Rep, Minn, p. 11.

H153-2-B

REFORMS IN JUDICIAL PROCEDURE, AMERICAN BAR ASSOCIATION BILLS. Part 2
Feb. 27, 1914. 63-2. ii+13-38 p. Y4.J89/1:P94/3-2.

Committee Serial No. 8.

Microfiche note: Hearing begins on microfiche No. 2 of 14.

Committee: House Committee on Judiciary

Subject descriptors: Judicial reform; Civil procedure

Bills: (63) H.R. 133; (63) H.R. 4545

Witnesses:
Taft, William Howard, pres, ABA, p. 14.
Shelton, Thomas W., member, ABA, p. 19.
Parker, Alton B., representing NY State Bar Assn, p. 24.
Root, Elihu, Sen, NY, p. 27.
Andrews, James De W., atty and legal scholar, NYC, p. 34.

H153-2-C

PROCEDURE IN U.S. COURTS
Jan. 26, 1916. 64-1. 11 p. Y4.J89/1:P94/4.

Committee Serial No. 8.

Microfiche note: Hearing begins on microfiche No. 2 of 14.

Committee: House Committee on Judiciary

Subject descriptors: Judicial reform; Civil procedure

Bill: (64) H.R. 9428

Witness:
Wheeler, Everett P., representing ABA, p. 3.

H153-3-A

FEDERAL EMPLOYEES' COMPENSATION. Part 1
Mar. 31, 1914. 63-2. 44 p. Y4.J89/1:Em7/4-1.

Microfiche note: Hearing was also filmed and fully indexed as part of H100-4.

Committee: House Committee on Judiciary

Bill: (63) H.R. 15222

H153-3-B

FEDERAL EMPLOYEES' COMPENSATION. Part 2
Apr. 3, 1914. 63-2. ii+45-65 p. Y4.J89/1:Em7/4-2.

Microfiche note: Hearing begins on microfiche No. 2 of 14. Hearing was also filmed and fully indexed as part of H100-4.

Committee: House Committee on Judiciary

Subcommittee: House Subcommittee No. 2 (Judiciary)

Bill: (63) H.R. 15222

H153-3-C

FEDERAL EMPLOYEES' COMPENSATION. Part 3
Jan. 28, 1916. 64-1. 78 p. Y4.J89/1:Em7/5.

Committee Serial 16.

Microfiche note: Hearing begins on microfiche No. 3 of 14.

Committee: House Committee on Judiciary

Subject descriptors: Workmen's compensation; Federal employees

Bill: (64) H.R. 476

Witnesses:
McGillicuddy, Daniel J., Rep, Maine, p. 3.
Andrews, John B., sec, Amer Assn for Labor Legislation, p. 5.
Ward, Eva, staff, Amer Assn for Labor Legislation, p. 19.
Hull, Harry E., Rep, Iowa, p. 21.
Gainor, Edward J., pres, Natl Assn of Letter Carriers, p. 23.
Meeker, Royal, Commr, BLS, p. 27.
Beaman, Middleton, Legis Drafting Research Fund, Columbia Univ, p. 58.
Clark, Lindley D., DC, p. 63.
Rogers, Frank T., pres, United Natl Assn of Post-Office Clerks, p. 70.
Cantwell, Edward J., sec, Natl Assn of Letter Carriers, p. 71.
Flaherty, Thomas F., sec-treas, Natl Fedn of Post Office Clerks, p. 73.

H153-4

H. SNOWDEN MARSHALL
Jan. 10, 17, 19, Feb. 2, 4, 9, 11, 28, 29, Mar. 1-4, 8, 24, Apr. 5, 7, 24, 29, May 1, 6, 1916. 64-1. 1058 p. Index. Y4.J89/1:M35.

Committee Serial No. 39. Feb. 28 - Mar. 4 hearings were held in NYC.

Committee: House Committee on Judiciary

Subject descriptors: Department of Justice; Marshall, H. Snowden; Congressional investigations; Corruption and bribery; White Collar crime; Administration of justice; Legal ethics; Osborne, James W.; New York State; New York City

Bill: (64) H. Res. 90

Witnesses:

63D CONGRESS, 1ST SESSION.

H. R. 4545.

IN THE HOUSE OF REPRESENTATIVES.

MAY 1, 1913.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court

63D CONGRESS, 2D SESSION. H. R. 4544.

shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United

States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

63D CONGRESS, 1ST SESSION. H. R. 4545.

A BILL

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

By Mr. CLAYTON.

MAY 1, 1913.—Referred to the Committee on the Judiciary and ordered to be printed.

63D CONGRESS,
2D SESSION.

House Calendar No. 47.

H. R. 4545.

[Report No. 162.]

IN THE HOUSE OF REPRESENTATIVES.

MAY 1, 1913.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

DECEMBER 22, 1913.

Referred to the House Calendar and ordered to be printed.

A BILL

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

63D CONGRESS, 1ST SESSION. } H. R. 4545.

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate

court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

HOUSE CALENDAR NO. 47.

63D CONGRESS, 2D SESSION. } H. R. 4545.

[Report No. 162.]

A BILL

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

By Mr. CLAYTON.

MAY 1, 1913.—Referred to the Committee on the Judiciary and ordered to be printed.

DECEMBER 22, 1913.—Referred to the House Calendar and ordered to be printed.

63D CONGRESS,
2D SESSION.

H. R. 4545.

IN THE SENATE OF THE UNITED STATES.

JULY 21, 1914.

Read twice and referred to the Committee on the Judiciary.

AN ACT

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third nineteen hundred and eleven, be, and the same is hereby amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

HOUSE CALENDAR NO. 47.

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate

court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

Passed the House of Representatives July 20, 1914.

Attest: SOUTH TRIMBLE,

Clerk.

63D CONGRESS, 2D SESSION.

H. R. 4545.

AN ACT

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

JULY 21, 1914.—Read twice and referred to the Committee on the Judiciary.

63D CONGRESS, 3D SESSION.

Calendar No. 744.

H. R. 4545.

[Report No. 852.]

IN THE SENATE OF THE UNITED STATES.

JULY 21, 1914.

Read twice and referred to the Committee on the Judiciary.

JANUARY 5, 1915.

Reported by Mr. O'GORMAN, with an amendment.

[Insert the part printed in italic.]

AN ACT

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

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"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate

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CONGRESSIONAL RECORD:

CONTAINING

THE PROCEEDINGS AND DEBATES

OF THE

SIXTY-THIRD CONGRESS, FIRST SESSION.

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TO THE

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CONTAINING

THE PROCEEDINGS AND DEBATES

OF THE

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BILLS AND RESOLUTIONS.

H. R. 4544—To reserve certain lands and to incorporate the same and make them a part of the Caribou National Forest Reserve.
Mr. Smith of Idaho; reported with amendment (H. Rept. 302), 3930.—Debated, amended, and passed House, 6300–6303.—Passed Senate, 6339.—Examined and signed, 6496, 6514.—Presented to the President, 6614.—Approved [Public, No. 87], 7030.

H. R. 4545—To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved Mar. 3, 1911.
Mr. Clayton; reported back (H. Rept. 162), 1465, 11458.—Debated and passed House, 12405, 12408 [Appendix, 777].—Referred to Senate Committee on the Judiciary, 12413.

H. R. 4618—To increase the limit of cost for increased quarantine facilities at the port of Portland, Me.
Mr. Hinds; reported back (H. Rept. 104), 418.—Debated and passed House, 911.—Referred to Senate Committee on Public Buildings and Grounds, 948.—Reported back, 3742.—Passed Senate, 5673.—Examined and signed, 5902, 6089.—Presented to the President, 6136.—Approved [Public, No. 80], 6559.

H. R. 4628—For the relief of N. Ferro.
Mr. Harrison of Mississippi; reported back (H. Rept. 832), 10511.—Passed House, 11768.—Referred to Senate Committee on Claims, 11776.

H. R. 4629—To reimburse Gaston R. Poitevin for property lost by him while assistant light keeper at East Pascagoula River (Miss.) Light Station, as recommended by the Lighthouse Board.
Mr. Harrison of Mississippi; reported back (H. Rept. 830), 10511.

H. R. 4630—For the relief of Fred A. Emerson.
Mr. Hinds; reported with amendment (H. Rept. 715), 9274.—Amended and passed House, 14754, 14758.—Referred to Senate Committee on Claims, 14796.

H. R. 4651—To authorize the Secretary of the Treasury to sell certain land to the trustees of the charity fund of Star in the East Lodge, of Old Town, Me.
Mr. Guernsey; reported with amendment (H. Rept. 846), 10705.—Amended and passed House, 13871.—Referred to Senate Committee on Public Lands, 13917.—Reported back (S. Rept. 773), 14611.—Passed Senate, 16853.—Examined and signed, 16902, 16939.—Presented to the President, 16954.—Approved [Private, No. 158], 16964.

H. R. 4744—To authorize the appointment of John W. Hyatt to the grade of second lieutenant in the Army.
Mr. Slemp; reported back (H. Rept. 285), 3648.—Passed House, 8141.—Referred to Senate Committee on Military Affairs, 8173.—Reported back (S. Rept. 605), 10708.—Passed Senate, 11894, 11895.—Examined and signed, 11957, 12003.—Presented to the President, 12059.—Approved [Public, No. 131], 12432.

H. R. 4793—For the relief of John H. Gatts.
Mr. Moss of West Virginia; reported back adversely (H. Rept. 443) and laid on the table, 5332.

H. R. 4814—Granting a pension to Minnie Nordyke.
Mr. Fess; reference changed to Committee on Pensions, 2284.

H. R. 4858—Granting a pension to Charles W. Cunningham.
Mr. Moss of West Virginia; reference changed to Committee on Pensions, 1617.

H. R. 4899—To fix the standard barrel for fruits, vegetables, and other dry commodities.
Mr. Tuttle; reported with amendment (H. Rept. 800), 10124.—Debated, 15499, 15500.

H. R. 4931—To prevent false advertising in the District of Columbia.
Mr. Dent; reported back (H. Rept. 1194), 16840.

H. R. 4938—Providing for the issuance of patents to transferees of town lots purchased from the United States at public sale in certain cases.
Mr. Ferris; reported with amendment (H. Rept. 150), 1107; debated, 1926, 2749, 3509, 3510.—Amended and passed House, 3510.—Referred to Senate Committee on Public Lands, 3598.—Reported back (S. Rept. 333), 4715.—Passed Senate, 11392.—Examined and signed, 11511, 11517.—Presented to the President, 11665.—Approved [Public, No. 126], 12432.

H. R. 4952—To refund to John B. Keating customs tax erroneously and illegally collected at Portland, Me., on cargo of coal Mar. 11, 1908.
Mr. Hinds; reported back (H. Rept. 734), 9612.—Passed House, 11756.—Referred to Senate Committee on Finance, 11776.

H. R. 4988—To provide for the disposal of certain lands in the Fort Berthold Indian Reservation, N. Dak.
Mr. Norton; reported with amendment (H. Rept. 371), 4781.—Debated, amended, and passed House, 6290–6294.—Referred to Senate Committee on Indian Affairs, 6338.—Reported with amendments (S. Rept. 561), 9282.—Amended and passed Senate, 11892.—House concurs in Senate amendments, 12748.—Examined and signed, 12848, 12853.—Presented to the President, 12948.—Approved [Public, No. 162], 13192.

H. R. 4992—Granting a pension to George McC. Foster.
Mr. Bowdle; reference changed to Committee on Invalid Pensions, 1817.

H. R. 5058—For the relief of Gattleib Schlect and Maurice D. Higgins, and for the relief of the heirs and legal representatives of William Eindhammer and Valentine Brasch.
Mr. Brown of New York; reported with amendment (H. Rept. 895), 11073.

H. R. 5079—For the relief of Mary Abel.
Mr. Pepper; reported with amendment (H. Rept. 508), 6312.—Debated, amended, and passed House, 10358, 10359.—Referred to Senate Committee on Claims, 10378.—Reported back (S. Rept. 619), 11075.—Passed Senate, 11895.—Examined and signed, 11957, 12003.—Presented to the President, 12058.—Approved [Private, No. 64], 12432.

H. R. 5155—To provide for a district judge in the northern and southern districts of the State of Mississippi, and for other purposes.
Mr. Collier; reported back (H. Rept. 1101), 14155.

H. R. 5170—Granting an increase of pension to George H. Imboden.
Mr. Avis; reference changed to Committee on Pensions, 6091.

H. R. 5176—Granting a pension to Eva Prime.
Mr. Brown of New York; reference changed to Committee on Invalid Pensions, 3546.

H. R. 5195—For the relief of the Atlantic Canning Co.
Mr. Green of Iowa; reported back (H. Rept. 535), 6773.—Debated and passed House, 10360.—Referred to Senate Committee on Claims, 10378.

H. R. 5243—Granting a pension to Ezra R. Fuller.
Mr. Palmer; reference changed to Committee on Pensions, 6959.

H. R. 5303—To amend section 3 of an act entitled "An act to provide for the examination of certain officers of the Army and to regulate promotions therein," approved Oct. 1, 1890.
Mr. Hay; reported back (H. Rept. 281), 3648.

H. R. 5304—To increase the efficiency of the aviation service of the Army, and for other purposes.
Mr. Hay; reported with amendment (H. Rept. 132), 816.—Debated, 5260, 8793–8796.—Amended and passed House, 8796.—Referred to Senate Committee on Military Affairs, 8866.—Reported with amendment (S. Rept. 576), 9616.—Amended and passed Senate, 11892, 11893.—House concurs in Senate amendments, 11961.—Examined and signed, 12033, 12130.—Presented to the President, 12194.—Approved [Public, No. 143], 12433.

H. R. 5370—Granting an increase of pension to Charles B. Daniel.
Mr. Langley; reference changed to Committee on Pensions, 1617.

H. R. 5384—Granting an increase of pension to Catherine Casler.
Mr. Smith of New York; reference changed to Committee on Invalid Pensions, 8998.

H. R. 5425—Granting an increase of pension to Miller Stocking.
Mr. Mapes; reference changed to Committee on Invalid Pensions, 2284.

H. R. 5427—Granting an increase of pension to Daniel W. Spring.
Mr. Mapes; reference changed to Committee on Invalid Pensions, 2284.

H. R. 5438—Granting an increase of pension to Margaret J. Berry.
Mr. Moss of West Virginia; reference changed to Committee on Pensions, 14072.

H. R. 5445—For the relief of the legal representatives of Jonathan Morris, deceased.
Mr. Richardson; reported back for reference to Court of Claims (H. Rept. 387), see H. Res. 443, 4886, 6503.

H. R. 5474—For the relief of Patrick McGee, alias Patrick Gallagher.
Mr. Taggart; reported with amendment (H. Rept. 632), 8268.—Amended and passed House, 10365, 10366.—Referred to Senate Committee on Military Affairs, 10378.—Reported back (S. Rept. 802), 16178.—Passed Senate, 16855.—Examined and signed, 16900, 16902.—Presented to the President, 16954.—Approved [Private, No. 159], 16964.

H. R. 5487—To authorize an additional appropriation for the erection of the United States appraisers' stores building at Milwaukee, Wis.
Mr. Stafford; reported with amendment (H. Rept. 153), 1107.—Debated, 1930, 1931, 2756, 2757.—Amended and passed House, 2757.—Referred to Senate Committee on Public Buildings and Grounds, 2858.—Reported back (S. Rept. 392), 3742, 5772.—Debated and passed Senate, 5674, 6668, 7297.—Examined and signed, 7354, 7375.—Presented to the President, 7403.—Approved [Public, No. 92], 8719.

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H. R. 5528—Granting a pension to William N. Ruggles.
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H. R. 5551—Granting a pension to Robert Strong.
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H. R. 5746—For the relief of Marcus L. Pelham.
Mr. Donovan; reported back (H. Rept. 405), 5017.—Debated and passed House, 6504, 6536, 6537.—Referred to Senate Committee on Military Affairs, 6679.—Reported back (S. Rept. 545), 9002.—Passed Senate, 11891.—Examined and signed, 11957, 12003.—Presented to the President, 12059.—Approved [Private, No. 65], 12432.

H. R. 5753—To correct the military record of John Minahan, alias John Bagley.
Mr. Kinkaid of Nebraska; reported with amendment (H. Rept. 1035), 12976.—Debated, 13096, 13097.

H. R. 5832—For the relief of Edward William Bailey.
Mr. Holland; reported back (H. Rept. 262), 3546.—Debated, 6497, 14741.—Laid on the table (see bill S. 1270), 14741, 14758.

H. R. 5849—To amend section 100 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved Mar. 3, 1911.
Mr. Francis; reported back (H. Rept. 121), 587.—Debated, 4916, 6284, 6911, 7687.

H. R. 5850—To amend section 162 of the act to codify, revise, and amend the laws relating to the judiciary, approved Mar. 3, 1911.
Mr. Watkins; reported back (H. Rept. 111), 504.—Changed to Union Calendar, 4123.—Debated, 6404–6443, 6750–6764.—Amended and passed House, 6764.—Referred to Senate Committee on the Judiciary, 6793.

H. R. 5851—To authorize and provide for the manufacture, maintenance, distribution, and supply of electric light and power within the Lihue district and the Koloa district, county of Kauai, Territory of Hawaii.
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VOLUME LII, PART VI.

CONGRESSIONAL RECORD

SIXTY-THIRD CONGRESS, THIRD SESSION.

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Mr. Kahn; reported back (H. Rept. 1455), 4802.

H. R. 1698—To amend an act entitled "An act to provide for an enlarged homestead," and acts amendatory thereof and supplemental thereto.
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H. R. 2471—For purchasing a site and erecting a public building at Superior, Nebr.
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H. R. 2504—To amend section 2 of an act entitled "An act to incorporate the National Society of the Daughters of the American Revolution."
Mr. FitzHenry; reported back (S. Rept. 1042); passed Senate, 4680.—Examined and signed, 4838, 4888.—Presented to the President, 5056.—Approved [Public, No. 277], 5522.

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Mr. Esch; reported with amendment (S. Rept. 1010); amended and passed Senate, 3985.—House disagrees to Senate amendment and asks for a conference, 4308.—Senate insists on its amendment and agrees to a conference, 4393.—Conference appointed, 4308, 4393.—Conference report made and agreed to in Senate, 4560.—Conference report made, debated, and agreed to in House, 4671.—Examined and signed, 5251, 5417.—Presented to the President, 5459.—Approved [Public, No. 303], 5523.

H. R. 2662—For the relief of Andrew J. Lawrence.
Mr. Hayes; reported with amendment (S. Rept. 866), 1011.—Amended and passed Senate, 4958.—House concurs in Senate amendment, 5186.—Examined and signed, 5245, 5417.—Presented to the President, 5459.—Approved [Private, No. 246], 5523.

H. R. 2667—For the relief of the legal representatives of Parker S. Rouse, deceased.
Mr. Hayes; reported back (S. Rept. 884), 1285.—Passed Senate, 4961.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 206], 5522.

H. R. 2668—For the relief of the heirs of Ellery B. Wilmar.
Mr. Hayes; reported with amendment (H. Rept. 1266), 1276.—Amended and passed House, 3526.—Referred to Senate Committee on Public Lands, 3552.

H. R. 2703—For the relief of Drenzy A. Jones and John G. Hopper, joint contractors, for surveying Yosemite Park boundary.
Mr. Kahn; passed Senate, 4951.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 207], 5522.

H. R. 2909—To extend the privileges of the seventh section of immediate-transportation act to Bay City, Mich.
Mr. Woodruff; reported back (S. Rept. 1034), 4523.—Passed Senate, 5350.—Examined and signed, 5350, 5491.—Presented to the President, 5521.—Approved [Public, No. 306], 5523.

H. R. 2969—Providing for an increase of salary of the United States attorney for the district of Connecticut.
Mr. Baker; ordered stricken from the files, 5520.

H. R. 2972—Forbidding the importation, exportation, or the carriage in interstate commerce of watchcases made in whole or in part of an inferior metal having deposited or plated thereon, or brazed or otherwise affixed thereto, platings, coverings, or sheets composed of gold or of an alloy thereof bearing words or marks importing a guaranty or wear for a specified time, and of watchcases of less than nine karat bearing the word "gold," and of watch movements not properly marked in respect to the number of their jewels and their adjustment, and for other purposes.
Mr. Goeke; debated. [Appendix, 558.]

H. R. 3305—Directing the accounting officers of the Treasury to credit and settle an account of Maj. George H. Penrose.
Mr. Stevens of Minnesota; reported back (S. Rept. 883), 1285.—Passed Senate, 4961.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 208], 5522.

H. R. 3430—For the relief of Lottie Rapp.
Mr. Anthony; reported with amendment (S. Rept. 914), 1541.—Amended and passed Senate, 4963.—House concurs in Senate amendment, 5186.—Examined and signed, 5245, 5417.—Presented to the President, 5459.—Approved [Private, No. 247], 5523.

H. R. 3435—For the relief of Mrs. Max S. Retter.
Mr. Anthony; reported back (S. Rept. 886), 1285.—Passed Senate, 4961.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 209], 5522.

H. R. 3580—For the relief of Francis Tomlinson.
Mr. Kreider; passed Senate, 4953.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 210], 5522.

H. R. 3613—To reimburse Le Grand C. Cramer for amount of damages to his motor launch Winninish by the United States launch Gunedmertrix at Morris Heights, N. Y., on Mar. 31, 1911.
Mr. Levy; reported back (S. Rept. 885), 1285.—Passed Senate, 4961.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 211], 5522.

H. R. 3771—Granting a pension to Joseph F. Flynn.
Mr. Riordan; reference changed to Committee on Pensions, 2927.

H. R. 3885—For the relief of Peter Scott.
Mr. Switzer; reported back (S. Rept. 891), 1285.—Passed Senate 4961.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 212], 5522.

H. R. 4001—For the relief of Daniel J. Ryan.
Mr. Calder; reported back (S. Rept. 903), 1487.—Passed Senate, 4962.—Examined and signed, 5146, 5187.—Presented to the President, 5417.—Approved [Private, No. 213], 5522.

H. R. 4008—For the relief of Sandy Crawford.
Mr. Gorman; reported back (S. Rept. 877), 1156.—Passed Senate, 5960.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 215], 5522.

H. R. 4266—Granting patent to certain lands to the legal heirs of W. F. Nichols.
Mr. Wingo; reported back (S. Rept. 990), 3927.—Passed Senate, 5345, 5346.—Examined and signed, 5350, 5491.—Presented to the President, 5521.—Approved [Private, No. 250], 5523.

H. R. 4541—To consolidate the veterinary service, United States Army, and to increase its efficiency.
Mr. Hay; debated in Senate, 5338–5340.—Laid on the table, 5340.

H. R. 4545—To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved Mar. 3, 1911.
Mr. Clayton; reported with amendment (S. Rept. 852), 963.—Amended and passed Senate, 4955, 4956.—House concurs in Senate amendment, 5225.—Examined and signed, 5245, 5417.—Presented to the President, 5459.—Approved [Public, No. 278], 5522.

H. R. 4630—For the relief of Fred A. Emerson.
Mr. Hinds; reported back (S. Rept. 873), 1156.—Passed Senate, 4959.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 214], 5522.

H. R. 4899—To fix the standard barrel for fruits, vegetables, and other dry commodities.
Mr. Tuttle; debated, 1077–1093, 1514–1531. [Appendix, 76.]—Amended and passed House, 1527–1531.—Debated and passed Senate, 5353.—Examined and signed, 5505, 5521.—Presented to the President, 5521.—Approved [Public, No. 307], 5523.

H. R. 4931—To prevent false advertising in the District of Columbia.
Mr. Dent; debated, 1773, 3796.

H. R. 5195—For the relief of the Atlantic Canning Co.
Mr. Green of Iowa; reported back (S. Rept. 893) and passed Senate, 1328.—Examined and signed, 1484, 1500.—Presented to the President, 1733.—Approved [Private, No. 107], 2248.

H. R. 5823—Granting an increase of pension to Benjamin W. Clark.
Mr. Ainey; reference changed to Committee on Pensions, 1596.

H. R. 5849—To amend section 100 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved Mar. 3, 1911.
Mr. Francis; debated, amended, and passed House, 269–275.—Referred to Senate Committee on the Judiciary, 295.—Reported back (S. Rept. 1054), 5102.—Passed Senate, 5350, 5351.—Examined and signed, 5505, 5521.—Presented to the President, 5521.—Approved [Public, No. 308], 5523.

H. R. 5850—To amend section 162 of the act to codify, revise, and amend the laws relating to the judiciary, approved Mar. 3, 1911.
Mr. Watkins; reported back (S. Rept. 973), 3548.—Debated, 5344.

H. R. 5890—For the relief of settlers within the limits of the grant to the New Orleans, Baton Rouge & Vicksburg Railroad Co.
Mr. Aswell; debated in Senate, 4952, 4953.

H. R. 5966—For the relief of Clyde Odum.
Mr. Sparkman; reported back (S. Rept. 863), 1010.—Passed Senate, 4958.—Examined and signed, 5067, 5178.—Presented to the President, 5201.—Approved [Private, No. 216], 5522.

63D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 162.

JUDICIAL PROCEEDINGS IN UNITED STATES COURTS.

DECEMBER 22, 1913.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 4545.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 4545) to allow and regulate amendments in judicial proceedings in the courts of the United States, report the same back with the recommendation that the bill do pass.

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63D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPT. 162, Part 2.

JUDICIAL PROCEEDINGS IN THE UNITED STATES COURTS.

JULY 1, 1914.—Referred to the House Calendar and ordered to be printed.

Mr. DUPRÉ, from the Committee on the Judiciary, submitted the following

VIEWS.

[To accompany H. R. 4545.]

The legislation proposed by this bill (H. R. 4545), hereinafter reproduced in full, has been urged for some time by the American Bar Association. A committee of that body, headed by Mr. Everett P. Wheeler, the well-known attorney and publicist of New York, and including former Representative Paul Howland, of Ohio, appeared before the Judiciary Committee specially in support thereof. Former Representative John W. Davis, Solicitor General of the United States, by direction of the Attorney General, joined this committee in indorsing the measure.

The Judiciary Committee thereafter ordered the bill favorably reported. The report, however (No. 162), merely recommended that the bill do pass. It did not explain the measure. Being in full sympathy with the bill and desiring that the membership of the House should have at hand, when it is reached, some explanation of its objects and purposes, I requested Mr. Everett P. Wheeler to prepare a brief analysis of the bill. This he has done in a lucid and convincing manner, and adopting his views as my own, I herewith submit them:

The object of the first section of this bill is to enable the district courts of the United States to correct a mistake made by the plaintiff in describing his suit as a suit at law when his remedy should have been in equity, or in describing his suit as a suit in equity when his remedy should have been at law, without the necessity of bringing a new action. The practice thus proposed exists in most of the States in which there is no separate court of chancery. In the so-called code States the provision which was adopted by the New York Code of Procedure in 1848 has been adopted, namely, that the distinguishing forms of actions at law and suits in equity have been abolished. It is not proposed in any way to abolish the essential distinction between remedies at law and in equity, but to obviate the necessity of dismissing one suit and beginning another. This

seems all the more reasonable because in the Federal courts the same judge presides over trials at law and hearings in equity. There is the same clerk's office and in most cases the same clerk.

The proposed act does not in any way interfere with the right of trial by jury. If the action is brought in equity and transferred to the law docket, the issues will be triable by jury as before. The practice thus proposed has already been in part adopted by the Supreme Court by equity rule 22 of 1912:

> If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

If the court had power to deal with proceedings at law to the same extent which it has to deal with proceedings in equity, it would undoubtedly have adopted a similar rule with reference to suits begun on the law side of the court, but this power has not been conferred upon it and therefore the proposed act still is necessary.

The object of the second section is similar. It authorizes the defendant to interpose equitable defenses by answer or plea without the necessity of filing a bill on the equity side of the court. This enables the court in the one suit to deal with the whole controversy and obviates the expense and delay caused by a separate suit. As, for example, if the action were brought on a contract, the defendant could by answer allege that there was a mistake in reducing to writing the actual terms of the agreement and that on this ground he was entitled to have the contract corrected so as to conform to the real agreement of the parties.

The details of the procedure are left by the bill to be regulated by rule of court.

This proposed legislation is in strict harmony with the provisions of the new equity rule of the Supreme Court (rule 30) that abolishes the old practice of a cross bill and requires the defendant in equity suits to set up by answer "in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit," or any "counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." Here again the bill proposes to extend to the court in actions at law the same power which it now has in actions in equity.

The third section of the bill was drawn to meet a difficulty which sometimes arises in practice and has caused grievous injustice. The plaintiff brings his suit and fails to allege in his pleading all the necessary jurisdictional facts. It has been held that it is necessary that the jurisdiction of the court should appear on the face of the pleadings, and actions have been dismissed after testimony has been taken and hearing has been had because of the failure to insert the proper allegations of citizenship. Indeed there are instances in which the defendant has not made the objection until after judgment and has then sued out a writ of error and succeeded in reversing the judgment, solely because of the failure of the pleading filed by the plaintiff to make the proper allegations of citizenship.

This bill is in strict analogy to section 921 of the Revised Statutes, which provides:

> That when causes of a like nature or relative to the same question are pending before a court of the United States or of any Territory, the court may make such orders

and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.

The object of the bill is identical with that of the statute, to avoid unnecessary cost or delays in the administration of justice.

[H. R. 4545, Sixty-third Congress, first session.]

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

O

Calendar No. 744.

63D CONGRESS, 3d Session. } SENATE. { REPORT No. 852.

AMENDMENTS TO THE JUDICIAL CODE.

JANUARY 5, 1915.—Ordered to be printed.

Mr. O'GORMAN, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 4545.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 4545) to amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, beg leave to report the same with an amendment and to recommend that it be so amended and passed.

The amendment is to insert after the word "amendment," in line 11, page 2, the following: ", if preserved."

The bill proposes to add to the Judicial Code three new sections with relation to regulating practice and procedure in United States courts, viz: Section 274a, providing for correction at any stage of the proceeding of error in filing the suit on the law or equity side of the docket, as the case may be; section 274b, providing for interposition of equitable defenses in suits at law without filing a bill in equity; section 274c, providing for curing defects at any stage of the proceeding in original allegation of diverse citizenship where jurisdiction is based upon that fact alone.

The bill (H. R. 4545) as referred to the committee is as follows:

63D CONGRESS, 2D SESSION.

H. R. 4545.

IN THE SENATE OF THE UNITED STATES.

JULY 21, 1914.

Read twice and referred to the Committee on the Judiciary.

AN ACT

To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate

court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

Passed the House of Representatives July 20, 1914.

Attest: SOUTH TRIMBLE,

Clerk.

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HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

REFORMS IN JUDICIAL PROCEDURE
AMERICAN BAR ASSOCIATION BILLS

Serial 8—Part 1

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COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman*.

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
R. Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	L. C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk*.

REFORMS IN JUDICIAL PROCEDURE—AMERICAN BAR ASSOCIATION BILLS.

SERIAL 8, PART 1.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, December 17, 1913.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

STATEMENT OF HON. EVERETT P. WHEELER, CHAIRMAN OF SPECIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

The CHAIRMAN. Gentlemen of the committee, this is the time fixed for hearing Mr. Wheeler and others who represent the American Bar Association, in behalf of certain measures pending before the committee and which were introduced at the instance of the American Bar Association. One of them is H. R. 4545; another is H. R. 9991, and H. R. 7355.

Mr. WHEELER. Yes, sir. There are two other bills of similar tenor to No. 7355, No. 61 and No. 1875, but they are all substantially the same, and those three you mentioned are on the same point.

The CHAIRMAN. You will indicate, of course, where there are two bills covering the same subject, which one you perfer.

Mr. WHEELER. Mr. Chairman and gentlemen of the committee, the first bill to which I have to call your attention is one that has been in a previous Congress, reported favorably by the committee, and has twice passed the House. That is House bill 9991. It is what we have come to know in the discussions we have had on the subject as

the "technical-error bill." That is, it provides that no judgment shall be set aside or reversed or a new trial granted for error unless in the opinion of the court to which an application is made after an examination of the entire cause it shall appear that the error complained of has injuriously affected the substantial rights of the parties. We adopted some amendments that were suggested in this committee, and which seem to us to cover the ground exactly.

Then there is also a provision that the trial judge may take a special verdict, reserving questions of law for ultimate decision, as, for example, in an action for negligence, he could take a verdict on the question of damages, reserving the question as to whether or not there was a right of recovery. It gives to the appellate court the power to consider that question of law upon the record.

That would enable the plaintiff, as a similar provision sometimes enables the plaintiff in my own State of New York, to reinstate a verdict that had been set aside by the trial judge, to the great advantage of litigants.

Under the other practice the only remedy in such case is to grant a new trial, which is not only expensive and dilatory, but which often works injustice because the honest witnesses on the second trial presumptively have not quite so clear a memory as they had when it was more fresh and, on the other hand, dishonest witnesses are tempted to change their testimony to meet the views of the court. Our courts in New York and in other States have complained of that difficulty.

It seems to us there is no occasion to argue that very much at length, because the bill has been before the committee in previous Congresses, and has met the approval of the committee, and substantially the same bill, as I said, has twice passed the House, once on unanimous consent.

The second bill to which I desire to call attention is House bill 4545. That provides in general that if any Federal court shall find that a suit at law should have been brought on the equity side, or a suit in equity on the law side, the court can order an amendment to the pleadings, and transfer the case to the proper docket. It also gives the right to interpose equitable defenses in an action at law.

I may say in that connection that in many of the States the right exists in the State courts to interpose equitable defenses in actions at law and we find that it works very well. One of the last cases I tried before a jury was a suit brought on a promissory note. We set up an equitable defense, and the court submitted the facts under that defense to the jury. Under the Federal practice, however, we would have been obliged to file a cross bill and to try these equitable allegations separately at additional expense.

The CHAIRMAN. Mr. Wheeler, I do not desire to interfere with the orderly course of the statement which you make to the committee, but going back to H. R. 9991, you say this has twice passed the House. In which Congress was it that it passed the House?

Mr. WHEELER. It passed the House at the last Congress and at the Congress previous to that.

The CHAIRMAN. I simply wanted to get that in the record.

Mr. WHEELER. Yes.

The CHAIRMAN. Can you tell the committee why it did not pass the Senate?

Mr. WHEELER. Mr. Rayner, of Maryland, was opposed to the application of this legislation to criminal cases, and he made a vigorous

contest in the Senate upon that point and the result was that the bill failed to go to a vote. It never was voted upon in the Senate. It was reported out of the Judiciary Committee of the Senate after a good deal of debate with the words "or criminal" omitted. I am informed that that change was not made because the majority of the committee favored it, but because it was felt that in view of the strenuous opposition of Senator Rayner it could not come to a vote if that clause was retained. However, in point of fact it did not come to a vote, and Mr. Root has introduced a bill at the present Congress with the words contained in it, so that that bill, in the same form, is now pending in the Senate.

The CHAIRMAN. In the exact language of this bill 9991?

Mr. WHEELER. Yes.

The CHAIRMAN. Of course, it has not been acted on in the Senate?

Mr. WHEELER. No. We have not had any hearing before the Senate this session.

Mr. FLOYD. I will ask you to state if this same provision of law is not incorporated in the laws of a number of the States?

Mr. WHEELER. It is.

Mr. FLOYD. There it relates also to criminal defenses?

Mr. WHEELER. It does. In fact, in New York and in California it was first applied to criminal cases. It was the law in criminal cases in New York for 10 years before we applied it to civil cases. And the court of appeals called attention to that fact, that it seemed anomalous that whereas in a criminal case they had the right to look to the merits on the record and not reverse unless in their judgment the judgment below was erroneous on the merits; yet in civil cases they were sometimes obliged to reverse for technical error.[1] In California they went so far as to incorporate in their constitution an amendment in the language of this first section, substantially, but there they applied it only to criminal cases, leaving the application to civil cases to legislation; and there are other States in which the same rule is applied, and it has worked very will.

Mr. FLOYD. I desire to bring out the fact that it is not a new principle of law, but has been in practice in a number of States. It has long been the rule in my State, applied to criminal cases.

Mr. WEBB. Mr. Wheeler, do you not think that the courts have a right to say what is harmless error?

Mr. WHEELER. They ought to have, but some of the circuits do not exercise it.

Mr. WEBB. I know in some States the court makes the rule.

Mr. WHEELER. In New Hampshire, for example, which was one of the leading States in reforming legal procedure, our committeeman, Mr. Samuel C. Eastman, who was attorney general of that State, and who is prevented from being here by illness in his family, took an active part in that movement, as did Chief Justice Doe. It is really a matter in which practice varies in the different States, and that is one of the mischiefs that this bill would cure. In the circuits where the State practice is in accordance with this bill they administer it now, but there are other circuits in which the rule is different in the State courts, and there they feel bound under the practice act to follow the State practice with technical strictness.

[1] People v. Strollo (191 N. Y., 42, 61, 67); see also People v. Gilbert (199 N. Y., 28).

If there are no other questions in regard to the first bill, I will complete what I had to say in regard to the second.

The other point involved in House bill 4545 is the third section, which provides that a judgment shall not be reversed because of a defective allegation of citizenship. The present strict rule sometimes works very great injustice. This portion of the bill was first proposed by the chairman, who had his attention called in his own circuit to some injustices that had been done by the present strict rule. I myself know of a judgment coming here to the Supreme Court which the court felt obliged to reverse solely on the ground of defective allegation of citizenship. That would certainly seem unreasonably technical, and we welcomed the suggestion from the chairman that this section should be added to the bill as drawn by the bar association, and it has been approved by the association.

I may say that these bills both have been discussed in the sessions of our American Bar Association in successive years, and while at first there was difference of opinion and a good deal of debate, yet at the last session at Montreal and at the previous session at Chattanooga they were both unanimously approved.

Mr. Solicitor General Davis is here this morning to speak to these two bills, and I know the committee will be very glad to hear him.

STATEMENT OF HON. JOHN W. DAVIS, SOLICITOR GENERAL OF THE UNITED STATES.

Mr. DAVIS. Mr. Chairman and gentlemen of the committee, I did not know until this moment that I was here to speak in reference to these bills. I thought that I was here to hear my friend Mr. Wheeler and the distinguished gentlemen who accompany him and whom it has been my pleasure to hear on these same measures.

Speaking as a member of this committee, I think perhaps I am justified in saying to the committee that I am here as the result of the conference between these gentlemen and my chief on yesterday, he heartily agreeing with them as to the propriety of these two measures. I want to express to the committee his approval of these two bills, and my own approval of these two bills of course is known to the committee by reason of the action we took on them at the last session.

Mr. WEBB. Did you report the bill out of the last session?

Mr. DAVIS. I reported one of them, I am sure, and the other I do not know. I know the technical error bill I reported. I think both bills were passed, and in the reports of the committee you will find a report of the committee on which that action was based.

Mr. WEBB. They were both favorably reported?

Mr. DAVIS. That is my recollection of it, and I do not care myself to take the time of the committee in adding anything to what those reports contain.

Mr. WHEELER. Mr. Howland, of Ohio, is here as a member of our committee; Mr. Lawson, of Missouri; and Mr. Thorndike, of Boston; and Prof. Irvine, of Cornell University. They all cordially favor the bill, and I am sure we are in the hands of the committee as to whether they desire to hear anything further.

The CHAIRMAN. The committee will be very glad, Mr. Wheeler, to hear you further, or any other gentlemen.

STATEMENT OF MR. FRANK HOWLAND, OF OHIO.

Mr. HOWLAND. Mr. Chairman and gentlemen of the committee, these bills are old friends, and it is not necessary and not my purpose to present any argument in favor of legislation which has already been passed upon favorably by this committee at various times.

The matter now comes before the committee in the final shape it has taken after consideration by the committee and by the House, and I am speaking now of the technical error bill.

The American Bar Association, I think, is anxious that action be taken by the committee at an early period of the session, if the bill still meets the approval of the committee, so that it will get on the calendar and get the action of the Congress as soon as possible.

With reference to the law and equity bill, I do not know of any opposition to that. That is the Clayton bill, H. R. 4545, authorizing the court to transfer an equity cause to the equity side, which was erroneously commenced as an action at law, and vice versa, and authorizing the court in the case of a defective allegation of adverse citizenship, which is jurisdictional, of course, to correct that allegation in the appellate court in accordance with the fact. There can not be any opposition to a proposition of that kind. It would seem as though that was fundamental, that that ought to be done, and the only thing that strikes me in connection with legislation of this character is that it is remarkable that it has not been done before.

Mr. WEBB. That form of liberal practice is followed in nearly every State now, is it not?

Mr. HOWLAND. Every State, and the whole tendency of the times is to do away with technicality.

The bar of the country is the great conservative force in the country. That has been the history of the bar. The bar is inclined, by reason of its study, its habit of thought, to be conservative, and it is well that it is so. But here is the American Bar Association now asking for what we are pleased to designate as legal reforms which are along the line demanded by popular sentiment in order to make our legal procedure more simple and to do away with delays in its administration. So that when the conservative element of society, to wit, the legal profession, is in line with the popular sentiment of the day, there ought really to be no opposition to the speedy adoption of a favorable report on these bills and their enactment into law.

I desire to say just one word, which need not necessarily go into the record, that it is with great pleasure that I appear before the Judiciary Committee in behalf of this legislation and renew old acquaintances.

The CHAIRMAN. If the other gentlemen desire to say anything we would be very glad to hear them.

Mr. WHEELER. Prof. Lawson, of Missouri.

STATEMENT OF PROF. JOHN D. LAWSON, OF MISSOURI.

Mr. LAWSON. Mr. Chairman and gentlemen of the committee, at the request of Mr. Wheeler I will just say one word as the result of my experiences for the last four or five years in studying criminal procedure and legal procedure.

In addition to being a teacher of law, I have been for some years editor of the American Law Review, and in the pages of that journal I have written very much in favor of law reform and the abolition of technicality.

My study of the subject of procedure in England and France during the past three years has convinced me of the truth of what the chancellor of Great Britain said at Montreal, namely, that technicality is the mark of an undeveloped legal procedure, and that the efforts that have been made by members of the bar to get rid of our historical technicality is in no sense at all, as is thought by some, an attack upon the legal profession or an attack upon the courts, but is simply in line with what has occurred everywhere in Europe. Until one of the greatest lawgivers of the world, though he is generally recognized as a soldier and not as a lawgiver, namely, Napoleon the First, appeared in France to simplify French procedure, and until the great law reformers appeared in England a half century ago procedure was about what it is in some parts of our country to-day. In other words, the courts and the profession were looking more to the form than to the substance, and that has resulted, I think you will agree with me, in popular dissatisfaction with our courts, caused by the impatience of our people at the long delays in obtaining justice and the uncertainty through the application so strictly of technical rules of procedure.

That is the only thought I wish to put before you, because so far as the merits of the bill are concerned it has been argued by Mr. Wheeler, once or twice by myself before this committee, and I have felt that we are practically agreed upon the bills being proper bills to be recommended for passage.

I thank you.

The CHAIRMAN. Now, gentlemen, another bill of Mr. Wheeler, H. R. 7355.

Mr. WHEELER. Yes. That bill has also been before the committee, but has never been reported upon either way, as I understand it.

The bill was originally drawn to meet this difficulty which arose from the decision of the Court of Appeals of New York in the case of Ives *v.* The South Buffalo Railroad. There our supreme court had held that the workman's compensation act of the State of New York was constitutional, but the court of appeals reversed that and held that this act was in violation of the fourteenth amendment to the Constitution of the United States, because it took away property without due process of law.[1]

They put it on the ground that the statute imposed a liability upon the employer without fault upon the part of the employer.

On the other hand, the argument for the bill, as you all remember, no doubt, is that accidents in employment are a part of the risk of the business, and that suitable provision should be made for compensation.

We lawyers who were in active practice felt that such legislation was really as much in the interest of the employers as of the employed, because the present practice in negligence cases leads to a great many suits being brought, a majority of which are unsuccessful, and the lawyers in which are often paid by a share of the proceeds; and the reports from casualty companies show that the

[1] 201 N. Y., 271; reversing 68 Misc., 643.

expenses of the business and of litigation amount to almost as much as the amounts that are paid to the litigants, all of which is productive of great injustice and great complaint.

If, as I said, our court of appeals felt obliged to decide against the validity of that law, on the other hand, in New Jersey, in the State of Washington, and in some other States the courts sustain the validity of similar law. So we were confronted with the situation of a different construction being given to the United States Constitution in different States. It means one thing on the east bank of the Hudson and another thing on the west bank, which no one, I think, can justify or support.

Mr. WEBB. We find that condition in the patent laws, do we not, Mr. Wheeler, now, and has it not existed for quite awhile?

Mr. WHEELER. It is not quite so serious as that. It does occasionally happen. That, no doubt, has grown out of the fact that the Supreme Court is so crowded that it has been refusing certioraris in patent cases and, as the committee will remember, one method of remedying that has been to propose—which bill has been before previous Congresses—to establish a court of patent appeals. While the diversity in patent cases deserves consideration, yet it does not seem to us so serious as this question of difference regarding fundamental rights under the Federal Constitution.

We are all desirous—I think I may say that without going too far—that our fundamental law should be respected and honored, and we find that there are many who assail its provisions and are seeking for revolutionary methods. It seems to us that the best way to avoid that popular agitation is by giving this right of review, whether the decision in the State court is against the constitutionality of the State statute or in favor of it, and we are, in New York, encountered by this proposition, which would be an extremely serious one and which gives rise to very great popular dissatisfaction.

In order to meet that decision in the Ives case we have amended our State constitution so that there is no question now, so far as the constitution of New York is concerned, that the legislature has power to pass a workman's compensation act, and it has just passed one within the week.

If cases under that act should come before the court the court may possibly feel bound to follow its previous decision under the Federal Constitution, and there would be no remedy for that under existing laws.

So that the situation is acute, and we do earnestly ask the committee to give this right of review in such cases.

Let me say this: This bill in a somewhat different form passed the Senate at the last Congress. It was there thought better to give the right of review by certiorari so that there would be no absolute right to bring a writ of error in such cases. The argument for that change which was persuasive with the Judiciary Committee of the Senate was that under the form of bill as we now have it here there might be many writs of error brought for delay. I feel justified in saying that in either form the bill would be satisfactory to our committee. We simply desire that the present evil should be remedied by some remedial legislation.

I should like to hand up to the committee a copy of this Senate bill, which is Senate bill 94, and the three bills in this House that are pending. Those are bills Nos. 61, 1875, and 7355.

We have been over those bills and it seems to us that the latter bill, No. 7355, is perhaps the most satisfactory and complete in form, and that is the one of the House bills which we would recommend.

Mr. Smith, of Minnesota, who introduced that bill, is here, and Prof. Irvine, of Cornell, who has specially prepared himself to speak on that bill, is also here, and I should be very glad if the committee would hear from both of those gentlemen. Since Mr. Smith desires that Prof. Irvine should do so, let me ask that Prof. Irvine speak first.

STATEMENT OF PROF. FRANK IRVINE, OF NEW YORK.

Prof. IRVINE. Mr. Chairman and gentlemen of the committee, the statement of Mr. Wheeler that I came specially prepared to speak on this bill may have instilled in your hearts some feeling of dismay. I assure you that I have no set speech to make, and it is rather a deep-seated feeling that induces me to speak rather than that I feel that I have anything specially prepared, for I have not.

The arguments in favor of such a measure it seems to me must commend themselves to the committee. There are two objections I have heard, and only two, to the passage of such a measure. One is that it will increase the burdens of an already overburdened court. As far as that is concerned, I doubt it. If the Ives case had come up immediately we would have had a decision upon the workmen's compensation acts in the different States before this, and the pathway would have been marked out for the State legislatures. No one knows how many cases are coming into the Supreme Court, or perhaps are there already, relating to that general subject. I do not think the burden of the court is in the end increased by affording a ready means to get an important question speedily settled.

Suppose the burden of the court is somewhat heavy; it would not be greatly increased. I really think the importance of prompt hearings upon constitutional questions is so great that that difficulty would be better met by relieving the court in some other respects from the exercise of jurisdiction that it already possesses.

The other objection is that the Federal Government has no concern beyond seeing that the States do not impinge upon Federal rights, and that as long as the State courts support the claim of Federal authority, that is as far as the Federal Government is concerned. Is that true? It certainly is true that when the Constitution was framed the judicial power of the United States was made to extend to all cases arising under the Constitution, treaties, and laws of the United States.

The First Congress, in the judiciary act, saw fit to invoke only a comparatively small part of the judiciary power granted by the Constitution, and undoubtedly their fear was that the State courts would assert their rights and their powers as against the powers of the Federal Government. That was the danger then. Secondly, we have the present provision by which a writ of error can be had only where the decision of the State court was against the Federal right claimed.

The situation has now changed. The State courts no longer show any disposition to assert their power at the expense of Federal powers. Indeed, I think the State courts hesitate very much in denying the right claimed under the Federal Constitution or under the Federal

law, and I think that it is important that the way should be opened so that the State courts may not have authority without any review to extend Federal power at the expense of State powers. That is what it amounts to now. In the Ives case the court of appeals of New York says the workmen's compensation act, passed by the legislature of the State, is against the Federal Constitution. That may be true and it may not. That is the view of the court. Suppose it is not true; suppose the view of some other court is correct; that State court has sustained an unwarranted extension of the Federal power and of Federal legislation, and it is as much the business of the Federal courts to see that Federal powers are kept within their proper limits as that the State courts do not impinge upon it.

To my mind, just at the present moment this is the most important measure of all three that have been presented. The layman can not understand why it is that one side may have what he calls an appeal and the other side may not. The layman in New York can not understand why the railroad company could have come to the Supreme Court of the United States in the Ives case if it had been beaten and the plaintiff may not do so. You can not convince the layman that such a state of the law that permits an appeal by one party and not by the other is right. And as lawyers I think we are all interested in removing any ground of criticism, both of the law and of the judiciary, where that criticism may be removed by reasonable measures.

I thank you, gentlemen.

Mr. WHEELER. I am sure the committee will be very glad to hear from Mr. Smith, from Minnesota, who introduced this bill, No. 7355.

STATEMENT OF HON. GEORGE R. SMITH, REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA.

Mr. SMITH. Mr. Chairman and members of the committee, I probably would not take advantage of this opportunity to say anything if it were not for the fact that there are other bills covering this same subject. I wish to say that I have no pride of authorship in this bill, and if the committee finds that other bills that have been introduced are better than the one I have introduced I would be glad to have them adopt that bill which they think the best. I was moved to introduce this bill by conditions that have arisen in the last four or five years. There has been more or less criticism——

The CHAIRMAN (interposing). Which are the bills referred to?

Mr. SMITH. The one I have introduced is 7355, and the one introduced by Mr. French is 1875, and the one introduced by Mr. Lenroot is No. 61. Those seem to be the three bills before the committee at this time.

It occurred to me that there was a substantial right denied the citizens when the supreme court of a State undertook to set aside the laws of that State on the ground that the Constitution of the United States had been violated by reason of the law and only giving to one side, as has been plainly put, from the layman's viewpoint, a right of appeal.

I think we as legislators and lawyers should do all in our power to allay any idea that there is any special privilege being granted, and while there was a reason, probably, for that law, and is undoubtedly a reason for the law being as it is, the reason has passed, as the speaker, who just preceded me has said, and the question now should be up

to us to pass such legislation as will give the parties to a controversy in court a right to have a decision of that court reviewed by the highest court in the country; and those are the thoughts and feelings that moved me to introduce this bill. I hope the committee will act favorably on the thought. I have nothing further to say. It is a question that has been discussed a great deal, as I say, of late, and especially since the criticism on the courts. The court has not escaped its measure of the criticism by the public, and it is rather a pride of the lawyer to avoid that criticism if possible, and I believe that this kind of legislation will be a move in the right direction.

I thank you, gentlemen.

Mr. WHEELER. Mr. Chairman, I may say that the hearings before this committee on the 25th of January, 1912, and again last January, were printed and that they contain full briefs from the committee upon the various matters that we have been arguing here this morning. It did not seem to us necessary, in view of that very full hearing that was had then, to go into more detail than we have this morning, but your clerk has very kindly sent for and brought some copies of the printed proceedings of previous hearings, and I will be very glad to put those at the disposal of the committee if any of the gentlemen of the committee would like to see them.

The CHAIRMAN. The personnel of the committee has changed so much since the former hearings that it is very largely a new committee as compared with what it was then; and while I think that the older members of the committee who have heard the discussions over similar measures are somewhat familiar with the questions presented by these bills, I think it would be advisable for you to produce copies of the previous hearings.

Mr. WHEELER. I have consulted with the members of our committee and we feel that we have put the case before you, we trust, concisely and clearly. If there are any further questions that any member of the committee would like to ask, we would be very glad to answer them. Otherwise we will submit the case upon the briefs which have now been handed in and upon the oral argument which we have made.

The CHAIRMAN. On behalf of the committee I will say that we have been very glad to hear from you gentlemen.

Mr. WHEELER. I may say that in this printed report of the previous hearing it appears that Mr. Lehman, who was then Solicitor General, attended and spoke in favor of the bills as they were then before the last Congress; so that we have had much support from our friends, the Attorney General's office. Indeed, Mr. Lehman was the original chairman of this committee of which I now have the honor to be chairman. He afterwards became president of the association, and the mantle fell on my shoulders.

The CHAIRMAN. Do you gentlemen representing the Bar Association desire to say anything else? If not, the committee will go into executive session for the further consideration of the bills.

Mr. WHEELER. The members of the committee desire me to thank the Judiciary Committee for their interest in the hearing that we have had.

(Whereupon, at 11.30 o'clock a. m., the committee went into executive session.)

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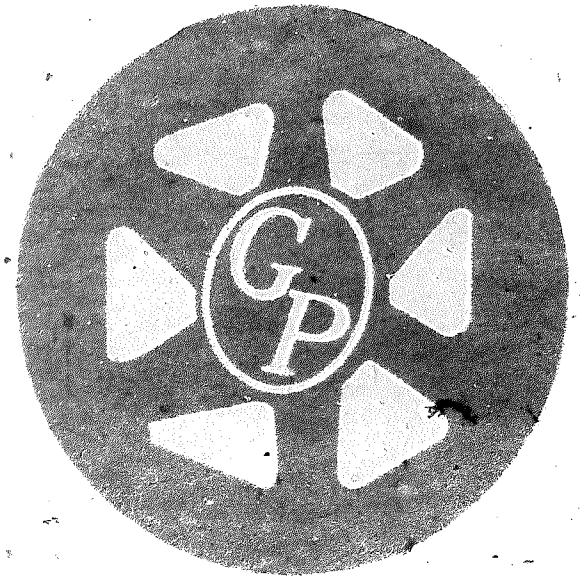

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

REFORMS IN JUDICIAL PROCEDURE
AMERICAN BAR ASSOCIATION BILLS

Serial 8—Part 2

FEBRUARY 27, 1914

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REFORMS IN JUDICIAL PROCEDURE—AMERICAN BAR ASSOCIATION BILLS.

SERIAL 8, PART 2.

THE COMMITTEE ON THE JUDICIARY,
Friday, February 27, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee has met this morning pursuant to a request heretofore made by members of the American Bar Association asking for a hearing on certain bills, particularly H. R. 133 and H. R. 4545.

[H. R. 133, Sixty-third Congress, first 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 and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving 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 the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States.

[H. R. 4545, Sixty-third Congress, second session.]

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

"SEC. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filling a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

"SEC. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

The CHAIRMAN. It is with a great deal of pleasure the Chair announces that the committee will be glad to hear from Judge William H. Taft, president of the American Bar Association.

STATEMENT OF HON. WILLIAM H. TAFT.

Mr. TAFT. Mr. Chairman and gentlemen of the committee, on behalf of the American Bar Association and for myself, I wish to thank the committee for their kindly permission for us to appear before them to urge the adoption of a bill that we have great hope will, if passed, enable the Supreme Court to adopt a model form of procedure on the common-law side of the court.

Under the existing statute, the Supreme Court has already adopted amendments to the equity rules, acting under an authority that the statute gave them from the beginning, and the object of the bill H. R. 133 is to give them the same permission with respect to the common-law procedure.

I am not going to dwell on the details of the bill, except to state that I think you might very well insert a section which would repeal anything in the statutes which would interfere with its evident purpose; that probably would be its effect at any rate, but I think it would be wiser to make the provision so as to have no doubt about it.

I presume there is no country where judicial procedure has made such an advance as in England, and no country where there is such a dispatch of business as there is in England. It has been supposed that a great many provisions of the Constitution securing rights of individuals interfered with the dispatch of business on the criminal side of the court, but if you will examine the British reports and the statistics you will find that while those same provisions protecting the individual exist there that exist here, nevertheless they are able to get through a murder case which here would take three or four weeks in three or four days, and with a very small number of judges as compared to ours they get through with vastly more business per judge.

There they have the system by which the high court of judicature makes the rules of the courts, and they have adopted a very simple procedure in the preparation of equity and law rules. Judge Lurton went abroad for the purpose of studying the system there—it gave me great pleasure, as President, to give him letters of introduction—and he spent a good deal of time with the then lord chancellor and the lord chief justice and with the other judges who had to do with the making of the equity rules. The changes in the equity rules are based in a large measure on the information he got there, together with the assistance received by the court from the various committees in the various circuits. I doubt not that the court would take the same course if you gave them the authority conferred in this bill. Of course it would help—I know the difficulty about getting any appropriation in a bill—to put in this bill a provision for an appropriation out of which the Supreme Court could pay a subordinate commission or officer who would do the routine work and then the court could act by way of supervision. But it is better to pass the bill first and then talk with Brother Fitzgerald and others about getting the appropriation.

There are a great many attacks on our judiciary. There are defects in the administration of justice in this country, undoubtedly, as there are in any administration of justice under human auspices. You can not have perfect justice; you can not help it; but the trouble about most of the attacks on the administration of justice, in my judgment, is that they are based on entirely wrong grounds.

I had a great deal of doubt about the wisdom of my coming here, not because I do not have confidence in the judgment of this committee, but because when the bill reaches the consideration of a large popular body like the House or of the country, the fact that I favor the bill might lead a great many people to be against it, in the view that nothing good could come out of Nazarath. But in the long run it is better to say what you think, no matter whether it helps or hurts at the time, with the hope that some time it may help and that somebody may be influenced ultimately who can bring about the reform you recommend.

Now, what I hope will come from this bill is this: In all of the States that have acted under constitutions that have not seemed to restrain them, the method of reform has been to unite law and equity in one form of action, and of course that is a reform. That is a re-

form which has been adopted in England, and that is a reform that takes out of the administration of law one of the technicalities and one of the kinks that have interfered with the dispatch of business. The maintenance of the separate branches of equity and law in the procedure is, I think, a useless relic of the past in the Federal administration of justice that ought to be remedied in so far as form is concerned. Of course, speaking to a committee of lawyers it is not necessary to point out that the merging of the two forms of proceeding can not get rid of the substantial principles that constitute the important difference between law and equity. The rigidness of the common law and its inelasticity must continue to be modified by the rules of equity, but there is not the slightest trouble in mingling the two systems and in administering equity and law in the same case. That is what ought to be done in the Federal courts.

There has been an intimation in the Supreme Court decisions that possibly the statement in the Constitution that the judicial power of the United States extends to all cases in law and equity under the Constitution, has fixed upon the judicial procedure under the Constitution of the United States the maintenance of distinct and separate courts of law and equity. I think there are some obiter dicta in the decisions of the Supreme Court from which that conclusion could be drawn, but the question has never come squarely before the court and under the influence of the experience in State courts in a single system; I believe the court would say that if you give them the authority it is quite within their power and province to unite the two in one form of procedure under a proper system of rules. That is what I would like to have go into this act, but I have been long enough in Washington, and my experience, however lacking in some respects, is valuable in that, to know that what you want to do in getting legislation is to get as much as you can and not ask for too much and defeat the whole. Therefore, if we get this bill through, then we can go on and ask that there be submitted to the court the power to adjust the two existing forms of procedure, so that we shall have only one form of civil action.

Mr. WEBB. In that connection I wish to say, as chairman of the subcommittee which considered the bill H. R. 4545, of which Judge Clayton is author and which was favorably reported and which is indorsed by the American Bar Association, that it provides that when a suit is brought on the equity side that should have been brought on the law side the court shall have the power to transfer it.

Mr. TAFT. Yes, sir; I have seen that. Of course, that is a very substantial step in remedying the inutility of the difference. But I have been very hopeful that ultimately you would come to the view, after you pass this bill, that you might go all the way and give to the Supreme Court the opportunity to make rules uniting the two. I presume in North Carolina you have a union of the two and you have not any embarrassment or difficulty?

Mr. WEBB. None whatever, sir.

Mr. TAFT. We should have just as good a procedure in the Federal courts as elsewhere. So much for this bill, gentlemen.

Mr. Shelton, who has devoted so much time as the head of the committee of the American Bar Association having this bill in charge, will doubtless explain to you the statutes that ought to be

repealed, either impliedly or expressly, in order to make the functions and authority of the Supreme Court in this case as broad as you can. I am not going to stop to discuss the details, because I have not had recently the opportunity to familiarize myself with the various sections or to assist the committee in that regard. I only want to say that the American Bar Association, so far as I know its opinion, is very strongly in favor of this bill, and regards it as an important step forward.

Generally, with respect to the administration of justice in the Federal courts, I do not have to say that I am very much opposed, very much opposed indeed, to the modern suggestions with reference to reforming our courts by the recall of judges and the recall of judicial decisions. I think both will certainly break down the judicial system of the courts, and therefore what I am anxious to do is to vindicate the courts by remedying the real objections to their administration of justice. It seems to me that there is an opportunity for this committee and for Congress to make a model administration of justice at small cost in the Federal courts. I want it distinctly understood that while I believe the system of the Federal courts to be the bulwark of individual liberty in this country, I am not at all unaware of the defects that exist in those courts. I invited attention, when I had the honor of submitting messages to Congress, to certain abuses that Congress might very easily remedy, to wit, the delay of the civil procedure and the reduction of cost. Therefore, I beg to ask the patience and the indulgence of the committee while I invite special attention to one or two other reforms that perhaps are not included in this morning's discussion or are not strictly germane to it.

You have been investigating some Federal judges, and I think that investigation of that sort which stimulates the sense of responsibility in all of them is a very useful thing. Without reference to any particular judges, I think it is an admirable thing to have them understand that they are under watch, and that the process of impeachment is a real thing and not what Jefferson called it, "a mere scarecrow of the Constitution." Judges are men. Judges need to have taken away from them, as far as you can take them away, the temptations that in the past have shown pitfalls which have made things dangerous for them and for the administration of justice. One of the things that some judges cherish, because they are men, is the exercise of patronage. Of course, you can say that you do not like it, but every once in a while it is very comfortable to have it. Of course I know that Democrats are not in favor of patronage, but I am speaking of the Republicans on this particular issue. What I am anxious to do, as far as possible, is to remove from the judge this power. I would not, perhaps, go so far as to provide that the appointment of the clerks of the courts should be with the Executive instead of with the judges, because of the danger that politics might enter into their selection. If we could be certain of a cast-iron competitive merit system, I might not object. A life judiciary, which I most strongly favor as the only satisfactory system, has one or two tendencies which are not good and which should be provided against. If you could put the appointment of the clerks and the appointment of all the court employees, except possibly the judicial messenger,

in the hands of some other power than the courts, it would help the courts. But to put it in politics like that of marshals would be worse. Give the Executive the power of removal of the clerks. Limit the courts to the classified civil service in the selection of clerks. Then, either the court or the President could remove the clerk on charges. When it comes to making the appointment of a receiver, give the appointment to the court from an eligible list of indifferent and competent persons to be furnished by the Interstate Commerce Commission, if it affects interstate commerce, as generally such receiverships do. What is the case with respect to the clerks of the Federal courts? If a judge has had political taste when he has gone on the bench you will find in some cases, and one case is too many, that the clerk and all of the court attendants formed a little nucleus which exercises political influence. That ought to be done away with. This is not true with any, but a very few courts, but if there are any, it reflects upon the whole judiciary in the present state of the public mind.

What is the result of the examination by the Attorney General's office with reference to the clerks? You will find that too many of them are defective in the rendering of accounts; that there are a great many against whom charges have been made, as the records of the Department of Justice will show. I recommend to Congress that they give me the power to remove, leaving the power to appoint with the courts. You can do very much that will strengthen the character of the clerks and give them a greater sense of responsibility. You put on a life judge and make a life clerk, and they become members of the same family; and every lawyer who hears me knows that one of the most ungracious things, one of the most difficult things, for a lawyer to do is to make a charge against the clerk of the court to the judge who sits on the bench. The judge too frequently leans strongly in favor of his clerk. This tendency to protection of the clerk prompts excessive fees and delay in accounting. You have complete power to change that. Why not do it? Why not put them in a position so that the action on charges may be taken by somebody who is not a member of the judicial family, i. e., by the Attorney General, representing the President? If the court makes the appointment from a civil-service eligible list and the Attorney General makes removal on charges with no power in respect to appointment, politics and only fitness or unfitness will play a part in such action. I feel deeply upon this subject, because I have seen it work, and I know the advantage that could come from that kind of legislation. I am certainly not criticizing the Federal judiciary as a body of men. I think they are able, honest, hard-working, and courageous. I appointed more than 30 per cent of them, and therefore it would not become me if I did. But they are men; and I think the way to avoid difficulties with men who have personal defects—and there are strong men who do have—is to remove temptations of that sort that are completely within the control of legislation. I urge upon this honorable committee the enactment of a lower-fee bill. That, with greater responsibility of the clerks to an independent power of removal, will greatly reduce the cost of litigation in the Federal courts. The bill under discussion merely provides that the Supreme Court may fix the procedure—that is practically what it does—on the common-law side of the court. That

is one step, but that is not the only step that we hope may be taken, and as the wide range of my remarks with respect to possible reforms in the Federal courts indicates, there are many other steps that the American Bar Association will ask the committee to take.

I thank you for your very kindly attention, and I hope that some little has been said to stir in your minds the idea that the country is looking to you as the initiative body—I do not use the word "initiative" with great fondness, but it is used in the English language generally as well as in politics, and I have to use it when occasion presents itself. I believe that on this committee's shoulders rests very great responsibility in taking the steps that ought to be taken. Much change, which will effect great reform in Federal judicial machinery, is completely under your control, so far as civil procedure and costs are concerned. There are real defects in these matters that you can remedy.

I thank you for your attention.

The CHAIRMAN. The committee will be glad to hear from Mr. Shelton at this time.

STATEMENT OF MR. THOMAS W. SHELTON.

Mr. SHELTON. Mr. Chairman and gentlemen of the committee, after the speech of Judge Taft there is very little left to be said with reference to the merits of this bill or with reference to the science recommending it to your consideration. However, there are some practical details upon which it is quite possible I can throw light on account of having been connected with the campaign of the American Bar Association for a number of years.

Now, fortunately, we have a friend at court from the fact that the bill which you are now considering is the creation of the chairman of your committee, and, secondly, we are almost equally fortunate in the fact that this bill has been before the public for so many years and has created a universal demand for its enactment.

Now, when a bill to this effect has been considered by so many organizations, including the American Bar Association and many other business organizations, and has been indorsed by every one of them after a full consideration and after having been argued on the floor of these various organizations, there can not be very much question left in the mind of the average man that it must have merit and therefore that it can safely be enacted into law.

I would like to say that representatives of these associations have either appeared before you or have communicated with you individually or with your chairman or vice chairman. The business men of this country have taken up this matter, and within the last 12 months the Credit Mens' Association of the United States, probably one of the largest commercial organizations in the world, has unanimously and enthusiastically indorsed this bill and has appointed committees which will come here and ask to be heard, or will communicate with you in a proper way. It has been indorsed by the Chamber of Commerce of the United States, by the Southern Commercial Congress, by the National Civic Federation, and by, I suppose, 150 other prominent business organizations of this country. I mention that to you because it must appeal to you that the courts were created for the benefit of commerce and society, and that if

there were no business we would need no courts. Therefore, so far as you are concerned, when you come to reach your conclusion, you ought to do that thing which will meet most largely with the approval of the business men of the country. When, then, you realize the fact that the Clayton bill has been indorsed, as I tell you, by the leading business organizations it ought to have a persuasive effect upon you to enact it into law just as quickly as possible, in order that the Supreme Court may proceed to prepare and promulgate the system of rules.

President Taft indorsed it in an official message when the bill was first presented here, so there is no politics in the matter, and, as was stated in New York not long ago, there is no religion, although it is pretty near the foundation of the church, since religion and constituted government go hand in hand.

Mr. FLOYD. Is this the particular Clayton bill referred to in the report of the Attorney General?

Mr. SHELTON. This is the bill. I was just coming to that. I am authorized to state that it meets with the approval of the President, and the Attorney General has officially indorsed it.

I want to say, furthermore, that there was a conference of judges held at Montreal last year; one of the most unique organizations ever held in the history of the world, with the chief justice of every State and the senior Federal circuit judge of every circuit, lacking one or two, present. They met for the purpose of considering this matter and some others, and when it was mentioned, though it was not in order for them to indorse pending legislation, I do not remember to have heard a dissenting voice concerning it. That means a great deal, for, while it presupposes a desire for uniformity of procedure, it offers the promise of uniformity of decision. There is another thing behind this bill. We are trying to get you to enact this, and to do so as quickly as possible, for this reason: This bill occupies the unique position of having been submitted to every law school in the United States, and the bill has been indorsed by every single one of them without exception. I believe it has been considered by almost every law school in the United States, but if it happens that there are one or two that were overlooked, I would like to know what they are. It is utterly impossible for any measure, it matters not what it is, to have met with such universal approval as has this bill. It is unique in legislative history.

Mr. WEBB. I would like to ask you if the other bill, of which Judge Clayton is the author, which has been before Congress for several years, in regard to a suit brought on the law side which should have been brought on the equity side being transferred, has not been almost as universally approved?

Mr. SHELTON. I think it has, because everybody knows that that means justice. That is but a wholesome legislative policy—a legislative effort to correct an evil of its own making. There is absolutely no excuse for that condition and it can not occur with the Clayton bill in force. The trial court itself, under present conditions, sometimes does not know whether a controversy belongs on the law side or the equity side, and yet the business man has to suffer.

It must be convincing to you that this bill has met with the approval of men like Mr. James DeWitt Andrews, who sits behind me;

Dr. Roscoe Pound, of Harvard; Dean Henry Wade Rogers, of Yale, who was made a circuit judge a short time ago; Dean William M. Lile, of the University of Virginia, and others. I could go on and mention any number. They all approve it. Therefore, I do not think that you could possibly err, and, even if it so happen that you did err in the passage of this act, you could say that the universal indorsements of and demands for it created a situation unique in the legislative history of the country that had to be respected. Certainly you could not be blamed for acting, while you will be condemned for declining to act. I would direct those remarks to such members of this committee as might not have considered this matter and might naturally have some doubt remaining in their minds. Now, I want to say to you that the history of jurisprudence shows that the lawyers have never been able to agree upon the form of procedure. The Roman lawyers were 100 years trying to agree upon the Justinian Code, which was partly procedure and partly substantive law. In the reign of Valentinian III. during the first half of the sixth century of the Christian era, there was appointed a committee of five men to arbitrarily complete the code, and the edict went forward that while recommendations would be welcomed those five men were to finish it and everybody else had to agree to it. That was how a hundred-year struggle amongst the lawyers came to an end. We still praise the Justinian Code, and I believe that the principles of the Clayton bill will mark the beginning of a new era in American jurisprudence in like manner.

The Clayton bill takes away from the lawyers and the trial judges all question and all responsibility of preparing a system of pleading and procedure and places it where we believe it will be done just exactly as it should be done. In any event, it promises finality and certainty, with the right of repeal by Congress. With reference to the manner in which it should be done, Judge Taft has suggested to you a commission, and I believe unquestionably that a commission should be appointed if that meets with the approval of the Supreme Court; but first let us get this bill through which Judge Clayton has prepared and which all have accepted and agreed upon. That insures the principle; the necessary details will naturally follow. I have worked so hard and so many years trying to get through this act enabling the Supreme Court to prepare the system that I do not want anything to interfere with it.

I have had some correspondence with your vice chairman with reference to two amendments. One is to insert the words "not inconsistent with any law of the United States."

The CHAIRMAN. Are you referring now to H. R. 133?

Mr. SHELTON. Yes, sir. That brings up matters of law which are worthy of consideration. In the first place the Supreme Court has decided that the rules it makes do not have the power or effect of decisions or of statutes, and consequently this amendment would not be necessary with reference to that. Furthermore, if we insert the proposed amendment we would have to repeal any number of statutes. With that end in view, I have gone over the Revised Statutes and designated those that should be repealed if we inserted the amendment. Upon conferring with President Taft this morning it was found that there had been overlooked one of the most important

things in connection with the whole matter. So I would like to suggest to you that that amendment be not inserted. It forces us to deal with details that should be properly left to the court or to the commission.

The CHAIRMAN. You and I discussed that when I made the first draft of the bill?

Mr. SHELTON. Yes, sir.

The CHAIRMAN. Whether we should leave those words in the bill or should strike them out, and you and I agreed to leave them out?

Mr. SHELTON. Yes, sir; that is right.

The CHAIRMAN. Have you changed your opinion on that?

Mr. SHELTON. Not at all.

The CHAIRMAN. Have you there the statute giving the power to the Supreme Court to adopt the equity rules to which judge Taft referred?

Mr. SHELTON. I have not that statute before me. Do you recollect that statute, Mr. Taft?

The CHAIRMAN. The statute under which the Supreme Court revised the equity rules.

Mr. TAFT. I do not think the exception is there.

The CHAIRMAN. There was a statute authorizing it?

Mr. TAFT. That was in the original Federal judiciary act. I do not think it put in the exception; I may be wrong about that.

Mr. SHELTON. Unquestionably conflicts do arise between the laws of Congress and the court rules. To give you an illustration of it, you will find that rule 54 of the code permits depositions to be taken only when a cause is at issue. Section 853 of the Revised Statutes allows depositions to be taken when the witness lives a greater distance from the place of trial than 100 miles. There is a direct conflict between the rules and the laws of Congress and yet there is no difficulty about it, all the decisions and all the judges promptly agreeing that the laws of Congress prevail. So will it be on the law side. The Supreme Court is not going to hold that it has the power to legislate, and it will confine itself solely to regulating the detail machinery of the trial courts. Consequently, I would like to suggest, Mr. Vice Chairman, that you leave out the proposed amendment, and if you should happen to observe harm arising from any source whatever you can, at the very next session of Congress, repeal the whole business and do away with it. Even though it were possible that one were afraid to trust the Supreme Court, there is no danger—and there is so much to be gained. It follows that it would not be necessary to specifically repeal sections 914, 915, 916, and 918, since the effect of the bill would result in that, without adding the repealing clause. The Supreme Court would gather from the spirit and letter of the statute the desire of Congress to make an equable division of duty as to the courts, leaving to the court the preparation of the detailed machinery but reserving to itself all fundamental and jurisdictional matters. In other words, Congress would tell the Supreme Court what the nisi prius courts may and shall do, but will leave it to the experience of that great tribunal to provide how they shall do it. The Supreme Court will not disappoint. If at any subsequent date changes appear advantageous, and they are not made by the Supreme Court—a condition impossible of conception—you can do it directly; there would be no trouble about that. I am trying to convince you,

gentlemen, that the Clayton bill should remain as it is. Your other suggestion, Mr. Vice Chairman, including the courts of the District of Columbia, is spendid. I do not know how that happened to be omitted from the first draft. We evidently overlooked it. That is a splendid idea, since uniformity is desired all over the country.

We have taken that bill just as the chairman drafted it, and we have submitted it to a great many of the practical lawyers and law teachers and law givers throughout the country and they have considered it, and it has been argued on the floor of the American Bar Association and on the floor of a great many other bar associations, and they have all come to the conclusion that this bill is ideal and that it is the logical thing to do and we could not hope to further clarify the situation. After all, whatever power may rest in you as legislators, the courts are held solely responsible by the people, and not the Congress. Let that sink deep into your hearts. It is the pivotal point. The courts and lawyers are criticized for improper things or anything else that does not suit commerce and society. You know that without my having to recall it to your minds, and that no litigant or business man, dissatisfied with the manner in which the courts are conducted, ever comes to Congress for relief. The complainant does not even know that Congress, under the present system of pleading and procedure, holds the courts in a grip of iron and that their limitations are well defined. The public does not know that the court is without power to exercise any discretion whatever. Therefore, a litigant can observe the veriest wrong done immediately in the presence of the court and fail to understand why the court would not prevent it. Thus does ignorance become the sire of the "recall of judges." Is it fair to the judge? Does it allow the lawyer to cooperate with the judge if he were so disposed? For several years we have spoken and written in the educational effort to make the citizen know that Congress has enacted statutes that cover these particular questions and all others concerning procedure, and the courts have no discretion. With fettered hands the court observes justice defeated by technicality. He is but a moderator. If the judge dared grant the relief, counsel on the other side would promptly take advantage of it and secure a new trial, because the ruling was contrary to a statute. This bill will place in the hands of the Supreme Court the power to put into effect a system of rules that would be scientific and corelated and that would serve the purpose that is absolutely needed and that the people are going to have. It will coordinate the learning and ability of the lawyer and the judge, whereas they are now antagonistic. It will set the Supreme Court free to do those things it is prepared and properly situated to do, the Congress confining itself to substantive, jurisdictional, and fundamental matters.

Just one other thought. This system of rules lies halfway between the two systems of court procedure that have been in vogue a long time—one the common law as modified by statcte, and the other the code system composed of rigid and arbitrary statutes. It will eventually take its place in jurisprudence under a suitable designation. It will supply a model form to be adopted by the States, and thus bring about uniformity among the Federal and State courts. A thing that section 917 of the Revised Statutes has never done and was

never intended to do. Indeed, the business men of this country have determined to do away with that delusion and snare at any cost, without reference to the other great possibility of uniformity. If any of you gentlemen who have control of the legislative department should observe any hardship under the proposed rules you need not enact a statute, but you suggest it to the Supreme Court, when, with equal promptness, an order can be issued putting into effect the suggestion, the benefit of which is had without delay. That has been done in connection with the equity rules, and that is one of the chief virtues of the Clayton bill. It sets the Supreme Court free to respond to the public demands for little reforms, a thing that it has never been able to do on the law side of the district courts.

I want to make a request of you to report this bill. If I could show you the correspondence coming to me—as chairman of the committee on Uniform Judicial Procedure of the American Bar Association—from all over the United States, I do not think that you gentlemen, if you mean to respond to public opinion and an earnest desire, will hesitate to report this bill. With indorsements and requests for it almost unparalled, you are rid of all responsibility for any evil that may follow, but you will be praised by a grateful people for the complete relief that is in store. We are entering upon a new and wholesome era of jurisprudence, in which all good men are joining without reference to politics. It is a hopeful sign and it is necessary, for the potency and dignity of the laws of Congress, are measured and limited by the manner in which they are administered by the courts.

Mr. CHAIRMAN. I beg to say that Judge Alton B. Parker is present.

The CHAIRMAN. The committee will be glad to hear from Judge Parker.

STATEMENT OF HON. A. B. PARKER, OF NEW YORK.

Mr. PARKER. Mr. Chairman and gentlemen of the Judiciary Committee, within two months after the bill of December 2, 1912, was introduced by Judge Clayton, the New York State Bar Association, with a membership of 3,500, which includes the leading members of the bar from all sections of the State, and which has been able to command the services of a Carter, a Choate, and a Root as president, took under consideration this bill. It then appointed a special committee, composed of men who had extended experience in the Federal courts, to make an investigation and report at the annual meeting which was held in January of this year. As a result of that investigation there was a unanimous report, a most earnest report that this bill be recommended for passage by Congress. After discussion, this report was unanimously adopted by the State Bar Association, and a resolution passed recommending that the bill become a law.

The CHAIRMAN. Judge, may I interrupt you just one moment?

Mr. PARKER. Certainly, Mr. Chairman.

The CHAIRMAN. Section 917 of the Revised Statutes of the United States provided:

> The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used, in suits in equity or admiralty, by the circuit and district courts.

It seems that this language which was suggested as an amendment to this bill borrows something from the language in the statute "not inconsistent with any law of the United States." The committee would like to hear from you, whether it should go into this bill or be left out.

Mr. PARKER. Mr. Chairman, in my judgment it should be left out. It should be left out, as it occurs to me, for the reason that the statute already provides for a procedure, viz, and in effect that the procedure in the district court shall consist, as near as may be, with the procedure of the State in which it is held. That is not satisfactory. If it were there would be no excuse for this act. What is wanted is to do away with the uncertain practice now provided by the statute and to substitute for it a uniform practice in the form of rules. The insertion of the clause would present for debate the question whether the court is not to take into consideration, under the command of the statute, the practice in the several States. My attention had not been called to the question until the debate between the chairman and Mr. Shelton this morning, but it seems to me that it would be open to the objection I have stated and that the bill should stand as it is. That was the result of the report of our committee. I am not able to say that they took that feature into consideration, for I was not present at any of their meetings, but with all their experience in Federal practice—and there are no members of the bar with greater and wider experience—they made no such suggestion, and offhand it seems to me that the bill ought not to be changed, but ought to stand as it is written.

It was suggested by Judge Taft that there ought to be taken into consideration, perhaps not at this time, but a little later, a scheme to harmonize the practice between the common law and the equity sides of the court. I quite agree with him. It seems to me that the bill which has been suggested as having been introduced by the chairman to provide for the transfer from one docket to the other of equity and common cases will quite meet that suggestion.

The CHAIRMAN. That is H. R. 4545, which has been reported from the committee.

Mr. PARKER. In our State that is practically the way it works.

The CHAIRMAN. By direction of the committee I reported that bill favorably to the House on December 22. I introduced that bill in the House, and it is a bill, I may say, that grew up from some correspondence the chairman had with several of the judges—Judge Shelby and others. We passed a bill embodying several of the provisions which are found in the bill H. R. 4545 of this session of Congress. I may say that this bill, H. R. 4545, I think, has the approval of both the Judiciary Committee of the House and the Judiciary Committee of the Senate.

Mr. PARKER. Well, it seems to me, Mr. Chairman, that this bill will accomplish precisely what you wish. Under our practice, if a mistake has been made and a case which should be brought on the law side has been brought on the equity side of the court, when it is reached in equity it is transferred to the common law branch for

trial by jury and vice versa. There is no technicality allowed to interfere at all, and I should say that the bill which you have introduced, Mr. Chairman, would accomplish precisely that result.

I shall not take your time by making an address. The subject has been most admirably treated and exhausted by Judge Taft, who does have the right to assume that the members of this committee and every good citizen of the United States are his friends, and he ought to know that we all appreciate the fact that since his service has ended as President of the United States he has given himself to the public service in a private way in such measure as has no other man within my recollection, and we are grateful to him for it.

I came here not to speak but merely to represent the New York State Bar Association, of which I am the president, because it seemed to me that the testimony of these 3,500 experienced men is worth far more to you and is of far greater value than any suggestion that a single individual may make. There is an ideal connected with this question which reaches out far beyond a change in practice. It is, perhaps, quite as convenient for our people at home, now that they are accustomed to the present practice, to get along with it as it is, but it is far from ideal. It is a most embarrassing practice, as all of you have found out whenever you have had occasion to go into the Federal courts of other States having a practice different from your own. It is practically impossible for you to get along without the aid and assistance of a lawyer familiar with the practice in the local district. There is no reason why it should be so. There is every reason why there should be uniformity, absolute uniformity, in the system of practice in the Federal courts. I do not mind saying that to many there is another practice ideal which it is hoped this present step will lead up to—procedure regulated by court rules all over this country instead of by statute. By that I mean a uniform practice modeled by the State courts upon the rules adopted by the Supreme Court of the United States. It is not to come in your time or mine, but nevertheless it is an ideal which should be reached in the future and one toward which, as good lawyers and good citizens, we should contribute our mite, although we never expect to receive any benefit from it whatever.

There is another matter which seems ideal and which this great step of uniformity in the Federal procedure all over the country will aid. Back in 1898, in welcoming the American Bar Association to the State of New York, I took as my principal theme the uniformity of law. The American Bar Association have been struggling along with it ever since. It has not accomplised as much as we then hoped. It is true that the negotiable instrument law has been passed by 38 States, so that we are now within 10 of uniformity on that subject. The bill of lading act has been adopted by a number of States, and this is also true of a few other bills. Some time the value of uniformity on commercial and other lines will be realized, and then such momentum will be given the subject as that it can not be stayed. You can not tell what particular thing is to produce that result, but produced it will be some day. One can doubt that the scheme of the fathers to keep home-rule powers in the possession of the States tends to assure to the citizens the protection of those great principles of liberty which are incorporated into our constitutions. That is not to say that there may not come a time, or that

the time has not arrived when some of the powers reserved to the States or the people might well be conferred upon the Federal Government, but the general scheme of reserving all powers to the States that may be prudently exercised at home should be preserved. One of the arguments made day by day in favor of a strong centralized government in the absence of uniformity of law in relation to those subjects about which there should be no dispute. Of course, there are matters in which every State is interested by reason of its situation which are entirely different from that of any other State, but, as to the law governing the administration of estates and commercial transactions, etc., there is no reason why uniformity should not come and it will come, perhaps not in your day, but it will come, and the bill now under consideration is likely to be one step, and a very important one, in its perfect working out.

I thank you, gentlemen, for your courtesy.

Mr. SHELTON. Mr. Chairman, Senator Root has come here at the invitation of the American Bar Association.

The CHAIRMAN. We shall be glad to hear Senator Root.

STATEMENT OF HON. ELIHU ROOT, A SENATOR FROM THE STATE OF NEW YORK.

Senator ROOT. Mr. Chairman and gentlemen of the committee, I am very glad to join my brethern of the American Bar Association in saying a word on this subject, although I had not expected to take it up at this stage.

There are three bills on that same subject matter as the bill you have been discussing now before the Senate Committee on the Judiciary. They have been referred to a subcommittee, which is about to take them up and probably give hearings upon them. Those bills are one granting to the courts the power to make rules on the common-law side, one permitting a case brought on the wrong side to be transferred over to the other without going back and beginning over again, and one preventing the reversal of decisions except for matters going to the merits.

Now, let me say, as I am here, something about the practical aspect of this kind of legislation. Bills intended to cure the evils spoken of have been before both Houses of Congress for a great many years and there has been a very gradual advance in sentiment regarding them. At first, I can recall the American Bar Association committee coming before the Senate Judiciary Committee and being quite unable to get any bills of the character reported. Then, after a few years, the committee came to report them. I think I have reported bills on all of these subjects from the Senate Judiciary Committee to the Senate several times and I think the same course has been followed here—that bills were reported to the House. Then they came to the stage of passing one House and dying in the other. Judge Clayton has just mentioned a bill which was passed in the House and passed with amendments in the Senate, but which failed to become law because of the conditions late in the session. There have been quite a number of bills aimed at these evils that have gone through one House or the other. It is quite evident that there is a general feeling that there are defects in our system of practice which

stand in the way of the doing of justice and which ought to be cured. What we need is to have united action and bring the subject up out of the level of private bills on to the level of matters of public importance that require the united action of the committees in both Houses—the united and cooperative action of the committees of both Houses.

I am not going into the details of these bills, they differ slightly in form before this committee and before the Senate committee, but that can be regulated by conference either before or after they have passed; but I want to say that all these bills point out the same evil throughout this country in greater or less degree.

We have come to the building up of systems of practice in which justice is tangled in the net of form, in which a plain, honest man coming into court to assert his rights or to ask redress for a wrong finds himself confronted by statute-made obstacles to getting a decision on his demand. My own State of New York is the worst sinner in that respect in the country, I believe, although it was very nearly 70 years ago that Mr. David Dudley Field started the reform procedure which spread over the greater part of the country and which was followed by Great Britain in 1873. But just about the time that the country at large had adopted the reformed and simplified procedure and Great Britain, from which we deprive our system of law, had followed, we began to take a back track and to build up a complication of procedure until now legislatures have put into practice specific provisions for this thing and that, and that, and that, giving a litigant a right to an examination here, giving him a right to interlocutory relief there; so that a man who comes into court saying he has been wronged and asking a judgment, has to try 20 lawsuits about statutory rights before he can get to a judgment on his simple demand. When we make a statutory right the judges have got to observe it just as much as they have the original right founded on common justice. If they ignore it, there is reversal, and so the man who has but little means to employ lawyers, the man who has but little time to take from earning his livelihood becomes discouraged and sometimes becomes ruined, and the men who have abundant means to employ lawyers can secure immunity against being brought to justice upon the demands of the poorer and humbler litigants. A race of acute, adroit, code lawyers has grown up. You will find men in any of the great States where this system prevails where the legislature has been interfering with the practice, who will undertake for reasonable compensation to delay any case indefinitely; and as a rule they can do it. The reason is that our legislatures have built up a great system of technical procedure creating statutory rights which prevent the courts from doing justice.

Mr. McCoy. Is it not true that a lawyer who has encountered something in his own practice is likely to go up to the legislature and get an amendment to the code?

Senator Root. Precisely. And the prohibitions which are put in our constitutions against special legislation have contributed to that. Somebody sees what seems to him an evil in his own practice or he is disgruntled; something has been done that he does not like, and he becomes a member of the legislature, and he gets a change in the code of procedure. That may be all very well for him, but it may be very bad, indeed, for 10,000 other people; and our system of practice has been built up in that way on special instances to answer the demands of the lawyer who thinks about his own case instead of considering the general subject of the public.

Mr. Thomas. Senator, how long after filing an equity suit in New York can you get a trial?

Senator Root. It does not take very long to get a trial of an equity case there. Two months, Judge Parker says. The great trouble is not so much getting to the trial; it is that we have so many technical provisions that you have to go back and have another trial.

I was starting to say that our judges want to do justice. Here and there there may be a judge who does not want to, but it is a very rare exception. They want to do justice. My observation is that three times out of four they are prevented by the technical rules of practice from doing the justice they desire to do.

Mr. McCoy. May I make another suggestion, Senator?

Senator Root. Yes, sir.

Mr. McCoy. In answer to Mr. Thomas's suggestion, I would say that you can reach a case in New York City on the equity special term in two months, provided all these technicalities have not been used against you.

Senator Root. Yes, sir; after the case gets on the calendar and if there are no proceedings to prevent.

Mr. Thomas. Senator, please tell us what you think of the constitutionality of this bill.

Senator Root. You mean the bill authorizing the Supreme Court to make rules?

Mr. Thomas. Yes, sir; this bill we are discussing now.

The Chairman. H. R. 133.

Senator Root. Yes, sir. I have never supposed there was any serious question of its constitutionality. Of course, this would not confer upon the Supreme Court the power to abolish jury trials, and it would not confer upon them the power to violate any provisions of the Constitution; but, really, the effect of this bill is——

Mr. Volstead (interposing). Would it confer upon the judges the right to modify any existing statute? That is, can we delegate to the courts the power to change an existing statute?

Senator Root. No; we can not. But this bill is what changes the existing statute. We do not authorize the courts to do so. What we have now is a statute which requires the courts to conform to the practice in the separate States. This is a substitute for the requirement of conformity to the separate States. It modifies that requirement by authorizing the courts to make the rules of practice. To that extent this law will modify the existing statute. We do not authorize the courts to change the existing statute.

Mr. Thomas. Here is the matter that I want your opinion on, Senator. Section 8 of the Constitution of the United States enumerates the various powers of Congress, and, among others, subsection 9, "To constitute tribunals inferior to the Supreme Court," and subsection 18 of that section reads as follows:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

I would like your opinion about that.

Senator ROOT. My opinion is that we are executing that provision of the Constitution in this statute by relieving the courts from the requirement which we have already imposed upon them to conform the practice in common-law cases to the practice of the several States.

This statute which we have already made constrains the courts, and this bill, if passed, will be a substitute for the statute, or will modify the statute, so that by law the courts may make rules to govern the procedure in common-law cases as well as in equity cases.

Mr. THOMAS. You know that under the Constitution the Congress has the right to declare war. Do you think they could delegate that right to the Supreme Court of the United States?

Senator ROOT. No.

Mr. THOMAS. Why have we not the power to delegate this very right?

Senator ROOT. The way in which Congress does declare war is to authorize the President to use the armed forces of the United States to accomplish a particular purpose, and this is exactly analogous to that.

We, by law, provide that the Supreme Court of the United States shall make the rules in relation to the practice. The whole progress and development of our Government is necessarily toward a greater measure of delegation of authority. As our Government becomes more vast and complicated and the problems more difficult to understand, and as more and more duties are imposed upon Congress, it becomes more necessary to delegate more and more. That is the inevitable result of a higher and wider organization.

We can, ourselves, no longer consider and pass upon matters of detail. We delegate to the Interstate Commerce Commission the power to do things which, in the beginning, the legislators and Congresses did themselves. And they are dealing with a vast transportation problem with the exercise of exceedingly wide discretion.

And we have just delegated to the Central Reserve Board enormous power in regard to the banking interests of the country. We are now considering a measure for a trades commission, to which, if the bill passes, will necessarily be delegated very broad powers.

It is the inevitable course of the development of government in a growing country that the body which is at the head must deal more and more with the general subjects, and must delegate the particulars more and more to other agencies. It will, in accordance with that inevitable course of development, leave this subject of making rules of practice to the courts which have to administer them.

Mr. MCCOY. Senator Root, suppose there is now on the statute books a statute which prescribes the forms of practice at common law. Would not Congress, by passing a bill like this, give the power to the Supreme Court, if it made an inconsistent rule, to repeal that section? Could not this affect the existing law without controlling future law?

Senator ROOT. I think it would be quite competent for us to confer, if I understand your question, upon the Supreme Court the power to make the rule which would, by the operation of this statute, take the place of the present rule.

Mr. VOLSTEAD. Would that not be a delegation of power, and would not the effect of such a rule be that the Supreme Court might repeal? Can we confer that power?

Senator ROOT. No; we do not. We change the law ourselves.

The operation of the statute now passed is to change the law, and it makes it amount to this, that the practice on the common-law side of the Federal courts shall conform to the State practice, except as it is covered by the rules of the Federal courts. That becomes the law if we pass this bill. We ourselves modify the existing rule by excepting from the application of the rule those cases which are covered by the rules of the Federal court. If there were no statute on the subject, if we never had made the conformity act, the court would go on and make its rules.

The court does not derive its authority to make rules from an act of Congress. It is inherent in the exercise of judicial power. You constitute the court, you confer jurisdiction upon the court, either by the Constitution or by statute, and the court proceeds to exercise the jurisdiction. It must have rules; it must exercise jurisdiction in accordance with rules, and the court makes the rules. It does not require any authority from us.

The trouble about the rules on the common-law side now is that we have interposed a statute which prevents the courts from making rules which differ from the rules of State practice, and the effect of this proposed law would be to modify that hidebound, hard and fast statute which we have already passed, making it apply only to the cases which the courts had not covered.

Mr. Chairman, while I am here may I call the attention of the committee to another bill which has already passed the Senate?

The CHAIRMAN. We will be very glad to hear you on that.

Senator ROOT. I thank you. I refer to the bill authorizing the bringing up to the Supreme Court of cases in which there has been a decision upon the constitutionality of an act, although the decision was in favor of the claim of Federal right. This is an act amending section 237 of the Judicial Code.

As section 237 now stands, when, in a State court, there has been a claim of right or immunity under the Constitution or laws or treaties of the United States, and the decision is against the claim, there can be a writ of error to the Supreme Court.

There have been some cases in which the decisions of the courts of last resort in States have been in favor of the claim, giving to the provisions of the Federal Constitution an effect which many people think the Supreme Court would not give to those cases. The notable case in that connection is the Ives case in New York, regarding the workmen's compensation act. There the Court of Appeals of New York held that the statute which was before them was in violation, both of the New York State constitution and the Federal Constitution—the fourteenth amendment of the Federal Constitution. Now, there are many people who think that the Supreme Court of the United States would not have held that that was in violation of the fourteenth amendment of the Federal Constitution. The people of New York have amended their constitution so as to obviate the objection made regarding that particular case, but there was no way in which the judgment of the Supreme Court could be obtained on that question, and the people of the State, many of them, have felt they were resting under a decision giving a more drastic effect to the Federal Constitution than the Supreme Court of the United States,

the guardian of that Constitution, itself would have given, and there has been no way to meet that.

There were, I think, six bills introduced in the Senate, all of which went to the Judiciary Committee, and that committee reported a substitute, which has passed and which is now before your committee.

The bills undertook, I think, most of them, to give an unlimited right to appeal or to take a writ of error in such a case. We modified that by substituting for that unlimited right the jurisdiction in the Supreme Court of the United States to bring up a case by a writ of certiorari or otherwise, taking the language in which the authority to take up cases from the Circuit Court of Appeals by certiorari was used.

The idea of that modification was that the unlimited right would load down the calendar of the Supreme Court of the United States with a vast multitude of cases in which an appeal was taken for purposes of delay, and that in every case of public importance and concern involving a constitutional question the Supreme Court would exercise its jurisdiction.

There is very great public interest in the subject, and it is, I think, a matter which is of importance, not with reference to any private interest at all, but with reference to having the law made fixed and certain, and I invoke the attention of the committee to that bill.

The CHAIRMAN. The bill you refer to, Senator, is Senate bill No. 94?

Senator ROOT. I think it is.

The CHAIRMAN. That is an act to amend an act entitled "An act to codify, revise, and amend the law relating to the judiciary," approved March 3, 1911, which appears to have passed the Senate January 21, 1914.

Senator ROOT. Yes; that is it. It adds a clause to section 237 of the judicial code. If that is passed, the effect would be that when a Federal question is raised in a State court, if the decision is against the claim of right under the Constitution or laws of the United States, there is an absolute right to take a writ of error, while, if the claim is in favor of the right, then the Supreme Court has, nevertheless, jurisdiction to bring up the matter.

The CHAIRMAN. By this bill it is provided—

That section 237 of chapter 10 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, is hereby amended by adding thereto the following:

"It shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States."

I introduced a bill similar to this in the House (H. R. 7355). The bills, I think, are identical.

Senator ROOT. If the House will pass that bill, it will be very helpful.

I thank you very much, Mr. Chairman, for giving me the privilege of expressing my views on this subject.

Mr. TAFT. May I say one word in reference to the last subject which Senator Root has been discussing, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. TAFT. I simply want to say that the committee can act safely in the matter of approving this bill, because it has been recommended by the Progressive Party and it also also approves itself to Senator Root and myself, and that ought to cover the whole ground.

One other suggestion I would like to make with reference to the matter, and that is that it would be without doubt an important constitutional question with respect to the question under discussion this morning, and it might be safer to provide that upon the adoption of the rules by the Supreme Court of the United States, thereupon certain sections of the statute that would interfere with those rules, naming them, should stand repealed. Then there would not be any difficulty about the contention in regard to judicial power, because there is not any doubt that Congress may provide that laws shall be repealed as of a certain date in the future, upon the happening of a certain event.

Mr. NELSON. What is your opinion as to the present effect, without that?

Mr. TAFT. I should think the courts would hold the act to be impliedly a repeal of that section.

Senator ROOT. Pro tanto?

Mr. TAFT. Yes; that this bill would do so. What is the use of encountering a constitutional argument if you can remove the basis for it?

Of course the difficulty is that when you have a bill that has been discussed, you would like to get it through and then chance yourself on the constitutional argument. If it would not interfere with its passage, I should be in favor of the amendment I suggest, taking those things out of the statute.

For instance, it is not at all certain that the Supreme Court ought not to change the time with reference to return day, and there are a great many things that you ought to give to the Supreme Court rather than leave them as the statute provides. You could do that by the method I suggest; namely, make it a specific repeal of the statutes which interfere with the discretion which you wish to confer on the Supreme Court.

Of course, there is no doubt about the power of the courts to make the rules of procedure. That has been done since we knew anything about them.

I wanted to enforce this last proposition of Senator Root's, and if you have two forces so diametrically opposed, in favor of a bill, for Heaven's sake, let it go through.

Mr. SHELTON. Mr. Chairman, with the committee's permission, I should like you to listen for just a few moments to Prof. James De Witt Andrews, of New York.

STATEMENT OF JAMES DE WITT ANDREWS, ESQ., OF NEW YORK, N. Y.

Mr. ANDREWS. Mr. Chairman and gentlemen of the Committee on the Judiciary, so much has been said, and well said, with reference to this matter that I shall not repeat any of it. I shall confine my brief remarks to two or three matters which I think have a bearing on this act.

The bill is a very brief one, but that is not its chief merit. Its chief merit is that it is a recognition of those fundamental things, the ignoring of which always throws the law into confusion.

This idea of going back is simply a restoration—and if I may indulged for a moment or two in the matter of history, not because of the human interest which there is in history, at all, but from the fact of the controlling influence of the thing that is perdurable and must remain; I would allude to the fact that the procedure in the courts began its reform in 1832 and 1834 with the idea of delegating to the courts the power of making rules governing the practice, and those were the Hillary rules. It has been the departure from that idea which has been the cause of our undoing.

Now, with reference to the constitutionality of the act, the very first act of the Supreme Court upon its assembly, its first proceeding was the establishment of a set of rules. Those rules you will find in the first volume of the United States Reports.

Those rules simply adopted the rules of practice and procedure and practice of the high court of chancery and the practice of the court of Kings bench in England, and it is quite true, as Senator Root has said, that the legislation of Congress has only been to limit these powers and take them away.

There is still one additional thought that might be urged in reference to that subject, and that is this.

Under the division of power in the English constitution there were two branches, the legislative and the executive. The judiciary was a part of the executive. We subdivided that into three parts, the legislative, the executive, and the judicial, but we did not depart from or ignore the proposition that the administration of the court is still administrative. I think it will not be necessary to pursue that argument further.

That is to say, these rules are rules of administration. The general command to the court is to do justice. This is an administrative function of the rules—that the rules shall govern in the application of the substantive law.

Now, I would like to say just a word further in reference to the great and far-reaching effect of this act, extending beyond what Judge Parker so ably presented to you. That is to say, heretofore the courts of the United States have been obliged to conform to the practice of the local tribunals. The object of this bill will be to reverse the proposition so far as the Federal courts are concerned. So far as the Federal courts are concerned there will be one uniform act and practice throughout the whole United States, and if that act is drafted with any skill it will be seen that its reflex action will be vastly toward a uniformity of practice in the whole United States. Therefore you can say that this act has for its purpose the beginnig of a reform which will bring about a uniform practice.

May I say just a word in reference to the practice? The result of the great many years of study and practice at the same time—the first time that I offended you or the public was in the preparation of a book that had for its object the demonstration of the fact that the rules of pleading, under the code and at common law, all the fundamental rules were identical.

The second edition of that book, in which I think it was performed, was that the fundamental rules of law and equity pleading were alike.

The first act in Illinois enabling parties to testify was entitled, "An act to dispense with the bill of discovery." When the bill of discovery was swept off, as it has been practically, in all the States of the United States, the substantive rules of pleading that were left in the law of equity were the pleading rules bottomed upon the common law. There is no difficulty in sustaining that proposition, both by dictum and authority.

Let us see about the substance. Take it in reference to parties. The largest number of parties that any legal author I have ever known was tempted to draw was 118. I think all the rules in reference to the making of parties can be compassed in 50 or 60 rules. There are the rules as to parties in equity, and the rules of pleading. Now, if you simplify that practice you begin to draw to the code that much desired simplicity, and to reach the real idea of scientific codification. If those matters will be reflected upon I am sure you will see that the action taken under this bill will have the most profound effect upon the administration of justice in the United States of America of any piece of legislation that has ever been passed.

Mr. VOLSTEAD. I would like to know to what extent you imagine the courts would go under this provision. Suppose they could permit equitable defense to be set up in legal actions?

Mr. ANDREWS. That question goes to the question of the power of this Congress to confer that power. I suppose you mean under the effect of the rule?

Mr. VOLSTEAD. Yes.

The CHAIRMAN. Suppose this bill should be passed as it is?

Mr. VOLSTEAD. Would that be considered substantive law?

Mr. ANDREWS. In equity rules they have insisted in one or two places upon the substantive law, but the matter of transferring a cause of action from the law side to the equity side is not substantive law.

In some jurisdictions they have an independent court of equity and another independent court of law. They have in other jurisdictions, as in Illinois, where they have a circuit court, and in Chicago a superior court, which is a court of general jurisdiction; it has both a law side and a chancery side.

Now, under an act of this kind, where a court is, of course, one court, a district court, I see no reason why they have not the power to enable the litigant to reform his action.

Mr. VOLSTEAD. That, I think, does not quite meet the proposition. Suppose a person should bring an action at law, but there is an equitable defense to it. Would the power given in this bill be sufficient to permit the Supreme Court to prescribe a rule under which that equitable claim might be disposed of?

Mr. ANDREWS. I think there is doubt on that proposition because of the form of this act.

Mr. VOLSTEAD. Why could not this be modified so as to give the full power to consolidate, if desirable, both the equity and the law jurisdictions of the various Federal courts?

Mr. ANDREWS. I suppose the committee has had its attention called to the fact that in some jurisdictions where there are Federal courts the courts have done that very thing. The question would arise after the statute of limitation period had arisen in its severe and acute form; it would arise after that time. This bill seems to confine itself to matters of form largely—to procedure largely.

Mr. VOLSTEAD. Is it a matter of form and procedure?

Mr. ANDREWS. You mean the other?

Mr. VOLSTEAD. Yes.

Mr. ANDREWS. Yes; it is. Therefore I am inclined to believe it would give the power; but it might be wise to touch upon that proposition. I do not believe in the suggestion made by my learned brother, Taft, the idea of the necessity for changing this act in the other respect, and for this reason: The moment you do that, in my judgment, you will destroy its beneficient effect. That beneficient effect is this: If this act has any one great power, it consists in this, that when the Supreme Court of the United States finally gives its attention to these rules you will have in one place in the United States a uniform, homogeneous, certain set of rules. But if you allow any act or any matter of precedure to live and survive that sanction, then you will have a hodgepodge again.

Mr. GRAHAM. You think the danger arises from attempting to name them; that the act will, by implication, repeal everything that is inconsistent with it?

Mr. ANDREWS. Yes.

Mr. FLOYD. I am not satisfied about the power of Congress to do this thing. You stated in the beginning of your remarks that the first thing the Supreme Court did after it assembled was to prescribe certain rules. I agree with the proposition if there were no statutes to the contrary the Supreme Court might establish any rules of practice that were not inconsistent with the Constitution of the United States; but when Congress passes a constitutional law within its authority, I doubt the constitutionality of an act that attempts to delegate to the Supreme Court of the United States, or any other court, the power to repeal that law.

For instance, how many laws will this repeal? If it repeals any it will repeal every statute that is in conflict with those rules when they are made by the Supreme Court.

Mr. ANDREWS. Of course, it is within the power of Congress to repeal that.

Mr. FLOYD. It is within the power of Congress to repeal it; but my question is, Is it within the power of Congress to delegate to the Supreme Court of the United States the authority to repeal an existing statute? I concede their absolute right to make rules not in conflict with the Constitution or with a statute, but I most seriously question the right of Congress to delegate the authority to the Supreme Court of the United States, or any other court, to make rules and regulations which, in effect, will repeal existing statutes.

Another question is this: Suppose the Supreme Court of the United States has adopted a uniform code of rules; will it not still be within

the power of Congress to modify, by legislative acts, the rules which the court has adopted?

Mr. ANDREWS. Certainly.

Mr. FLOYD. Then, would another rule of the Supreme Court repeal the new statute?

Mr. ANDREWS. I will answer both of those propositions. The subject of this bill, bill No. 133, is the whole subject of procedure. You do not deny your power to do anything on that subject you wish to do?

Mr. FLOYD. No; I insist upon it; I insist upon our exclusive right to do it.

Mr. ANDREWS. What is the effect of what you are doing? The effect of this act is to take back to Congress the whole power over the subject of procedure, and if you wish to say that the rules of procedure, after they have been adopted, shall be the rules, you may do so.

Senator Root explained the matter, it seems to me, clearly enough up to the point of saying you were taking back to yourselves the whole subject by this bill.

The CHAIRMAN. This allows the Supreme Court to do the following things: First, to prescribe the forms and manner of service of writs and all other processes. And, again, "the mode and manner of framing and filing proceedings and pleadings"; and third, "of giving notice and serving process of all kinds"; and fourth, "of taking and obtaining evidence"; and then, finally, "drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States."

It seems to me that by this act itself Congress will have pretty well defined what the court may do.

Mr. ANDREWS. Yes. In fact, Congress has taken back to itself the subject and now says so-and-so, as has been said by the chairman.

Every enumerated thing which is to be done is in the matter of administration, and Congress has done that thing right along in reference to forest reserves, in reference to pure foods, and in reference to other matters of that kind. They have established commissions without number. You are only saying Congress takes back that old act.

I think Senator Root explained it more lucidly that I can myself. I reason it out like this: They have taken back the old act and have said you may go on again as you did in the beginning and prescribe rules. No substantive right is concerned there; it is only a matter of administrative law.

Mr. NELSON. You think it is not necessary to repeal any statute of the United States; that simply saying they shall have the power to do this, that that of necessity repeals every statute which may be in the way?

Mr. ANDREWS. Yes; that is my opinion now.

Mr. FLOYD. That is my opinion of the purpose of it, but I doubt whether it would repeal any of them. What would be the objection to stating in express terms at the conclusion of the bill something like this: "That upon the adoption by the Supreme Court of the United States of any such rules, any statute in conflict therewith shall be deemed to be repealed"?

Mr. ANDREWS. I see no objection to it.

The CHAIRMAN. But that would not be necessary?

Mr. ANDREWS. I think it would not be necessary.

Mr. FLOYD. It would remove an infinite amount of controversy by a man who entertained similar views to mine as to the policy and power of doing such a thing.

Mr. NELSON. If you should attempt to enumerate them in a statute and omitted some, what effect would that have?

Mr. ANDREWS. Your repealing act would not take away; it would not be enumerative.

Mr. FLOYD. You could do it, in a general way. There would be a grave danger in enumerating particular statutes for the reason that the Supreme Court in its rules might not cover everything that had been covered by the statutes, and if you repeal the statutes in toto you might have an absence of any rules of procedure.

Mr. ANDREWS. I think another form would be a better one, for the reason also that there would be no danger of anybody's saying that the rules of procedure were now repealed upon the passage of this act.

Mr. GRAHAM. There is no difficulty about making a repeal act to take effect in futurum. I think we should stop there. It would be dangerous to attempt to enumerate, because you might spoil the whole system.

Mr. FLOYD. If the Supreme Court happened to overlook something, that might be dangerous.

Mr. ANDREWS. I thank you very much for giving me this opportunity of expressing my views on this subject.

Mr. SHELTON. Mr. Chairman, on behalf of the committee representing the American Bar Association I want to thank you very much for giving us this hearing.

The CHAIRMAN. We are very much obliged to you for giving us your views. I am sure the committee has been very much interested in the remarks of the gentlemen representing the American Bar Association. Those remarks have been very instructive and will be helpful.

(Thereupon the committee proceeded to the consideration of other business.)

CLAYTON, Henry De Lamar, (1857 - 1929)

CLAYTON, Henry De Lamar, (brother of Bertram Tracy Clayton), a Representative from Alabama; born near Clayton, Barbour County, Ala., February 10, 1857; attended the common schools; was graduated from the literary department of the University of Alabama at Tuscaloosa in 1877 and from its law department in 1878; was admitted to the bar in the latter year and commenced practice in Clayton, Ala.; moved to Eufaula, Ala., in 1880 and continued the practice of law; member of the State house of representatives in 1890 and 1891; United States district attorney for the middle district of Alabama 1893-1896; permanent chairman of the Democratic National Convention in 1908; elected as a Democrat to the Fifty-fifth and to the eight succeeding Congresses and served from March 4, 1897, until May 25, 1914, when he resigned and moved to Montgomery, Ala., to accept a commission as United States judge for the middle and northern district of Alabama, in which capacity he served until his death; chairman, Committee on the Judiciary (Sixty-second and Sixty-third Congresses); sponsor of the Clayton anti-trust act of 1914; one of the managers appointed by the House of Representatives in 1905 to conduct the impeachment proceedings against Charles Swayne, judge of the United States District Court for the Northern District of Florida, and in 1912 against Robert W. Archbald, judge of the United States Commerce Court; appointed to the U.S. Senate to fill the vacancy caused by the death of Joseph F. Johnston, but his appointment was challenged and withdrawn; died in Montgomery, Ala., December 21, 1929; interment in Fairview Cemetery, Eufaula, Ala.

Bibliography

Rodabaugh, Karl. “Congressman Henry D. Clayton and the Dothan Post Office Fight: Patronage and Politics in the Progressive Era.” *Alabama Review* 33 (April 1980): 125-49; Rodabaugh, Karl. “Congressman Henry D. Clayton, Patriarch in Politics: A Southern Congressman During the Progressive Era.” *Alabama Review* 31 (April 1978): 110-20.

62D CONGRESS,
1ST SESSION.

H. R. 12365.

IN THE HOUSE OF REPRESENTATIVES.

JULY 8, 1911.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any circuit court of the United States, the jurisdiction of the circuit court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though

defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

62D CONGRESS, 1ST SESSION.

H. R. 12365.

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

By Mr. CLAYTON.

JULY 8, 1911.—Referred to the Committee on the Judiciary and ordered to be printed.

x re: HR 12365 Index

CONGRESSIONAL RECORD:

CONTAINING

THE PROCEEDINGS AND DEBATES

OF THE

SIXTY-SECOND CONGRESS, FIRST SESSION.

VOLUME XLVII.

WASHINGTON:
1911.

H. R. 12318—To amend section 4 of the act entitled "An act to regulate commerce, approved Feb. 4, 1887, as heretofore amended, and for other purposes," approved June 18, 1910.
Mr. Steenerson; Committee on Interstate and Foreign Commerce, 2656.—Debated, 2653–2655.

H. R. 12319—To amend section 2 of an act approved Apr. 19, 1908, entitled "An act to increase the pension of widows, minor children, etc., of deceased soldiers and sailors of the late Civil War, the War with Mexico, the various Indian wars, etc., and to grant a pension to certain widows of the deceased soldiers and sailors of the late Civil War."
Mr. Willis; Committee on Invalid Pensions, 2656.

H. R. 12320—To provide for the filing of a petition for rehearing in the Supreme Court of the United States, and defining that court's jurisdiction in reference thereto.
Mr. McGuire of Oklahoma; Committee on the Judiciary, 2656.

H. R. 12321—To punish frauds at elections for Representatives and Delegates in Congress.
Mr. Powers; Committee on the Judiciary, 2656.

H. R. 12322—To create a commission for the purpose of inquiring into the qualifications of Members of and Delegates in Congress, and for other purposes.
Mr. Powers; Committee on the Judiciary, 2656.

H. R. 12323—To amend an act approved Feb. 6, 1907, entitled "An act granting pensions to certain enlisted men, soldiers and officers, who served in the Civil War and the War with Mexico.
Mr. Willis; Committee on Invalid Pensions, 2656.

H. R. 12324—Granting a pension to Jose Padilla.
Mr. Andrews; Committee on Pensions, 2656.

H. R. 12325—Granting an increase of pension to James Cass.
Mr. Anderson of Ohio; Committee on Invalid Pensions, 2656.

H. R. 12326—Granting an increase of pension to Jacob W. Shoemaker.
Mr. Anderson of Ohio; Committee on Invalid Pensions, 2656.

H. R. 12327—Granting an increase of pension to Henry E. Wright.
Mr. Bradley; Committee on Invalid Pensions, 2656.

H. R. 12328—Granting an increase of pension to Charles H. Valentine.
Mr. Bradley; Committee on Invalid Pensions, 2656.

H. R. 12329—Granting an increase of pension to Helen L. Scott.
Mr. Cameron; Committee on Invalid Pensions, 2656.

H. R. 12330—Granting a pension to Timothy Hawkins.
Mr. Cameron; Committee on Invalid Pensions, 2656.

H. R. 12331—For the relief of William H. Taliaferro, administrator of James G. Taliaferro, deceased.
Mr. Carlin; Committee on War Claims, 2656.

H. R. 12332—To carry into effect the findings of the Court of Claims in the matter of the claim of the trustees of Cedar Run Baptist Church, of Culpeper County, Va.
Mr. Carlin; Committee on War Claims, 2656.

H. R. 12333—To carry into effect the findings of the Court of Claims in the matter of the claim of the trustees of the Presbyterian Church of Marshall, Va.
Mr. Carlin; Committee on War Claims, 2656.

H. R. 12334—To remove the charge of desertion from the military record of Thomas W. Moore and grant him an honorable discharge.
Mr. Clark of Florida; Committee on Military Affairs, 2656.

H. R. 12335—Granting an increase of pension to Thomas Burke.
Mr. Copley; Committee on Invalid Pensions, 2656.

H. R. 12336—Granting an increase of pension to Loyd T. Lathrop.
Mr. Copley; Committee on Invalid Pensions, 2656.

H. R. 12337—Granting an increase of pension to Hamilton Bond.
Mr. Cullop; Committee on Invalid Pensions, 2656.

H. R. 12338—Granting a pension to Thomas B. Neifus.
Mr. Daugherty; Committee on Invalid Pensions, 2656.

H. R. 12339—To refund certain taxes paid by the Southern Redistilling & Rectifying Co. (Ltd.), of New Orleans, La.
Mr. Dupre; Committee on Claims, 2656.

H. R. 12340—Granting an increase of pension to James E. Cothern.
Mr. Hamilton of West Virginia; Committee on Invalid Pensions, 2656.

H. R. 12341—Granting an increase of pension to William L. Pierce.
Mr. Hanna; Committee on Invalid Pensions, 2657.

H. R. 12342—Granting an increase of pension to Eli Roberts.
Mr. Hanna; Committee on Invalid Pensions, 2657.

H. R. 12343—Granting a pension to Kate G. Morris.
Mr. Littlepage; Committee on Pensions, 2657.

H. R. 12344—Granting an increase of pension to John L. Barr.
Mr. McGuire of Oklahoma; Committee on Invalid Pensions, 2657.

H. R. 12345—Granting an increase of pension to James C. Wood.
Mr. McGuire of Oklahoma; Committee on Invalid Pensions, 2657.

H. R. 12346—Granting an increase of pension to Martin L. McNabb.
Mr. McGuire of Oklahoma; Committee on Invalid Pensions, 2657.

H. R. 12347—For the relief of the heirs of John D. Riley.
Mr. Moon of Tennessee; Committee on War Claims, 2657.

H. R. 12348—Granting an increase of pension to Caleb Crotzer.
Mr. Pepper; Committee on Invalid Pensions, 2657.

H. R. 12349—Granting an increase of pension to Levi Runyan.
Mr. Pepper; Committee on Invalid Pensions, 2657.

H. R. 12350—Granting an increase of pension to William G. Miller.
Mr. Richardson; Committee on Invalid Pensions, 2657.

H. R. 12351—Granting an increase of pension to Isaac H. Crews.
Mr. Russell; Committee on Invalid Pensions, 2657.

H. R. 12352—Granting an increase of pension to Thomas R. Anderson.
Mr. Russell; Committee on Invalid Pensions, 2657.

H. R. 12353—For the relief of Caroline G. Meglemry.
Mr. Sherley; Committee on War Claims, 2657.

H. R. 12354—Granting an increase of pension to Alfred M. Shaw.
Mr. Speer; Committee on Invalid Pensions, 2657.

H. R. 12355—Granting an increase of pension to James Davison.
Mr. Speer; Committee on Invalid Pensions, 2657.

H. R. 12356—Donating obsolete bronze cannon to Major Jenkins Post, No. 99, Grand Army of the Republic, Hanover, Pa.
Mr. Lafean; Committee on Military Affairs, 2751.

H. R. 12357—To amend an act entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved Aug. 5, 1909.
Mr. Weeks; Committee on Ways and Means, 2751.

H. R. 12358—Making it unlawful to collect or receipt for the special tax for the purpose of carrying on the business of wholesale liquor dealer or retail liquor dealer in communities where State or local laws forbid the sale of such intoxicating or spirituous liquors.
Mr. Roddenbery; Committee on Ways and Means, 2751.

H. R. 12359—To prohibit the use of the United States mails for the purpose of advertising, soliciting, or offering for sale intoxicating liquors in communities where State or local laws forbid the sale of such intoxicating or spirituous liquors.
Mr. Roddenbery; Committee on the Post Office and Post Roads, 2751.

H. R. 12360—To divide the State of Oregon into two judicial districts.
Mr. Lafferty; Committee on the Judiciary, 2751.

H. R. 12361—Providing for the establishment and operation of a Government owned and controlled line of steamers along the Pacific coast and through the Panama Canal, and making provisions therefor.
Mr. Stephens of California; Committee on Appropriations, 2751.—Reference changed to Committee on Interstate and Foreign Commerce, 2887.

H. R. 12362—Concerning taxable costs in suits at law.
Mr. Clayton; Committee on the Judiciary, 2751.

H. R. 12363—Providing that questions of negligence and contributory negligence shall be submitted to the jury.
Mr. Clayton; Committee on the Judiciary, 2751.

H. R. 12364—To provide for circuit and district courts of the United States at Opelika, Ala.
Mr. Clayton; Committee on the Judiciary, 2751.

H. R. 12365—To allow and regulate amendments in judicial proceedings in the courts of the United States.
Mr. Clayton; Committee on the Judiciary, 2751.

H. R. 12366—To revive the right of action under the captured and abandoned property acts, and for other purposes.
Mr. Clayton; Committee on War Claims, 2751.

H. R. 12367—To provide for the refunding of cotton tax.
Mr. Clayton; Committee on War Claims, 2751.

H. R. 12368—Granting a pension to Mamie R. Grant.
Mr. Bartlett; Committee on Pensions, 2751.

H. R. 12369—Granting an increase of pension to Charles T. Bown.
Mr. Barchfeld; Committee on Invalid Pensions, 2751.

H. R. 12370—Granting a pension to William A. Richards.
Mr. Clayton; Committee on Invalid Pensions, 2751.

H. R. 12371—For the relief of Spencer Roberts, a member of the Metropolitan police force of the District of Columbia.
Mr. Carlin; Committee on the District of Columbia, 2751.

H. R. 12372—Granting an increase of pension to William Barfield.
Mr. Catlin; Committee on Invalid Pensions, 2751.

H. R. 12373—For the relief of W. S. Adams.
Mr. Fields; Committee on War Claims, 2751.

H. R. 12374—Granting a pension to John M. Boen.
Mr. Floyd of Arkansas; Committee on Invalid Pensions, 2751.

H. R. 12375—Authorizing Daniel W. Abbott to make homestead entry.
Mr. French; Committee on the Public Lands, 2751.

H. R. 12376—For the relief of James A. Showen.
Mr. Hamilton of West Virginia; Committee on Claims, 2751.

H. R. 12377—Granting an increase of pension to William H. Bishop.
Mr. Hamilton of West Virginia; Committee on Invalid Pensions, 2751.

H. R. 12378—Granting an increase of pension to Henry B. Mitchell.
Mr. Heald; Committee on Invalid Pensions, 2751.

H. R. 12379—Granting a pension to John W. Connors.
Mr. Humphrey of Washington; Committee on Pensions, 2751.

H. R. 12380—Granting a pension to Sophronia Vanderbeck.
Mr. Hughes of New Jersey; Committee on Pensions, 2751.

H. R. 12381—Granting an increase of pension to James Hand.
Mr. Hughes of New Jersey; Committee on Invalid Pensions, 2751.

H. R. 12382—Granting an increase of pension to John Campen Mixon.
Mr. Kent; Committee on Invalid Pensions, 2751.

H. R. 12383—Granting a pension to William Barth.
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H. R. 12384—Granting an increase of pension to James H. Cloer.
Mr. Kent; Committee on Invalid Pensions, 2751.

H. R. 12385—Granting a pension to Rebecca Back.
Mr. Langley; Committee on Pensions, 2751.

H. R. 12386—Granting a pension to Margaret A. Wells.
Mr. Martin of Colorado; Committee on Pensions, 2751.

H. R. 12387—Granting an increase of pension to John Pierce.
Mr. McGillicuddy; Committee on Invalid Pensions, 2751.

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Mr. McGillicuddy; Committee on Invalid Pensions, 2751.

H. R. 12389—Granting an increase of pension to George F. Sheldon.
Mr. O'Shaunessy; Committee on Invalid Pensions, 2751.

H. R. 12390—Granting an increase of pension to Margaret O'Reilly.
Mr. O'Shaunessy; Committee on Invalid Pensions, 2751.

H. R. 12391—Granting an increase of pension to Aaron Henry.
Mr. Palmer; Committee on Invalid Pensions, 2751.

H. R. 12392—Granting an increase of pension to James B. Armstrong.
Mr. Palmer; Committee on Invalid Pensions, 2751.

H. R. 12393—For the relief of John S. Hufford.
Mr. Palmer; Committee on Military Affairs, 2751.

62D CONGRESS,
2D SESSION.

H. R. 18236.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 18, 1912.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any district court of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed,

AN ACT

To allow and regulate amendments in judicial proceedings in the [illegible]

though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

62D CONGRESS, 2D SESSION.

H. R. 18236.

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

By Mr. CLAYTON.

JANUARY 18, 1912.—Referred to the Committee on the Judiciary and ordered to be printed.

62D CONGRESS, 2D SESSION.

House Calendar No. 116.

H. R. 18236.

[Report No. 286.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 18, 1912.

Mr. CLAYTON introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

JANUARY 30, 1912.

Referred to the House Calendar and ordered to be printed.

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any district court of the United States, the jurisdiction of the district court is based upon the

62D CONGRESS, 2D SESSION. H. R. 18236.

diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

62D CONGRESS, 2D SESSION. } H. R. 18236.

[Report No. 286.]

A BILL

To allow and regulate amendments in judicial proceedings in the courts of the United States.

By Mr. CLAYTON.

JANUARY 18, 1912.—Referred to the Committee on the Judiciary and ordered to be printed.

JANUARY 30, 1912.—Referred to the House Calendar and ordered to be printed.

62D CONGRESS,
2D SESSION.

H. R. 18236.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 8, 1912.

Read twice and referred to the Committee on the Judiciary.

AN ACT

To allow and regulate amendments in judicial proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

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62D CONGRESS, 2D SESSION. H. R. 18236.

A BILL

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Passed the House of Representatives February 7, 1912.

Attest: SOUTH TRIMBLE,

Clerk.

AN ACT

To allow and regulate amendments in judicial proceedings in the courts of the United States.

FEBRUARY 8, 1912.—Read twice and referred to the Committee on the Judiciary.

x re: HR 18236

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X re: HR 18236

CONGRESSIONAL RECORD:

CONTAINING

THE PROCEEDINGS AND DEBATES

OF THE

SIXTY-SECOND CONGRESS, SECOND SESSION.

VOLUME XLVIII.

WASHINGTON:
1912.

investigation into the conditions, the finances, and charges of the several utility corporations here in the city should be begun at once, so that we may be advised as to whether the rates charged are excessive or not.

It is only necessary, it seems to me, to investigate the capitalization of some of these companies to justify the charge that the rates are excessive. For instance, and I will take only a moment, the Capital Traction Co. is capitalized at $16,000,000, with 28.588 miles of trackage, making the capitalization per mile $559,675. The Washington Railway & Electric Co. is capitalized at $27,995,018. The total mileage is 83.26 miles, and the capitalization per mile is $336,260.

In the hearings which we had before the committee the other day, when we were trying to ascertain whether these companies could afford to give free transfers from the lines of one company to the lines of the other, it is true of at least the president of one of the companies that he was not able to tell us whether the cost for construction and equipment was $100,000 or $200,000 per mile. Yet he wanted to assure the committee that it would impoverish the company to grant these free transfers.

It seems to me that these matters should be investigated, and investigated at once, so that the rates of charges can be determined within the near future.

Mr. GALLINGER. In reply, Mr. President, I will only say that I have no apprehension, if this matter is put in the hands of the Commissioners of the District of Columbia, there will not be an immediate investigation along all those lines.

It is proper, I should further say, that the gentleman to whom the Senator from Ohio refers has been connected with that company for only a few weeks. I agree with the Senator that his testimony was very unsatisfactory, but the fact is he did not know very much about the company or its operations. There had been a change in the management and he had been elected to the presidency of the company, a gentleman who is very familiar with all these questions having been displaced and having left the city.

Mr. POMERENE. But the Senator from New Hampshire will agree with me that he was very positive in giving testimony to the effect that they could not afford free transfers.

Mr. GALLINGER. I think that the president of the Capital Traction Co., who is very familiar with all these matters, was still more positive on that point.

Mr. POMERENE. That is very true. He assured us that there was a very small surplus after the payment of the dividends, but we were not advised as to the cost per mile of the trackage.

Mr. GALLINGER. All those matters, when we come to the final disposition of the bill, will be taken up. I am very glad the Senator from Ohio offered his amendment, so that it may be in print to be examined. As I suggested before, I think the Senator, when he looks it over, will feel that he has got to enlarge it so far as the force is concerned, if we have three commissioners, making them an independent board.

Mr. POMERENE. I desire to state that my only object in presenting the amendment, or what additional amendments may be necessary, is to insure the very earliest investigation of this subject.

Mr. GALLINGER. Let the reading of the bill proceed.

The Secretary resumed and concluded the reading of the bill.

Mr. GALLINGER. Now, Mr. President, I will ask that the bill be laid aside. It has become the unfinished business. I will venture to repeat my suggestion that I trust Senators who may feel that they ought to offer amendments to the bill will have them prepared as early as may suit their convenience and have them printed, so that we may have an opportunity to examine them before voting on them.

EXECUTIVE SESSION.

Mr. NELSON. I suggest, if there is nothing else to intervene, that we have a short executive session, and I move that the Senate proceed to the consideration of executive business.

The motion was agreed to, and the Senate proceeded to the consideration of executive business. After five minutes spent in executive session the doors were reopened, and (at 4 o'clock and 38 minutes p. m.) the Senate adjourned until to-morrow, Thursday, February 8, 1912, at 2 o'clock p. m.

NOMINATIONS.

Executive nominations received by the Senate February 7, 1912.

AMBASSADOR.

Myron T. Herrick, of Ohio, to be ambassador extraordinary and plenipotentiary of the United States of America to France, vice Robert Bacon, resigned.

REGISTER OF THE LAND OFFICE.

Hal J. Cole, of Washington, to be register of the land office at Spokane, Wash., his term expiring March 18, 1912. (Reappointment.)

CONFIRMATIONS.

Executive nominations confirmed by the Senate February 7, 1912.

UNITED STATES ATTORNEY.

Sherman T. McPherson to be United States attorney, southern district of Ohio.

RECEIVER OF PUBLIC MONEYS.

Frank A. Boyle to be receiver of public moneys at Juneau, Alaska.

POSTMASTERS.

ALABAMA.

Hortense Rowe, Camp Hill.

COLORADO.

Rose E. Wilder, Alamosa.

LOUISIANA.

Charlton Fort, Minden.

MASSACHUSETTS.

William L. Lathrop, Orange.
John G. Orr, Pittsfield.

MINNESOTA.

Manley S. Elliott, Paynesville.
Ole J. Flaa, Boyd.
T. V. Knatvold, Albert Lea.

NEW YORK.

Mortimer N. Cole, Castile.
Thomas H. Dickinson, Champlain.
Henry B. Flach, Attica.
Jerome H. Freeman, Savona.
William Johns, Hermon.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, *February 7, 1912.*

The House met at 12 o'clock noon.

The Chaplain, Rev. Henry N. Couden, D. D., offered the following prayer:

O Thou who art supremely great and glorious, "Life-giving, life-sustaining potentate," fill our minds with wisdom, our hearts with love and gratitude, that we are Thy children involved in changeless love. As the heavens declare Thy glory, so may we, in lives of purity, high resolve, and noble endeavor. In the spirit of the Lord Jesus Christ. Amen.

The Journal of the proceedings of yesterday was read and approved.

ILLUSTRATIONS OF COINS OR MEDALS.

The SPEAKER. This is Calendar Wednesday, and the call rests with the Judiciary Committee.

Mr. CLAYTON. Mr. Speaker, I call up the bill (S. 4651) to amend section 171 of the penal laws of the United States, approved March 4, 1909.

The SPEAKER. The Clerk will report the bill.

The Clerk read the bill, as follows:

Be it enacted, etc., That section 171 of the penal laws of the United States, approved March 4, 1909, be amended so as to read as follows:

"SEC. 171. Whoever within the United States or any place subject to the jurisdiction thereof shall make, or cause or procure to be made, or shall bring therein from any foreign country, or shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, device, print, or impression, or any other thing whatsoever, in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money, either under the authority of the United States or under the authority of any foreign Government, shall be fined not more than $100. But nothing in this section shall be construed to forbid or prevent the printing and publishing of illustrations of coins and medals or the making of the necessary plates for the same to be used in illustrating numismatic and historical books and journals and school arithmetics and the circulars of legitimate publishers and dealers in the same."

The SPEAKER. Are there any amendments?

Mr. CLAYTON. There are no amendments. Mr. Speaker, this bill was reported from the Committee on the Judiciary by the gentleman from Virginia [Mr. CARLIN]. I may say that section 171 of the criminal code is amended by the insertion, after the word "journals" in the latter part of that sec-

tion, of these words: "And school arithmetics." So that the last sentence of that section will read this way:

But nothing in this section shall be construed to forbid or prevent the printing and publishing of illustrations of coins and medals or the making of the necessary plates for the same to be used in illustrating numismatic and historical books and journals and school arithmetics and the circulars of legitimate publishers and dealers in the same.

I now yield to the gentleman from Virginia [Mr. CARLIN] 10 minutes, if he desires.

Mr. CARLIN. Mr. Speaker, I do not know that I care to make any statement.

Mr. MANN. Will the gentleman yield?

Mr. CARLIN. Certainly.

Mr. MANN. As I understand it, this is simply enlarging the law so as to allow publishers of school arithmetics to insert pictures of coins, medals, and so forth?

Mr. CARLIN. The gentleman is correct. Mr. Speaker, I do not care to be heard upon this bill; it is a simple matter.

The bill was ordered to be read a third time, was read the third time, and passed.

On motion of Mr. CLAYTON, a motion to reconsider the vote whereby the bill was passed was laid on the table.

AMENDMENT IN PROCEEDINGS, UNITED STATES COURTS.

Mr. CLAYTON. Mr. Speaker, I call up the bill (H. R. 18236) to allow and regulate amendments in judicial proceedings in the courts of the United States, which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any district court of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

Mr. CLAYTON. Mr. Speaker, this bill carries two very simple propositions relating to procedure in the court. The first proposition is that whenever an aggrieved party has instituted a suit in equity, and after the cause has proceeded it is developed that his remedy is at law rather than in equity, then, in order to prevent his case being dismissed out of court and justice thereby defeated, as where the statute of limitations has barred the action at law, the aggrieved party may transfer his cause to the law side of the docket upon such terms as the court may impose.

The second proposition is this: Under the practice as it now exists, where a court has jurisdiction on account of diverse citizenship, and the allegation of diverse citizenship is defectively made or perhaps not made at all, and the cause proceeds, it may be dismissed upon that question being raised, even in the appellate court. Indeed, it must be dismissed whenever that question is raised. In such case it is often too late for the complainant to have any remedy at all, because his claim is then barred by the statute of limitations. This bill proposes to allow him to amend in the appellate court and allege in a sufficient way the diverse citizenship.

Mr. CULLOP. Mr. Speaker, will the gentleman yield?

Mr. CLAYTON. Certainly.

Mr. CULLOP. Section 2 of this bill, I notice, provides for a removal on account of diverse citizenship at any stage of the proceedings. Is that correct?

Mr. CLAYTON. No; the gentleman has entirely misapprehended it. The cause contemplated by this bill has already been removed. This bill does not provide for removal at all, but where the case has already been removed and the diverse citizenship is defectively alleged it permits that defect in the allegation to be remedied at any time, even in the appellate court.

Mr. Speaker, I now yield to the gentleman from West Virginia [Mr. DAVIS].

Mr. DAVIS of West Virginia. Mr. Speaker, in the absence of any objection to the language or purpose of this bill, a discussion of it is more or less a work of supererogation. As stated by the chairman, the purpose of the bill is perfectly apparent on its face. It is in line with the whole tendency of modern thought with reference to court procedure. The whole tendency of both thought and legislation is to prevent a miscarriage of justice by reason of defects in procedure, whether committed through inadvertence, mistake, or ignorance.

Mr. CULLOP. Mr. Speaker, will the gentleman yield?

Mr. DAVIS of West Virginia. I yield, certainly.

Mr. CULLOP. In the statement the gentleman has just made I would inquire of him whether he assumes there would be a miscarriage of justice in the State courts?

Mr. DAVIS of West Virginia. I do not understand the relevancy of the gentleman's question.

Mr. CULLOP. I understood the gentleman to say that this was to prevent a miscarriage of justice?

Mr. DAVIS of West Virginia. Precisely.

Mr. CULLOP. If after the defect in the removal proceeding was discovered it would be the duty of the court to remand the case to the State court, does the gentleman assume that in the State court there would be a miscarriage of justice?

Mr. DAVIS of West Virginia. By no means, but it would not be the duty of the court to remand if there were a defect of such allegation, nor is that the procedure. Where there has been, under the second section of the bill, in cases covered by that section, a removal of the cause to the Federal court, or where the cause has been originally instituted therein, it proceeds to final conclusion in the United States court in the absence of a seasonable motion to remand, and, perhaps, to the Supreme Court of the United States, and there the defective allegation first appearing, that court may dismiss the cause as having been erroneously brought. The effect may easily be that the party would then be barred by the statute of limitations and deprived of all remedy in a proper case.

Mr. CULLOP. In such a case the court would not dismiss the case, but simply remand it back to the court from which it had been removed.

Mr. DAVIS of West Virginia. No; the Supreme Court would either dismiss the case or remand it to the lower Federal court for dismissal by that court; and that court would not of its own motion remand the cause to the State court, but would dismiss it if the jurisdictional allegations were defective.

Now, I concede to the gentleman that parties may after removal, upon proper motion, secure a remand, and with that procedure there is nothing in this bill that will interfere. This is to correct procedure where a cause is in the Federal court and has been proceeded with in that court even to a conclusion and an appeal.

Mr. CULLOP. The point I am trying to make and to get information upon from the gentleman is that where a cause was removed from a State court and there was a defect in the removal proceedings, or erroneously removed, when in such event the party would make a motion to have his cause remanded, this act would deny that right and give the opposite party in the Federal court the right to make a new proceeding or amend the one already instituted for the purpose of retaining his cause there, when, no doubt, it ought to be tried in the State court where the point was raised or where it was brought.

Mr. DAVIS of West Virginia. Mr. Speaker, I am unable to agree either with the procedure suggested by the gentleman from Indiana or with the law with reference to that procedure. If there be a cause removed from a State court in which there is a defective allegation of citizenship, that question may perhaps be raised upon motion to remand, but in every such instance the court could now permit an amendment of the pleadings in that particular. More commonly it would be raised at that stage of the cause by a demurrer, and upon such demurrer, if sustained, the court would give the party leave to amend; but the motion to remand could not be made in the Federal court after the cause had there proceeded to proof; but under this bill, after the cause had proceeded to proof, the parties might still amend the pleadings to conform with the proof as made instead of suffering a dismissal of their cause at that advanced stage of the proceedings. Now, there is not in this bill, Mr. Speaker, any purpose to affect in the slightest the procedure upon removal of causes or the power and right in an appropriate case to remand a cause so removed. It is only intended to prevent a miscarriage of justice at an advanced stage of the cause and to preserve to the party the right to make an immaterial amendment, so that he will not be put to the expense and delay incident to a reinstitution of his cause.

Mr. CULLOP. Mr. Speaker——

The SPEAKER. Does the gentleman from West Virginia yield to the gentleman from Indiana?

Mr. DAVIS of West Virginia. Certainly I do.

Mr. CULLOP. I would like to call the gentleman's attention to this language in section 2, which, in my judgment, makes the bill very much broader in its scope, as the language shows, than the gentleman is now interpreting it. In line 5, it says:

So as to show on the record such diverse citizenship and jurisdiction.

Now, that would mean that when the party instituted his removal proceedings, as he had to do if he relied on that ground at the inception of the pleadings in the cause, after it was brought in the State court, if he had not made the proper showing there when he got to the last stage in the Supreme Court of the United States, if it reached there, he could be educated and come into court then and make a cause for removal. Does the gentleman believe that is fair? Does the gentleman believe that that is a correct practice to establish in the courts of this country? Would it not be inviting a want of diligence, a want of study, a want of proper preparation in a case, if persons are permitted when it reaches the last court to amend their original pleadings in the case? If it would, I can not agree with the gentleman on that subject.

Mr. DAVIS of West Virginia. I certainly believe, Mr. Speaker, that where parties have failed seasonably to move to remand a cause, where they have permitted it to proceed to final determination without complaint, they have no right then to ask that the cause shall be remanded and retried from the beginning. If the gentleman wants an illustration of what this bill is aimed at, he will find it in one of the cases cited in the report of the committee—that of Denny *v.* Pironi, in One hundred and forty-first United States. Suit had been brought without a proper allegation of citizenship in the original pleadings. Proof had been taken, judgment had been rendered, and the cause went to the Supreme Court of the United States upon appeal. Before doing so, however, the parties, in the court below, sought to make citizenship appear of record, not by an amendment of their pleadings, but by setting it out in a remittitur of judgment which they had filed.

The court upon appeal very properly held that the remittitur was not a part of the true records; that, therefore, diversity of citizenship did not appear, the judgment must be reversed, the cause remanded, and the parties put back to reinstitute their proceedings. Under this bill they could have amended their declaration, made the fact appear as in truth it was, and the whole expense or cost, not only to themselves but their opponents, could have been averted.

Mr. CULLOP. Does the gentleman see what an advantage that gives the party over his adversary?

Mr. DAVIS of West Virginia. It gives none whatever, in my judgment.

Mr. CULLOP. Why, this bill simply puts a premium upon negligence in pleading and preparing causes. Suppose a party had seen his adversary's case removed for cause, and he had not stated his full case, and waited; and after he got to the last court, then he would be barred from pleading and proof. Look at the advantage it gives to the other party. It gives one litigant an advantage the other litigant does not have in court, and it is therefore taking, in common parlance, snap judgment of the opposite party, and deprives him of an opportunity to fully present his side on its merit.

Mr. DAVIS of West Virginia. On the contrary, if the gentleman will permit me, it is the present procedure that permits the snap judgment to which the gentleman refers, that a party without raising this question may sit by and permit the case to go to its final end, lying in ambush, as it were, for his unsuspecting opponent. This is a procedure which I think is against public policy. We need not say that all lawyers are all-wise; we need not say that all lawyers possess the highest degree of skill; but, be that as it may, the court accredits them to litigants as competent to transact their cases, and if it can be prevented no just cause should be permitted to fail because some error may be made by an attorney in his course of procedure, and certainly should not be permitted when his adversary has not seasonably raised his objection and presented it. My answer may not be conclusive to the gentleman, but he draws the distinction between his view and my own, and puts his finger on the very thing against which this bill is aimed.

Mr. Speaker, I yield back the balance of my time, if I have any. [Applause.]

Mr. CLAYTON. Mr. Speaker, I now yield to the gentleman from Kentucky [Mr. SHERLEY] five minutes.

Mr. SHERLEY. Mr. Speaker, I am in entire accord with the Committee on the Judiciary touching these two very important amendments, although I am going to offer a suggestion as to the first section in a moment. These amendments have long been needed, and if there is one thing that is apparent to all men in this day and generation, it is that procedure in court should not be made a trap for the unwary, and it is more important that the litigant have his rights determined than it is that some shrewd lawyer should take advantage of a technicality.

The purpose of the first section is to authorize the transfer from equity to law of a case that has wrongly been brought on the equity side. One of the difficulties that confronts every lawyer in certain classes of cases is to determine whether a remedy can be had at law, or whether he must go into a court of equity, because, properly speaking, a court of equity will not entertain jurisdiction of a suit where there is an adequate remedy at law. The first section is to authorize, where a mistake has been made, such transfer so as to prevent what would otherwise frequently happen, the running of the statute of limitation, so as to deny to a man any relief. I believe it could go further, and while the cases are perhaps very rare, still it is to my mind conceivable that cases might be brought on the law side that ought to be in equity, and that power ought to be given for the transfer of cases from law to equity as well as from equity to law. But I am so anxious to see this legislation passed and realize its importance is so great, that I am not willing to undertake in the haste of floor preparation to offer an amendment. I simply felt called upon to make this suggestion so that, if my view was found to be correct, steps may subsequently be taken to give to the court the power to authorize the transfer from law to equity as well as from equity to law.

The second provision has been very plainly explained by the gentleman from West Virginia [Mr. DAVIS]. It does not undertake to enlarge the jurisdiction of the Federal courts at all. It does not enable you to remove a case to the Federal court or to bring a case originally there that you could not bring without this law being passed. But it does prevent a man sleeping upon his right to make an objection to such a time when, if made, it could not be cured, and it gives the appellate court the right to authorize such a statement as to the jurisdictional fact of diverse citizenship as will cure a defective allegation. In my judgment the bill ought to be passed.

Mr. MANN. Mr. Speaker, will the gentleman yield to me?

Mr. CLAYTON. I yield to the gentleman from Illinois.

The SPEAKER. How much time?

Mr. CLAYTON. As much time as the gentleman may want; say five minutes.

The SPEAKER. The gentleman from Illinois is recognized for five minutes.

Mr. MANN. Mr. Speaker, the greatest reproach that can be leveled at our judicial system is that justice is frequently defeated either by delay or by technicality, and the design of the present bill is to correct it in two particulars at least—delay which may defeat justice, and technicality which may defeat justice. In this connection I deem it proper to compliment and congratulate the gentleman from Alabama [Mr. CLAYTON], the chairman of the Committee on the Judiciary, and the entire Judiciary Committee, who, as it seems to me, in the bills which they have reported, as well as those which they are now considering, show an earnest intent on their part to correct some of the evils growing out of the present methods followed under our judicial system. Some of these evils have been frequently called to the attention of the country and to the attention of Congress by our President, himself having been an eminent judge. I hope we may be able, under the guidance of the Committee on the Judiciary, to correct a number of these evils, so that justice may be made speedy and certain in the land. [Applause.]

Mr. CLAYTON. Mr. Speaker, I ask unanimous consent to print in the RECORD the report that I have prepared in this case. And I desire to say one other word, Mr. Speaker, and that is that this bill was prepared as the result of conferences with eminent lawyers throughout the country and correspondence with distinguished judges. Several judges of appellate courts, and, in fact, every judge and every practitioner at the bar with whom I have talked, have commended the measure. The Solicitor General of the present administration, Mr. Lehman, and I know no abler lawyer, when this bill was introduced sent to me a letter commendatory of the measure.

I think that there is a good deal of force in what the gentleman from Kentucky [Mr. SHERLEY] has said, that perhaps in one particular this bill does not go as far as it should. But I could not have that view agreed to by many lawyers or judges. I found a difference of opinion as to whether it should include actions at law; that is, whether or not the proposition stated by the gentleman from Kentucky should be included in the first section. I could not get an agreement, either among the bar or the bench, on that proposition. Hence, that was omitted, and this wise provision, which is a great step in modern progressive legislation, was adhered to.

We all ought to be in favor of bringing the courts up to date, to get rid of antiquated technicalities as much as possible, and this bill does it in two respects. It is a wise and good bill, and I hope it will have the approval of this House.

I want to thank the gentleman from Illinois [Mr. MANN] and the gentleman from Kentucky [Mr. SHERLEY] for their indorsement of this, which I think to be a meritorious measure. Perhaps after the able and elucidating speech of the gentleman from West Virginia [Mr. DAVIS] it was unnecessary for me to have said anything.

The SPEAKER. The gentleman from Alabama [Mr. CLAYTON] asks unanimous consent that he may insert in the RECORD, as a part of his remarks, the report which he mentions. Is there objection?

There was no objection.

Following is the report referred to:

[House Report No. 286, Sixty-second Congress, second session.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 18236) to allow and regulate amendments in judicial proceedings in the courts of the United States, report the same back with the recommendation that the bill do pass.

FIRST SECTION OF THE BILL.

Whether the remedy of an aggrieved person is at law or in equity is often a very close question not easily determined by lawyers or judges. Sometimes a bill in equity is filed and after a lapse of considerable time and much money spent in litigation, and after a right of action at law is barred by the statute of limitations, the bill is dismissed upon the ground that the complainant has a complete remedy at law. In such a case the complainant is left without an available remedy and justice is therefore defeated. This ought not to be.

That it is often a difficult question to decide whether the remedy is at law or in equity, see Buzard *v.* Houston (119 U. S., 347) and cases there cited. See also Russell's and Winslow's Digest, volume 1, page 587, relating to action for fraud. A distinguished Federal judge has said that "I have known cases where a final decision of the Supreme Court holding that the remedy was at law and not in equity, rendered many years after the institution of the suit, left the parties practically without remedy, although at the beginning they had a good case at law."

In the case of Buzard *v.* Houston (119 U. S., 347) the bill was in equity, and it appeared that the money sought to be recovered had been fraudulently obtained, but that complainant's remedy was at law for damages. In other words, the bill showed a ground for legal and not equitable relief. A demurrer to the bill on the ground that it showed no equity was overruled by the circuit court, and on appeal to the Supreme Court the decision of the circuit court was reversed.

The authorities directly in point cited by the Supreme Court in support of its decision were Parkersburg *v.* Brown (106 U. S., 487, 500), Ambler *v.* Choteau (107 U. S., 586), and Litchfield *v.* Ballou (114 U. S., 190), all cases of supposed mistake or fraud in which it developed on appeal that a remedy could be found in an action at law, and the litigations were abortive.

Insurance Co. *v.* Bailey (13 Wall., 616) is a case illustrating the same unfortunate predicament in which the litigant often finds himself. That was a case brought in equity for an accounting for fraud, and the Supreme Court concluded, several years after the suit was brought, that the complainant had mistaken his remedy and could have maintained an action for fraud.

In Whitehead *v.* Shattuck (138 U. S., 151) the bill in equity to recover land was dismissed on the ground that ejectment would lie. In Scott *v.* Neely (140 U. S., 110) a bill to subject land to payment of contract debt was dismissed on appeal, because the complainant had not established his claim at law; and in Cates *v.* Allen (149 U. S., 459) a bill to set aside a conveyance of land, brought by a contract creditor, was dismissed on the same ground.

The above case of Buzard *v.* Houston was also followed in United States *v.* Bitter Root Development Co. (200 U. S., 472) and in the following cases: Jones *v.* Mutual Fidelity Co. (123 Fed. Rep., 519), Mutual Life Insurance Co. *v.* Pearson (114 Fed. Rep., 393), Such *v.* Bank (127 Fed. Rep., 452), Ames Realty Co. *v.* Big Indian Mining Co. (146 Fed. Rep., 176), and in a large number of other cases in the inferior Federal courts.

Provision is made in section 1 of the bill that in such cases, where a mistaken remedy has been pursued, that the court may impose terms, costs, etc., so that any gross injustice may not be committed.

SECOND SECTION OF THE BILL.

The jurisdiction of the Federal courts should appear upon the face of the record, but it often happens where the jurisdiction depends upon diverse citizenship that the plaintiff fails to make the necessary allegation. Sometimes attention is not called to this defect in the trial court, but it is first noticed in the appellate court. This results in the reversal and remanding of the cause for new trial. The second section of the bill will enable an amendment to be made in an appellate court and in that way prevent the reversal of the cases on account of this defect in pleading.

In Steigedeler *v.* McQueston (198 U. S., 141) it is declared a general existing rule that the case will be dismissed when defect of allegation of diverse citizenship appears, either in the pleading or otherwise.

While, under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by plea in abatement when the pleading properly averred citizenship, the act of March 3, 1875 (18 Stat., 470, 472; sec. 137), made it the duty of the circuit court, at any time in the progress of a cause, to dismiss the suit if it was satisfied either that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly made or joined as plaintiffs or defendants for the purpose of creating a case cognizable or removable under the act of Congress. (Sheppard *v.* Grave, 14 How., 505; Williams *v.* Nottawa, 104 U. S., 209, 211; Farmington *v.* Pillsbury, 114 U. S., 138, 143; Little *v.* Giles, 118 U. S., 596, 602; Morris *v.* Gilmer, 129 U. S., 315, 316.)

In Parker *v.* Overman (18 How., 137), Robertson *v.* Cease (97 U. S., 646), Everhart *v.* Huntsville College (120 U. S., 223), Timmons *v.* Elyton Land Co. (139 U. S., 378), Denny *v.* Pironi (141 U. S., 121), and Wolfe *v.* Hartford Life Insurance Co. (148 U. S., 389), the above principle was applied when the defect discovered related to a question of diverse citizenship.

In Steigdeler *v.* McQuesten, above cited, the complaint properly alleged citizenship, and there was a motion to dismiss on other grounds, but no mention was made on the motion of nondiversity citizenship. Nevertheless the defendant might have raised the point in the trial court on a plea in abatement, but he waited until evidence taken by a master disclosed the jurisdictional defect. Then the objection to the jurisdiction was made. The trial court then denied the defendant's request to dismiss on that ground, and a trial was had, resulting in a judgment for the plaintiff on the merits. The defendant appealed to the Supreme Court. The Supreme Court sustained the circuit court, on the ground that the evidence so taken did not refute the allegation of diverse citizenship. But the Supreme Court reasserted the rule that if the proof had refuted the allegation, the decision would be reversed and the suit dismissed. Eaton *v.* Hoge (141 Fed. Rep., 66), adopts the same rule as the Supreme Court in cases involving the same question.

Both sections are in line with modern good legislation and seek to have substantial justice done in cases where now mere technicalities are allowed to defeat justice.

The SPEAKER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER. The question is on the passage of the bill.

The question was taken, and the bill was passed.

On motion of Mr. CLAYTON, a motion to reconsider the vote whereby the bill was passed was laid on the table.

DEFICIENCY APPROPRIATION, WORKHOUSE, DISTRICT OF COLUMBIA.

Mr. FITZGERALD, by direction of the Committee on Appropriations, reported the joint resolution (H. J. Res. 238) making an appropriation to supply a deficiency in the appropriation for the support of the workhouse of the District of Columbia for the fiscal year 1912, which, with the accompanying report (No. 308), was ordered printed and referred to the Committee of the Whole House on the state of the Union.

Mr. MANN. Mr. Speaker, I reserve all points of order on the resolution.

MESSAGE FROM THE SENATE.

A message from the Senate, by Mr. Crockett, one of its clerks, announced that the Senate had passed bills of the following titles, in which the concurrence of the House of Representatives was requested:

S. 4455. An act to provide for the establishment of additional aids to navigation at Ashland, Wis.;

S. 4242. An act to authorize the establishment of aids to navigation at Oconto Harbor, Wis.;

S. 4432. An act to provide for the construction of a light and fog-signal station and for improving the aids to navigation at Lorain Harbor, Ohio;

S. 4434. An act to provide for removing, reconstructing, and improving the fog-signal station at Cleveland, Ohio;

S. 4306. An act to provide for the disposition of pensions due inmates of the Naval Home;

S. 2235. An act to provide for the naturalization of aliens who have served or shall hereafter serve for one enlistment of four years in the naval auxiliary service;

S. 2037. An act to provide for the erection of a monument on the battle field of Gettysburg to commemorate the services of the United States Signal Corps during the War of the Rebellion;

S. 1345. An act for the relief of Elizabeth L. W. Bailey, administratrix of the estate of Davis W. Bailey, deceased;

S. 4854. An act to authorize the opening, widening, and extension of highways within and adjacent to the subdivision of the Barry farm, and for other purposes; and

S. 4433. An act to provide for rearranging, rebuilding, and improving the aids to navigation at Ashtabula Harbor, Ohio.

The message also announced that the Senate had passed without amendment bill of the following title:

H. R. 1618. An act amending paragraph 6 of the act relating to the Metropolitan police force.

The message also announced that the Senate had agreed to the amendments of the House of Representatives to the bill (S. 4246) to authorize the sale of land within or near the town site of Midvale, Mont., for hotel purposes.

The message also announced that the Senate had agreed to the amendments of the House of Representatives to the bill (S. 4351) to authorize and direct the Secretary of the Interior and the Secretary of the Treasury to deliver to the governor of the State of Arizona, for the use of the State, certain furniture and furnishings.

SENATE BILLS REFERRED.

Under clause 2 of Rule XXIV, Senate bills of the following titles were taken from the Speaker's table and referred to their appropriate committees, as indicated below:

S. 4455. An act to provide for the establishment of additional aids to navigation at Ashland, Wis.; to the Committee on Interstate and Foreign Commerce.

S. 4242. An act to authorize the establishment of aids to navigation at Oconto Harbor, Wis.; to the Committee on Interstate and Foreign Commerce.

S. 4433. An act to provide for rearranging, rebuilding, and improving the aids to navigation at Ashtabula Harbor, Ohio; to the Committee on Interstate and Foreign Commerce.

62D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 286.

JUDICIAL PROCEEDINGS IN UNITED STATES COURTS.

JANUARY 30, 1912.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 18236.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 18236) to allow and regulate amendments in judicial proceedings in the courts of the United States, report the same back with the recommendation that the bill do pass.

FIRST SECTION OF THE BILL.

Whether the remedy of an aggrieved person is at law or in equity is often a very close question not easily determined by lawyers or judges. Sometimes a bill in equity is filed and after a lapse of considerable time and much money spent in litigation, and after a right of action at law is barred by the statute of limitations, the bill is dismissed upon the ground that the complainant has a complete remedy at law. In such a case the complainant is left without an available remedy and justice is therefore defeated. This ought not to be.

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to the Supreme Court the decision of the circuit court was reversed.

The authorities directly in point, cited by the Supreme Court in support of its decision, were: Parkersburg *v.* Brown (106 U. S., 487, 500), Ambler *v.* Choteau (107 U. S., 586), and Litchfield *v.* Ballou (114 U. S., 190), all cases of supposed mistake or fraud in which it developed on appeal that a remedy could be found in an action at law, and the litigations were abortive.

Insurance Co. *v.* Bailey (13 Wall., 616) is a case illustrating the same unfortunate predicament in which the litigant often finds himself. That was a case brought in equity for an accounting for fraud, and the Supreme Court concluded, several years after the suit was brought, that the complainant had mistaken his remedy, and could have maintained an action for fraud.

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The above case of Buzard *v.* Houston was also followed in United States *v.* Bitter Root Development Co. (200 U. S., 472) and in the following cases: Jones *v.* Mutual Fidelity Co. (123 Fed. Rep., 519), Mutual Life Insurance Co. *v.* Pearson (114 Fed. Rep., 398), Such *v.* Bank (127 Fed. Rep., 452), Ames Realty Co. *v.* Big Indian Mining Co. (146 Fed. Rep., 176), and in a large number of other cases in the inferior Federal courts.

Provision is made in section 1 of the bill that in such cases, where a mistaken remedy has been pursued, that the court may impose terms, costs, etc., so that any gross injustice may not be committed.

SECOND SECTION OF THE BILL.

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While, under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by plea in abatement when the pleading properly averred citizenship, the act of March 3, 1875 (18 Stat., 470, 472; sec. 137), made it the duty of the circuit court, at any time in the progress of a cause, to dismiss the suit if it was satisfied either that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly made or joined as plaintiffs or defendants for the purpose of creating a case cognizable or removable under the

act of Congress. (Sheppard *v.* Grave, 14 Howard, 505; Williams *v.* Nottawa, 104 U. S., 209, 211; Farmington *v.* Pillsbury, 114 U. S., 138, 143; Little *v.* Giles, 118 U. S., 596, 602; Morris *v.* Gilmer, 129 U. S., 315, 316.)

In Parker *v.* Overman (18 How., 137), Robertson *v.* Cease (97 U. S., 646), Everhart *v.* Huntsville College (120 U. S., 223), Timmons *v.* Elyton Land Co. (139 U. S., 378), Denny *v.* Pironi (141 U. S., 121), and Wolfe *v.* Hartford Life Insurance Co. (148 U. S., 389), the above principle was applied when the defect discovered related to a question of diverse citizenship.

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Both sections are in line with modern good legislation and seek to have substantial justice done in cases where now mere technicalities are allowed to defeat justice.

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REFORMS IN LEGAL PROCEDURE

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-SECOND CONGRESS

SECOND SESSION

AMERICAN BAR ASSOCIATION BILLS

H. R. 16459, H. R. 16460, AND H. R. 16461

AND

H. R. 18236

(Covers subject matter of H. R. 12365)

TO ALLOW AND REGULATE AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES

AND

H. R. 16808

TO AMEND THE JUDICIAL CODE

AND

H. R. 17249

TO AMEND SECTION 237 OF THE JUDICIAL CODE

JANUARY 25, 1912
JANUARY 29, 1913

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913

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COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

HENRY D. CLAYTON, Alabama, *Chairman.*

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CHARLES C. CARLIN, Virginia.
WILLIAM W. RUCKER, Missouri.
WILLIAM C. HOUSTON, Tennessee.
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GEORGE W. NORRIS, Nebraska.
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J. J. SPEIGHT, *Clerk.*
C. C. BRANNEN, *Assistant Clerk.*

REFORMS IN LEGAL PROCEDURE.

AMERICAN BAR ASSOCIATION BILLS, H. R. 16459, H. R. 16460, H. R. 16461, AND H. R. 18236 (COVERS SUBJECT MATTER OF H. R. 12365), TO ALLOW AND REGULATE AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES; H. R. 16808, TO AMEND THE JUDICIAL CODE; AND H. R. 17249, TO AMEND SECTION 237 OF THE JUDICIAL CODE.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 25, 1912.

The committee met at 10 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The bills upon which the hearings were had are as follows:

[H. R. 16459, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend section two hundred and thirty-seven of an act approved March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of the act approved March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question

the validity of a treaty or statute of, or an authority exercised under, the United States, or where is drawn in question the validity of a statute of, or in authority exercised under, any State, on the grounds of their being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in the court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

[H. R. 16460, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend the act of March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended by inserting after section two hundred and seventy-four, at the end thereof, two new sections, to be known as section two hundred and seventy-four A and section two hundred and seventy-four B, as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleading which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

[H. R. 16461, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To regulate the judicial procedure of the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and sixty-nine of the act approved March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary" be, and the same is hereby, amended so as to read as follows:

"SEC. 269. That no judgment shall be set aside, or reversed, or new trial granted, by any court in the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point may require."

[H. R. 18236, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 18, 1912.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To allow and regulate amendments in judicial proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any district court of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

The CHAIRMAN. The committee has met this morning for the purpose of hearing Mr. Wheeler and others on H. R. 16459, 16460, and 16461, and while Mr. Lehmann, the Solicitor General is here, I shall, if we have time this morning, ask him something about H. R. 12365 (now H. R. 18236), that I called your attention to the other day. That relates to two matters: One is where the party has mistaken his remedy, conducted the litigation, and afterwards it is found out he has gone into the wrong court, rather than to have him dismissed from the court he is permitted to have his cause transferred to the proper court upon such terms as to cost as the court may impose; and the second object of that bill is where diverse citizenship is defectively alleged, which, of course, can be taken advantage of in the appellate court to permit the allegation to be amended even in the appellate court, so as to properly aver the diverse citizenship.

We will hear Mr. Wheeler first on the bills that I have already enumerated, and which I introduced at his request, he having brought them at the instance of the American Bar Association.

STATEMENT OF HON. EVERETT P. WHEELER, OF NEW YORK, APPEARING FOR THE AMERICAN BAR ASSOCIATION.

Mr. WHEELER. Mr. Chairman and gentlemen of the committee, these three bills that are before you are drawn by a special committee of the American Bar Association. We have been considering them for four years. Complaints that came to us from various States and various interests, the complaints of employees and employers alike, in regard to the delays of the law, in regard to the frequent occasions of the miscarriage of justice by reason of the disposition of a case not upon the merits but upon some technical objection that was quite irrespective of the merits. We have endeavored to deal with that situation in a conservative way. It was to provide for three several difficulties that these three bills were drawn.

I may say that 16461 has been before three successive Congresses, and I will take that up a little later.

The first bill (H. R. 16459) proposes to change section 237 of the Judicial Code so as to provide that if a decision is rendered in the highest court of a State that an act of that State is in violation of the United States Constitution, there may be a writ of error from the Supreme Court of the United States. As you are aware, under the present law such a writ of error can only be taken in such a case when the decision denies the claim made in the State court and sustains the validity of the State statute.

We know historically it was thought that no State court would ever decide that a State statute was in violation of the United States Constitution, except in a very clear case; that therefore it was unnecessary to do more than give a right of review where the State statute was sustained. But in the great expansion of the country and the great increase in judicial business this function of the appellate courts has been developed. So we find, as a matter of fact, that the courts are dealing with the Constitution and declaring statutes to be in violation of it more freely than they did at first. None of us can deny that, and none of us can fail to see that there is great public dissatisfaction. As a lawyer I regret that that dissatisfaction should sometimes have found expression in somewhat violent language. We all of us desire that the courts should maintain what they have had in the past—the respect of the whole community. But we are confronted with the situation that the diversity in the decisions in different States on constitutional questions is a grievance. It seemed to your committee and to the association that this was a just grievance.

One recent illustration that has brought the matter very much to the front and excited, I may say, universal attention throughout the country is the decision of the Court of Appeals of New York in the Ives case.[1]

There is a general tendency toward ameliorating the State law as the judges have made it in regard to the liability of employers. Such a law, very carefully considered, was adopted in the State of New York. The point was made that it took away the property of the employer without due process of the law, because it imposed a certain liability irrespective of fault.

[1] 201 N. Y., 271.

Mr. MOON. And thereby violated the fourteenth amendment.

Mr. WHEELER. Precisely. I was one of the counsel in that case. I was not called in on behalf of the original parties to the litigation. It excited great interest, and the Federation of Labor asked me to put in a brief, which I was glad to do. There is no time to discuss and there is no propriety in discussing whether the decision which was made was right or wrong. The court held that the statute was invalid. Yet we find right across the Hudson River that the courts of first instance in New Jersey have held a similar statute to be valid. The courts in Wisconsin, in Montana, and in the State of Washington have held a similar statute to be valid.

Mr. MOON. And those courts were the supreme courts?

Mr. WHEELER. Yes; they were the supreme courts of their respective States. The result of that is that the Constitution of the United States means one thing in New York and another thing in New Jersey, Wisconsin, Montana, and Washington. That is not a situation that commends the court or the law to the average man. You can explain it to a lawyer; we understand how it has arisen, but to a man who is not a lawyer and who looks at it as a man in the street does, it seems indefensible. I have heard it suggested that this law if passed would throw a burden upon the Supreme Court, but it seems to me that the most important duty and function of that court is to decide questions under the Constitution of the United States; that this is its original jurisdiction conferred by the Constitution itself. Whichever way such a question was decided in the court below the case was "a case under the Constitution," section 2, Article III, of the Constitution itself in defining the jurisdiction of the Federal courts declares:

> The judicial power shall extend to all cases in law and equity arising under this Constitution.

Moreover it seems to us that inasmuch as the cases are generally typical cases, that the decision of the Supreme Court, the highest tribunal, in one such case would settle them all, and the court would not, after all, have such an influx of appeals from this source.

There would be, in short, one test case which would settle the law for the whole country, and the State courts would enforce it according to the decision at Washington.

Mr. MOON. Mr. Wheeler, let me ask a question or two. The theory of the fathers in framing the Constitution upon that point I think was this: That they wanted to impinge upon the courts of the State just as little as possible, and that the two courts were to be kept independent, the one absolutely supreme in its own scope, and that whenever a question as to the constitutionality of an act or the violation of the Constitution of the United States was involved in a State court, and a decision there was that the Constitution of the United States was involved, and that the Constitution of the United States prevented it, then the Federal question arose, and the decision was against the United States, and the decision should go to the United States Supreme Court, but just as they had decided that the constitutionality of the act, that the act was unconstitutional, that it should be limited then to the jurisdiction of the States.

So far as I am concerned, I do not yet see any important reason why that should not be done, and yet no doubt inquiry ought to be

given to it to see whether there is not some important principle which we are overlooking involved in that thing, and I do not believe that any one concrete case could justify us in changing the existing law if there was a principle involved. I would like to investigate it a little further. I do not now see any objection to it so far as I am concerned, but there might be.

Mr. WHEELER. Next let me say a few words in regard to bill 16460. That provides that in case it appears in the course of litigation that an action has been brought on the wrong side of the court—at law when it should have been in equity, or in equity when it should have been in law—that the court shall permit such an amendment to the pleadings as to obviate the difficulty. It provides in the second place that equitable defenses may be interposed in suits at law. This is really conforming the practice of the Federal courts to the practice that prevails in most of the States, in two-thirds of them at least. It is now permissible in them to obtain equitable relief on an answer without the necessity of a cross-bill.

If a suit of law is brought, for example, on a contract, it is permissible by answer to pray that there be a re-formation of the contract. I think I may speak for the bar of all these States; it was their unanimous expression at our last bar meeting that this practice is a great convenience. It saves time. I tried, for example, myself, last March, in New York a case where an action was brought on a promissory note, and defense was set up in equity that in the Federal courts would have compelled the filing of a cross bill for equitable relief. The court tried them both. Under our practice, which I think is the practice of most of the States where this general principle is adopted, the court ordered the issues raised by the equitable answer to be tried before the same jury that tried the issues on the note. I am told by one of my Georgia friends, Maj. Cummings, of Augusta, that in all equity cases in that State the issues of fact are tried before a jury. We all know that under the old equity practice if a chancellor was in doubt upon an important question of fact, he could permit issues to be tried by a jury. All this procedure is flexible; it is all within the molding power of the court, and it does seem unreasonable that the Federal courts should be the last to permit such a flexibility of practice.

In the Federal courts, as we all know, the same judge, the same individual, sits in one case when there is written at the top of the title "At law"; and again in another case where the title reads "In equity"; and then, in a third, where the title reads "In admiralty." You have the same individuals deciding the equity, the law, and the admiralty. Why should counsel be obliged, if it turns out that there is some equitable point in the law case or some legal point in the equitable case, to bring a separate suit?

Mr. MOON. Judge, has it not always been decided by the Supreme Court of the United States that in the jurisprudence of the United States it is always recognized—the distinction between law and equity is under the Constitution a matter of substance as well as form and procedure, and, accordingly, legal and equitable claims can not be blended together in one suit? It seems to me there is a long line of cases establishing that fact—regarded under the Constitution as a matter of substance as well as form.

Mr. WHEELER. We have considered that very subject, and you will find in this report which we are going to hand up to the committee a careful consideration of it. The language of the Constitution is this (sec. 2, Art. III):

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.

This recognizes the intrinsic distinction between the principle of law and equity. You get damages in a suit at law; you get specific relief in your equity suit; and yet from the beginning—the judiciary act of 1789—we have intrusted the administration of those systems to the same judge. Why should it be any more an infringement to permit that same individual, in the same court, to mold the practice so as to administer either species of relief without the necessity of a new suit? In some of these cases that are referred to the decision was based on the existing statute. This statute does seem to require that the old methods which followed the English practice should still be followed; yet in a recent case, referred to on page 16 of our report (Schurmeyer *v.* Connecticut Mutual, 171 Fed., 1), the Circuit Court of Appeals of the Eighth Circuit held that even under the existing statute it was permissible where a suit had been brought on the wrong side of the court to mold the pleadings without compelling a new suit to be brought. But that has not been the general practice in the circuits, and the one effect of this act, if adopted, would be to assimilate the practice in all of them to that in the Schurmeyer case.

We do not undertake to break down the distinction between law and equity, but simply enable the court to mold its practice so as to administer the relief appropriate in either case without the necessity of a separate suit or of a cross bill. Perhaps some relief provided in this bill might be granted by rule of the Supreme Court. But I am informed that, inasmuch as that part of it which deals with cases at law does not come within the broad power of making rules conferred by law in that court, it would be quite content if this broader power should be given so as to enable the court to deal with both sides of the question. The court undoubtedly could say, "By an amended equity rule you can get relief in an answer to a bill in equity, which at present you can only get by cross bill." That is within the present power of the court. But they have no power to say, "You can set up an equitable defense in a suit at law." And that is what we ask.

Mr. MOON. Of course, they have said repeatedly that you can not.

Mr. WHEELER. Yes, under the present statute; but they have never held it under the Constitution—simply under the statute. Those cases are all collected and referred to in that part of the report which deals with that subject, which I have handed up to the committee, that begins on page 11.

Now, let me come to the third of our bills. That is in a different position. That bill is the one to which I referred as having been previously before Congress. It passed the House of Representatives unanimously at the last session. It went to the Senate, but, unfortunately, there was not time to bring it to a vote there, and so it lapsed. Let me make an observation in regard to the framing of this particular act. I think, perhaps, in drafting it, it would have

been better if the bill had provided that instead of amending "section 269 so as to read as follows," it had been provided that that section should "be amended by adding at the end thereof the following."

Mr. MOON. The bill as drawn is not right; it should not read that way.

Mr. WHEELER. I think it should be amended in the committee, because the present section 269 is the old clause that gives power to grant new trial. There is no reason why we should take away that granted power expressed in the present statute. Therefore I would propose the amendment as an addition to section 269—not as a substitute for it.

Mr. MOON. You would have to put in the whole section anyhow, because as amended it would not read this way.

Mr. WHEELER. The object of this particular bill is twofold. In the first place it gives to the court of appeals the power to deal with the case upon the merits, without regard to technical errors in the pleading or procedure that do not affect the merits. In the next place, in the final clause, it gives to all the Federal courts the power that is possessed in a number of States, that my friend Mr. Moon has informed us on a previous occasion exists in Pennsylvania. It does exist in New York. On the other hand, Mr. Whitman, of Illinois, tells me it does not exist there. Under the present statute the State court practice in suits at law is the model for the Federal courts, so that the circuits have to follow the practice of the States in this respect. This section would assimilate the practice throughout the country and give to the Federal courts everywhere the power to take a verdict on the facts, reserving its decision on the law. That seems to us manifestly reasonable. It obviates the necessity of frequent new trials, which only prolong litigation and tend to divert the examination of the court from the real merits of the case.

Mr. MOON. Do not many of the judges do it anyhow?

Mr. WHEELER. In some circuits they do and others they do not.

Mr. WHITMAN. I think they could hardly do it under our statute in Illinois. I have never known of it being done.

The CHAIRMAN. Could not they bring a special verdict on a question of fact?

Mr. WHEELER. Oh, yes.

Mr. DAVIS. The bringing of a special verdict upon a question of fact does not exist with us.

Mr. MOON. It is the practice in some of the Federal courts.

Mr. WHEELER. That is just it; it does exist in some circuits, but it does not exist in others. We have pointed out in this brief numerous cases where, by reason of the ordering of a new trial instead of granting judgment upon the merits, a case has been sent back for a second trial. In the Hillmon case in the Federal courts (145 U. S., 285; 188 U. S., 208) the second reversal of judgment in the court below was 23 years after the suit began. In the case of Springer *v.* Westcott (166 N. Y., 117) there were four appeals, and the entire recovery was only $900—for the contents of a trunk. It is obvious that the expense of the litigation far exceeded the amount finally recovered.

In another case, Walters *v.* Syracuse Rapid Transit Co. (178 N. Y., 50), there were four appeals.

And so it comes to this, that on the second or the third trial you have the double difficulty. In the first place it is certain that the memory of the honest witnesses will not be as accurate as it was when the facts were fresh. But suppose you have a dishonest witness, and he is willing to shape his testimony, as they sometimes do—as the court in the Walters case says they often do—to meet the exigencies of the situation created by the opinion of the court, under the present method, you do great injustice to litigants.

Mr. MOON. In personal damage cases I think it is pretty often.

Mr. WHEELER. It often happens. There can be no question of that. Take one of those cases. Suppose the judge is in doubt as to whether or not the complaint or suit (however you phrase it in the different States) should be dismissed; suppose questions of law are raised as to whether the necessary preliminaries have been satisfactorily complied with, he should take a verdict on the facts and reserve his decision on the law? I may illustrate by two cases in volume 160 of the New York Reports. Exactly the same question arose in each. The judges dealt with them differently. In one case he dismissed the suit; in the other case he took a verdict on the facts and reserved his decision on the law. When the first case went to the court of appeals they held he was wrong on the law and were compelled to order a new trial; in the second case, where a verdict had been taken, the court of appeals reinstated the verdict and ordered payment upon it.[1]

The whole effect, gentlemen, on this statute as we propose is to give validity and dignity to the verdict of a jury. All practicing lawyers know that juries are not so much influenced by these fine points of evidence, the technical objections raised on the trial, as many seem to suppose. I have often talked with jurymen after a verdict, and I uniformly, without exception, found this to be the case—the fine points of objection to this or to that did not weigh with the jury a particle. Really you would get a fairer verdict and you certainly would get a more stable one by permitting the practice here proposed than you would do under the present system.

Let me make one more suggestion, for which I am indebted to Attorney General Williams, who was one of the veterans when we had our meeting at Seattle and discussed this very question, and who has since departed to another world. "Why," he said, "gentlemen, as long as these technical objections have an effect on an appeal, as long as courts on appeal reverse judgments because of them, so long will lawyers feel themselves bound to take them." The public censures us for making technical objections, but a lawyer is bound to do his best for his client, and as long as he can take the objection and have it considered in a court he is sure to do it. "But," he added, "if you take away the effect of these objections, if you provide that the appellate court shall not decide the case because of a purely technical error, the lawyers will not make them any more. This would leave the case free to be dealt with upon the merits."

It seems to me that is always the position we want to be in. Of course, every man has been called upon to interpose legal objection when he was conscious that the real merits of a case were with the adverse party. That is our duty. Our client has a right to be heard

[1] Missano *v.* Mayor (160 N. Y., 123); Sheehy *v.* Mayor (160 N. Y., 139).

upon his case whatever it is. But that is a painful position for a lawyer.

The true position we all want to occupy is to have a good case, strong upon the merits, and be in a position where we can push it to judgment as soon as ordinary conditions will permit. Let us consider this legislation from that standpoint, which is the standpoint of the public.

Mr. Solicitor General Lehmann is interested in these bills from the legal standpoint. He was chairman of this committee of which I am now chairman, and I am following in his illustrious footsteps. Mr. Whitman, of Illinois, and Mr. Saner, of Texas, are here, so that we represent, we may say, all the great States east of the Rocky Mountains. I wish we could have had Attorney General Williams here from Washington to tell the story that I have recited for him to you. I do believe we represent a universal sentiment, and we hope this House, as the last, will embody it in legislation.

The CHAIRMAN. We will now be glad to hear from the Solicitor General.

STATEMENT OF HON. FREDERICK W. LEHMANN, SOLICITOR GENERAL OF THE UNITED STATES.

Mr. LEHMANN. Mr. Chairman and gentlemen of the committee, Mr. Moon has made some inquiry of me with respect to the bills here which provide for the administration of legal and equitable remedies in the same bill. I began the practice of law in Iowa. The code that was then enforced was that of 1860, and so long ago as that, more than 50 years ago, the State of Iowa recognized it and applied the procedure that is proposed in these bills. That was done under a constitution which is essentially, so far as the matters here involved are concerned, like that of the United States; that is to say, a constitution which creates courts which have jurisdiction at law and in equity, and the rulings of the court on that constitution have been that the substance of law in equity must be obtained distinctively. Nebraska has similar provisions, and so has the constitution of Missouri, as Judge Rucker knows. In all of those States we have but one form of action, but we administer the remedies either legally or equitably, as the nature of the case may require, and we have no real controversies. Of course, where the line of distinction between law and equity is broad, there is not likely to be any mistake of either party with respect of it. When you come to that twilight land where it is debatable—we do not have the debates in those States, because we can just take it either way as it may suit the parties. If nothing but a money judgment is asked in a case, a jury can administer the remedy, even though there may be equitable grounds for relief. On the other hand, if the case is purely one of legal cognizance, and we try it as a legal case, nobody is permitted to complain and ought not to——

Mr. MOON. Well, Mr. Solicitor General, the converse of that could not be absolutely—that is, you could not administer common-law rights under equitable forms without violating the seventh amendment of the Constitution.

Mr. LEHMANN. That you could do only by consent.

Mr. MOON. Yes; only by consent.

Mr. LEHMANN. But we avoid controversy upon that, because men are not looking for nice distinctions between law and equity, and we simply get rid of a whole lot of formality; as you say, if the man insists upon his rights to trial by jury, of course, he gets it, and if he has consented to a trial by court he can not raise the question that the suit was brought in the wrong form, and that is what we propose to do here by this bill—that if the suit is brought in the wrong form it shall not be dismissed, but it shall simply be recast in the proper form and proceed in the same tribunal. The difference between our Federal practice and our State practice is simply this: Both in the State courts and in the Federal courts the same man sits as judge at law and as chancellor.

Mr. MOON. That is not so in some States.

Mr. LEHMANN. Take the Western States, that is true in part of them. Of course, New Jersey has its separate courts of equity; but in the State of Missouri the same man sits as a judge at common law and as chancellor. He has the same docket, or he may have two dockets, and the case may be labeled "at law" or "in equity." It is in Iowa; it is not in Missouri—you do not have to label it. When we come into the Federal courts, however, having removed a case which was of equitable cognizance, and brought it in the way in which we do in the State courts, we have but one form of action, and the original pleading is called a petition whether at law or equity. When we come to the Federal court we must recast it. If we have made a mistake in the State court and brought a suit as being at law when it should be in equity, and that case is removed to the Federal court, we are thrown out altogether. We can not recast the form. If we have made a mistake on the equity side and, say, if you institute your Federal court at law when it should be equity, you can run along, incur a great deal of expense, and at the very last the ——— may be taken or the court may take it sui supplanta, and out you go.

On what? On manner of form. And the parties are punished for what? Not for any fault of their own, but for the fault of the lawyers who are accredited by the court as competent to guide them. And the essential bias of your formal, technical procedure is that you create a body of learning which is of no interest whatever to the parties litigant, and which the high priests who are supposed to be educated in the mysteries are themselves incapable of understanding. Then you do not punish the priests, but you punish the neophyte who follows them.

Mr. MOON. Mr. Lehmann, the things followed are expressed approximately like this: I do not think anybody that has ever practiced law or that studied law from any scholastic standpoint is not entirely in accord with my own doctrine, and do not believe the old common-law doctrines are absolutely ridiculous in this: The Supreme Court gives expression to the Constitution of the United States and the courts recognize and establish the distinction between law and equity. The remedies in courts of the United States are in common law and equity in accordance with the Constitution of the United States and in accordance with the principles of common law and equity as distinguished and defined in your act.

Mr. LEHMANN. That, however, is predicated upon your Constitution and your statutes?

Mr. MOON. State statutes, of course.

Mr. LEHMANN. You must preserve, in whatever form you adopt, the substantial distinction between law and equity. That requires, of course, that if there is a common-law right simply involved and the parties insist upon it you must accord them the trial by jury. You can have the trial by jury in a case even though you do not label it "at law," and there is not anything in the Constitution of the United States, and there is not anything in any decision construing the Constitution, as distinguished from the statute which preserves anything whatsoever in the way of form of procedure. Your constitutional limitations relate to the substance. You have, of course, the amendment preserving the right of trial by jury.

Mr. MOON. I think that these cases generally arise where that right is denied by the blending of the true form.

Mr. LEHMANN. Where the right is denied, but not in Iowa, Missouri, and Nebraska, and other States. I had a case early in my practice in Nebraska in which there seemed to be involved the examination of a long account, and it was necessary that that should be referred to a master under the equity procedure, but I took the view that it was simply a matter of common-law right, and made an investigation with respect to that, and I find no distinction between the rulings in the Federal courts and in the State courts. You must allow the trial by jury and you must give to the verdict of the jury where a right of trial by jury exists as a matter of right the effect of a common-law verdict and not simply of a verdict in chancery, which the chancellor can set aside, no matter upon what ground he does it—but you must do that. You can have a dozen issues in one case; six of them may be legal and six of them may be equitable, and you can try the legal issues in a legal way and the equitable in an equitable way, and when you have done that you have respected the substance of the Constitution; and it is not necessary and the Constitution does not preserve the forms; and in these Western States you must bear in mind that they also have that provision securing the right of trial by jury, some of them in one form and some in another—some that the right of trial by jury shall remain inviolate, some that the right of trial by jury shall not be taken away. That is entirely consistent with this blending of legal and equity administration in the same forum, by the same judge, and in the same action. We have it in Missouri; we have it right along there. We will try one part of the case at law and the other part at equity, and it works perfectly.

Mr. MOON. In New York, where this great movement began in 1908, they had to change the constitution of their State.

Mr. LEHMANN. In New York, where this great movement began, the courts deliberately began to nullify the work of David Dudley Field, and the construction that is displayed there is one that is not very much to be commended. They harp on that rule of construction, which is not a true rule, that any statute in derogation of the common law is to be strictly construed, and makes a fetish of the common law, makes a fetish of the very thing that it is the business of legislation to correct, and so they virtually nullify the code of David Dudley Field. And I would not be, with all due respect to Mr. Littleton, very much influenced by the decisions upon the code

in the State of New York, because they did not respect, as they ought to have done in the legislative action, the legislative intent.

Mr. MOON. I think one of the most serious reflections against the code pleadings is the voluminous decisions in the State of New York equity.

Mr. LITTLETON. I have had so many occasions to dissent from the court's holding that I can not feel any offense.

Mr. LEHMANN. Undoubtedly Mr. Moon is right about that, but the courts must get away from that idea that this is in derogation of the common law and therefore it is to be strictly worded. There is only one rule of construction of statute, and that is the intent.

Mr. MOON. I am prepared to say it is a consummation devoutly to be wished if it can be brought about.

Mr. LEHMANN. It can be brought about in part by legislative action and in part by judicial education, and the last is quite as requisite as the first.

Mr. NYE. Namely by the bar, I suppose.

Mr. LEHMANN. The bar needs it, but, as Mr. Wheeler has pointed out, there is a difficulty presented to the lawyer. He has perhaps no right to prescribe for his client what the law is or what the measure of justice is to which the client shall be entitled. The client may say "Courts are constituted for that purpose. You have no right to set up your standard of ethics of justice to determine my rights."

Mr. NYE. But the bar has the right to subscribe a simple, direct method of reaching justice for him, instead of making justice a millstone to hang around the neck of people.

Mr. LEHMANN. And that is what I am trying to do.

Mr. NYE. I understand it, and I am for this bill or any other bill that will simplify legal proceedings and give litigants a right to come to a court without the most learned and profound musty lawyer in the world.

Mr. LEHMANN. Let me tell you where all these bills are weak—all of them. They are simply scratching the surface, and they are commendable simply because they are a step in the right direction. Our formal law is crystallized too much, and too rigid—cast in a legislative form when it all ought to be a matter of rule of the court; that is the fundamental reform.

Mr. MOON. I know that has been recommended, but would you recommend that we should omit all matters of procedure to rules of the court?

Mr. LEHMANN. I should recommend that, except that you place a very few fundamental ones. I would see the day when it could be said of the American court, as it can be said of the English court and was said by Rogers, that they had so far proceeded in the reform of the legal procedure that it could be truthfully stated that no litigant of ordinary sagacity would fail in his case by reason of any mistaken steps in his procedure, and it can be done here.

Mr. MOON. England has pretty nearly done it—almost gone to that point?

Mr. LEHMANN. Yes, sir.

Mr. MOON. I want to say to you that after mature deliberation, so far as I am concerned, I am perfectly willing to trust the courts,

but the general spirit of unrest and distrust that exists in this country to-day, I think it will make it impossible to get there.

Mr. LEHMANN. It may make it difficult to do now, but that distrust and that unrest has come from the complexity of our procedure, and we have made a lucrative mystery of our business.

Mr. DODDS. That is what I was going to say. If it was not for that we would not have that unrest and disrespect.

Mr. MOON. I think that if you will look at our Federal procedure you will find it is an absolute patchwork all the way through.

Mr. LEHMANN. Certainly. The procedure in most of our States is the same thing. The procedure has been made by lawyers for lawyers. We have a statute in Missouri whereby in the trial of a criminal case Judge Rucker may be sitting trying some man. I ask various instructions, which are made, and he gets over those difficulties by references as he thinks proper; and then, in addition to that, I say, "Now, Judge, I want you to instruct on all of the law of the case." "What part of the law have I omitted?" "That is your business, sir, not mine. I now request you to instruct on all of the law of the case." He does not know what else to instruct. The case goes to the jury. The man is convicted, and I have got from then until I argue the case to find out something that neither he nor I thought about on which to reverse the case.

Mr. MOON. Did not they reverse the case there of homicide, first degree, because the prosecuting attorney did not charge the indictment that it was "against the peace and dignity of the Commonwealth," omitting the word "dignity"?

Mr. LEHMANN. It is done in the case of rape, bribery, and in one other.

Mr. LITTLETON. On the other side, is it not a fact that while the English courts have gone a great distance toward eliminating complications of pleadings, that much of our limitations in some sections and much of the complication and much of this delay and much of the thing about which one of these bills is a remedy, grows out of the fact that the judge below treats the trial as an incident and the verdict as the object, and puts you through whip and lash until you have to ambush and sharpshoot in order to save anything in the trial?

Mr. LEHMANN. We deal with verdicts in a very peculiar way, if that is what you refer to. We respect them very much in some ways and we disregard them in others. You have a complex procedure and you give opportunity to the man who is skilled in your procedure and he plays the game, not for the justice of the case, but tries a case for "error;" that is a phrase current in the profession—"try it for error"—that is, try it over the heads of the jury altogether; try it for the court of appeals.

There is too much opportunity—there is too much room for that sort of thing—and it discredits the profession, Mr. Littleton. I have been practicing for 40 years, and I am too old to go into anything else, and I must say that I am ashamed to acknowledge that in the manner of procedure in the 40 years I have been a lawyer there has not been any advance.

Mr. MOON. Speaking about playing according to the rules reminds me of an absolute fact. A friend of mine was appointed to the judiciary in Pennsylvania, and he was a very conscientious fellow. He had never tried a case, and he felt as though the weight of the universe was resting upon him. The old presiding judge noticed that he was perturbed, and said, "You do not need to bother yourself about it at all. The case comes before the court, and if a fellow does not play it according to the rules he loses, and if he does play it according to the rules he has got a chance. That is all you are concerned about—to see that he plays it according to the rules."

Mr. LEHMANN. The trouble is that the client is not skilled in the rules, and if the game is not played "according to the rules" the penalty is paid by the man. The thing was put well by a Kansas lawyer at a meeting of our Missouri Bar Association. He said: "We have two men, neighbors, who have a controversy. It may be over the right to a piece of land. That is the controversy; that is the quarrel between the two.

"They can not adjust it, and so they come to the courts to have that quarrel adjusted and that controversy settled. Each one gets a lawyer and the suit is brought. The moment the suit is brought another controversy arises, not as to who owned that piece of land, but as to whether the suit is properly brought—a quarrel not between the parties, but a quarrel between the lawyers—and the suit may go to the end and be disposed simply on the controversy between the lawyers, and the controversy between the parties may never be touched."

Mr. THOMAS. Does the code provide what suits shall be brought at law and in equity?

Mr. LEHMANN. No, sir.

Mr. THOMAS. Why should not it? Should not that settle the matter?

Mr. LEHMANN. No.

Mr. THOMAS. Why not?

Mr. LEHMANN. Because you could only make a very general rule and under your constitutional limitation that thing which is essentially equitable can not, without amendment to the Constitution, be made legal and that which is essentially legal can not be made equitable. The only way in which there has been a change of equitable jurisdiction growing out of this fact—the one principle of equitable jurisdiction—that its jurisdiction shall not attach where there is an adequate remedy at law and by the extension of legal procedure, as, for example, the right to consult the opposite party and to examine as upon cross-examination.

Mr. MOON. Essentially original and absolutely equitable.

Mr. LEHMANN. That was absolutely equitable and was accomplished through a bill of discovery. I doubt whether in any State of the Union you could found equitable jurisdiction simply upon the thing discovered, because the answer would be, "You have an adequate remedy at law by your right to examine the party." In that way we have limited equity jurisdiction, but I assume, under constitutional provisions which intrench both law and equity as distinctive jurisprudence, you could not take away the jurisdiction over torts and various other things.

Mr. MOON. Fraud?

Mr. LEHMANN. Fraud and those things which are the fundamentals of equity jurisprudence.

Mr. THOMAS. Could not the equity of those actions be defined within the limits of the Constitution? We do it in our State. They are defined by code in Kentucky. The code states what action shall be brought in law and what action shall be brought in equity.

In Kentucky actions of which courts of chancery had jurisdiction before the 1st day of August, 1851, may be equitable, and actions of which such jurisdiction was exclusive must be equitable, and all other actions must be at common law, or ordinary, as they are termed in Kentucky. Equitable actions are such as actions on return of "no property" and for "discovery," by surety against principal before debt matures and after maturity of debt, for sale of real property of infants and persons of unsound mind, and joint owners, to settle trust estates and estates of deceased persons, to grant divorce and alimony, to grant injunctions, to partition land and allot dower, and to enforce liens on real and personal property, and a number of other things which I do not now recall. I would have to refer to the law in force prior to 1851 to set out fully equitable jurisdiction in Kentucky, and I do not have that law at hand.

Mr. LEHMANN. How does it define that?

Mr. THOMAS. Certain actions at law and certain actions in equity.

Mr. LEHMANN. Does it say actions for the recovery of money only or does it actually classify assumpsit and trover?

Mr. THOMAS. Certain actions shall be brought at law and all other actions shall be brought in equity—shall conform to the Constitution in that respect. Why could not that be done, and then an attorney who brought an action at law that ought to have been brought in equity could simply have his case transferred by an order of the court to equity?

Mr. LEHMANN. You have, your honor, a part of that in the bill here, for a transfer from one docket to another.

Mr. THOMAS. The court making the order transferring all the pleadings; and if any other pleadings were needed, let those be filed by leave of the court.

The CHAIRMAN. Our time is growing pretty short.

Mr. MOON. I think we ought to hear this at length.

The CHAIRMAN. We can come back after lunch and hear other gentlemen.

Mr. MOON. I would like to hear Mr. Lehmann through.

The CHAIRMAN. Would you pardon me to finish the statement? The committee has been very indulgent.

Mr. LEHMANN. I will have to ask to be excused. I must go to court at 12 o'clock.

Mr. MOON. I was going to say that I desired to ask Mr. Lehmann a question in regard to the three particular bills that the American Bar Association, through Mr. Wheeler, has presented to the committee. H. R. 16459, that bill I do not believe you have touched on so far in your remarks. [After a pause.] I see; I have it. That is the one that refers to the Ives case.

The CHAIRMAN. Yes.

Mr. LEHMANN. I am not prepared to express an opinion about that. I quite agree with Mr. Moon that we had better look into the foundations of that. I can see one reason why there has been a

difference there: That the appeal allowed on the one side and not on the other. If I am claiming that a statute of the State is in violation of the Federal Constitution and that statute is upheld, then, if my contention is right, I have been denied a right guaranteed to me by the Federal Constitution, and naturally I should have an appeal to the Federal tribunal to secure the enforcement of his right given by Federal authority.

If, however, in the case of the plaintiff who asserts the right under a State statute which is contended is unconstitutional as violating the Federal law, and the State court so holds, the plaintiff has not been denied a right given by the Federal Constitution, but has been denied a right only given by the State law. I see that distinction. I am not prepared to say that that is a sufficient reason for not allowing the appeal, because I can see this state of affairs: You take that kind of law that is involved in that. Suppose that the Missouri, Iowa, and Nebraska Legislatures enacted such laws and the State courts held the laws to be valid and then they were taken to the Supreme Court of the United States and the Supreme Court of the United States said that they were valid and did not violate the Federal Constitution. Then, the case arose in New York and the New York Court of Appeals would hold that the statute was invalid and as violating the Federal Constitution, right in the teeth of construction of the Constitution by the Supreme Court of the United States. It certainly would seem there ought to be some remedy for that state of affairs, but I should like to look into the matter—the matter was suggested to me for the first time less than an hour ago.

The CHAIRMAN. In that connection, as a result of your investigation, would you please give the committee the benefit of it?

Mr. LEHMANN. Yes, sir.

The CHAIRMAN. You can reduce it to writing and address it to the chairman of the committee.

Mr. LEHMANN. Yes, sir; I would be very glad to do that.

The CHAIRMAN. Then, in regard to bill H. R. 16459, recurring to that?

Mr. LEHMANN. Yes, sir.

The CHAIRMAN. Some time ago you addressed to the chairman of the committee a letter approving H. R. 12365. You have not a copy of it there, have you?

Mr. LEHMANN. Yes, sir; I have it.

The CHAIRMAN. You observe the first section of that bill is in the following language [reading]:

> That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law, the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

I desire to say in that connection that that bill was drawn by me last summer in the light and as a result of a year or more correspondence with two circuit judges, calling attention to the necessity for such legislation, and it seems somewhat in line with one of these bills on the same subject that the American Bar Association

has had me to introduce and which has been referred to this morning. The bill which has been under discussion which I introduced at the instance of the American Bar Association has opposition. Former Senator Faulkner and others here are in opposition to that particular bill, but none of them have expressed any opposition, so far as I know, to this particular bill H. R. 12365, and what I wanted to know from you was if you still adhere to your opinion that that bill was a good bill and should pass, in your opinion?

Mr. LEHMANN. Oh, yes, sir; I do not change that at all. I have not compared the two bills with each other. I was brought over here rather hastily, and I see now two bills that were laid in some measure to the same subject. I am in favor of either of them.

The CHAIRMAN. I called attention to it so that it may go into the record that this bill H. R. 12365, which was introduced on July 8, 1911, and I reintroduced it on January 18, being now H. R. 18236, and made only the changes as you will observe in the second section of the bill, by striking out the word "circuit" before "courts" and inserting "districts to conform with the duties." That is the only change made.

Mr. LEHMANN. Oh, yes; I must go to the court at 12 o'clock, Mr. Chairman, if we can be excused now.

STATEMENT OF HON. CHAS. J. FAULKNER, OF WASHINGTON, D. C.

Mr. FAULKNER. I desire to correct to some extent the remarks of the chairman, and also to state the reason of my presence here. I am instructed by my client, who formerly requested me to oppose this measure found in bill 16460, to state that they did not desire me to appear for the purpose of making opposition to it. But I appear solely for this purpose and this alone: To file with the committee, with their permission, the protest and very short brief of Joseph I. Doran, of the Norfolk & Western, and Theodore W. Reath, general solicitor of the Norfolk & Western, against the bill known as 16460, and partially, if not entirely, indorsing bill 12365, which was offered by the chairman to Congress last summer.

The CHAIRMAN. And reintroduced at this session with the change striking out "circuit court" and inserting "district court," being now H. R. 18236.

Mr. FAULKNER. Mr. Doran and Mr. Reath are very anxious that their protest shall go into these hearings. In their protest they give very strong reasons for the opposition they have taken, and they analyze to some extent the report of the bar association which has been referred to here by Mr. Wheeler. With the permission of the committee, therefore, I will ask leave to file that, that it may be placed in the record as a part of the same.

Mr. WHEELER. May I ask the chairman if Mr. Faulkner will oblige us with a copy of this brief?

Mr. FAULKNER. I can, Mr. Chairman.

The CHAIRMAN. The brief will be printed as a part of the hearings, and the committee will be very glad to have you file a brief if you like.

Mr. WHEELER. We should appreciate that and we shall be very glad to do that.

The brief of Joseph I. Doran and Theodore W. Reath, submitted in their behalf by Mr. Faulkner, is as follows:

BRIEF OF JOSEPH I. DORAN AND THEODORE W. REATH.

IN THE MATTER OF ALLOWING AND REGULATING AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES.

The bill H. R. 12365 is in two sections. The first section regulates the law and equity practice, and is as follows:

"That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law."

In less drastic form this is somewhat the sole alteration which is proposed to be made by the bill known as S. 4029, which proposes to add to chapter 11 of the judicial code two new sections, as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right at any stage of the cause to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This last quoted bill is the one which a special committee of the American Bar Association reported favorably as a bill, "To prevent delay and unnecessary cost of litigation." (See report presented at the meeting at Boston, Mass., Aug. 29, 1911, pp. 14–16, and for the bill, pp. 23–24.) The report of the committee justifies the bill by the argument (p. 15):

"If the pleader by mistake has put the words 'at law' in his pleading when he should have put the words 'in equity' or 'in admiralty,' it should be the duty of the judge to make the amendment on the spot."

Again, speaking of the code system, at page 16, the report says:

"Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right."

If the bills accomplish no more than to permit transfer from the law to the equity side in such a case as that suggested by the committee's report where there was merely a clerical error in naming the writ, declaration, or other pleading, the bill would be unnecessary, for this could readily be accomplished, as the committee points out at page 17, by a rule of the Supreme Court in equity; and surely Congress ought not to be troubled to pass an act as to a matter which can and should be covered by a rule of court.

But the bills—and particularly S. 4029—run far beyond curing a mere clerical error of description. The proposed section (274 A) provides that in case a court shall find that a suit at law should have been brought in equity or the reverse "the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice."

Proceedings at law or in equity are essentially different in origin, nature, and object. The two New York cases (Leroy *v.* Marshall, 8 How. Pr., 373, and Railroad *v.* Schuyler, 17 N. Y., 592) cited on pages 15 and 16 of the report of the special committee of the American Bar Association are correct. The equitable proceedings were devised to cover those cases wherein for some reason a court of law could not administer justice. Hence there is a difference in the essentials of pleading which must ever be maintained. We do not understand that the advocates of these bills dispute this. Yet they urge that the courts shall be directed to do an impossibility, namely, order an amendment to pleadings at law to convert them into pleadings in equity or the reverse, when, in point of fact, neither is germane to the other. An attempt to abolish distinctions so fundamental between these great fields of jurisprudence by an act so indefinite in its terms and summary in its language can only cause years of confusion in practice. Even to attempt to criticize the bill is to realize the impossibility of foreseeing its effects in practice. It is not unfair to say that one of its effects will be to impose upon the court the duty of amending and curing the careless work of the incompetent pleader.

If the bill S. 4029 should pass what would be the result? Instead of well-understood precedents and forms well known and easy to handle by any competent lawyer we shall momentarily have a complete breakdown of the distinctions and slowly the formation, at the expense of litigation to acquire precedents, of an entirely new system based, however, upon the same general principles, because those principles are changeless and have been evolved out of experience.

After all such legislation is at best contrived to protect the few careless or incompetent practitioners from the consequences of their fault. Distinctions and forms, valuable in arriving at and effectually administering justice either at law or in equity, are to be sacrificed in order to save the few blunderers. The same argument, pushed to what was once well described by Mr. Justice Holmes as a dryly logical conclusion, would require the repeal of statutes of limitation, because in their operation they foreclose just claims carelessly assorted or neglected. The idea of such legislation seems to be a hasty generalization from the few cases wherein injustice seems to have been done and the sacrifice of matters which are of value to save those few persons from the consequences of their own fault.

As to codes, we venture the assertion that lawyers who have had the opportunity of observing court procedure in code States and in States where the common-law procedure obtains have usually reached the conclusion that the code proceedings, instead of simplifying litigation, have created the necessity for a reconstruction of the very same controlling principles for the reasons already stated—that they are changeless and inhere in the subject. In Pennsylvania the practice act of 1887 was intended to simplify pleading and practice, but, as one of the great judges of Pennsylvania afterwards said, did no more than substitute for the orderly narration or declaration the telling of the story as one old apple woman would tell it to another. And, at last, the courts in Pennsylvania had to come back to the common-law principles.

Thus, in Emmens *v.* Gebhart (7 Pa. County Court Rep., 522) (1890), Schuyler, P. J., said at page 525:

"Only the forms of special pleading have been abolished; its substance remains and must ever remain."

And in Fritz *v.* Hathaway (135 Pa., 274) (1890), Mitchell, J., said at page 280:

"The act is unwise and is founded on the erroneous and superficial view that, by abolishing technical forms it can get rid of distinctions inherent in the nature of the subject, but it would be doing injustice to the purpose of its framers to hold that it was meant to sanction mere looseness of pleading. Accuracy and technical precision have no terrors except for the careless and the incompetent, and the act of 1887 was not intended to do away with them. As to all matters of substance—completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

To some lawyers and to most laymen it appears as though the distinctions between law and equity, and many other actions of apparently formal pleading, are mere technicalities. But nearly all of the so-called technicalities of which laymen complain and many of those of which some lawyers complain are really essentials in the orderly and right administration of justice. The decision of the supreme judicial court of Massachusetts in the case which changed William Cullen Bryant from an indifferent lawyer into a fair poet is of interest in this

connection, though the case did cause Bryant to leave the bar and take up a literary career. That case is Bloss *v.* Tobey (2 Pick., 320) (1824), and was an action of slander. The declaration in the first count charged that the defendant did falsely and maliciously say of the plaintiff, "There is no doubt in my mind that he (plaintiff) burnt it (his store) himself." And in the second count the same phrase, coupled with the further phrase, "he (plaintiff) would not have got his goods insured if he had not meant to burn it" (the store).

For lack of a colloquium showing that an illegal act was charged in the alleged slander, and showing the circumstances under which the words were spoken, this pleading was held bad after verdict, and properly so, for if any other rule had been announced the result would have been to allow recovery to that particular plaintiff, but a safeguard of litigation would have been lost, namely, the safeguard that all the essential circumstances of the cause of action shall be shown in the declaration in order to warn the defendant of the cause of action he will be called upon to meet and enable him to prepare his case, summon the necessary and proper witnesses, etc.

The courts of the United States are already empowered to take care of the subject matter of the proposed bills in so far as the orderly and proper administration of justice requires or permits. (See Connecticut Mutual Life Ins. Co., 171 Fed., 1, and the report of the American Bar Association's special committee at p. 17.) The passage of any bill on the subject is unnecessary and unwise, and some of the bills suggested would be mischievous.

Respectfully submitted.

JOSEPH I. DOBAN.
THEODORE W. REATH.

JANUARY, 1912.

Mr. FLOYD. I move we adjourn.

Mr. DODDS. Is that to be printed in the record?

The CHAIRMAN. If that is the desire.

Mr. DODDS. I think if that is to be printed in full we should print it all.

The CHAIRMAN. Ought to be a part of the proceedings of the committee?

Mr. DODDS. Yes.

The CHAIRMAN. It will take that course, without writing it out; let this go in the proceedings—the two of them.

The report of the special committee of the American Bar Association and the brief of the American Bar Association submitted by Mr. Wheeler are as follows:

REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION.

[To be presented at the meeting of the American Bar Association, at Boston, Mass., August, 1911.]

To the American Bar Association:

The special committee appointed at the meeting of this association in 1907, and continued at each annual meeting since then, was charged with the duty of considering carefully alleged evils in judicial administration and remedial procedure, and suggesting remedies and formulating proposed laws.

We were authorized at the last meeting to present to Congress at its next session the bills heretofore reported by the committee and recommended by this association, in such form as to obviate as far as possible the objections thereto that have been taken in Congress, but retaining the essential principle of the bills heretofore recommended by the association. These bills were specifically recommended by the President in his annual message, December, 1910 (p. 44).

The association at that meeting approved the recommendation of our committee respecting the practice in admiralty, and we were instructed to bring the subject to the attention of the Supreme Court of the United States and to request that honorable court to adopt a rule in admiralty which should direct that the testimony in admiralty cases be taken in open court, subject to the provisions of the statute in regard to depositions de bene esse.

We were also authorized to consider a general practice act and to report thereon at this meeting. In this connection two resolutions were referred to us for consideration. The first of these was presented by Mr. Thomas Wall Shelton, and is as follows:

"*Resolved*, That in whatever form of pleading that may be adopted, there shall be preserved the common-law limitation upon the court that whatever is not juridically presented can not be judicially determined."

The other resolution was offered by Mr. Ernest T. Florance:

"*Resolved*, That the committee to suggest remedies and formulate laws, etc., be instructed to consider the preparation of a bill providing for the abolition of difference of forms of procedure between actions at law and cases in equity in the Federal courts."

1. In accordance with the instructions of the association we presented to Congress at its last session, beginning in December, 1910, the bills which had been recommended and approved by this association, which are to be found in full on pages 7 to 10 of our last report (pp. 620 to 623, vol. 35, for 1910). The bills were referred in each House to the Committee on Judiciary. We had a hearing before the full committee of the House of Representatives and before the subcommittee of the Senate consisting of Senators Nelson, Dillingham, and Overman. We also had many conferences and much correspondence with individual members of both committees. The question whether the amendments to procedure proposed in the first two sections of the bill would interfere with the province of the jury was debated very fully at the public hearing and in discussions with individual members. We endeavored to convince the committees to which the bills were referred, that so far from impairing the value of a trial by jury the amendments proposed tended to increase its value and to promote the determination of cases upon their merits rather than upon technical objections which do not affect the merits and to which juries pay no attention. We pointed out that these sections were dually to the verdict of a jury, rendered upon the facts as found in the testimony of witnesses, and permitting the appellate courts to pass directly upon the questions of law involved, without the necessity of another trial, we would make it possible to terminate many cases upon their merits, present these merits fairly to the court, and put an end to litigation which can be done consistently with giving a full and fair hearing to both parties.

We could not discover that there was any serious objection in either committee to these two sections, except that arising from a conservatism which is reluctant to make any change whatever. Nevertheless our efforts failed to obtain a report to the House or the Senate from the full committee of either body. The subcommittees of the Senate reported the bills to the full committee of that body.

There were also objections made to the third, fourth, fifth, and sixth sections of the bill to regulate judicial procedure. These relate to writs of error and appeals in criminal cases and habeas corpus proceedings. Some members of each committee were unwilling to put any limitation whatever upon the right of appeal in criminal cases.

Meanwhile the pending bills had attracted much attention in the House of Representatives. Many Members had become interested in them. It will be remembered that there was pending in the House of Representatives a bill which had been originally prepared by the Commissioners to Revise the Statutes of the United States, and which had been referred to a committee of the House of Representatives known as the Committee on the Revision of the Laws. Of this committee, Hon. Reuben O. Moon, of Pennsylvania, was chairman. He was also a member of the Judiciary Committee. When this measure was first under consideration before a joint committee of both Houses in 1906, a meeting of the lawyers of New York who practice in the Federal courts was held, at which several amendments were agreed upon and suggested to the joint committee. Among the amendments which were suggested at that time there were six which substantially proposed the reforms in procedure which were afterwards recommended by this association and embodied in the bill to regulate the judicial procedure of the United States already referred to.

These amendments in 1906 were drawn so as to correspond to the bill in the form in which it was then before the joint committee. It seemed, however, that there was no likelihood of this bill being seriously taken up by Congress, and in the original report of this committee we thought it expedient to recommend these amendments as separate measures drawn with reference to the Revised Statutes as they then existed. But the unexpected happened. The new Committee of the House of Representatives on the Revision of the Laws reported to the House, with some amendments, the bill which had been drafted by the commissioners, and succeeded in getting their report upon the calendar in such a form that it had the right of way, and did receive during several successive weeks, on the days set apart for the reports of committees, very full consideration. In view of this fact your committee conferred with several members of the Committee on Revision of the Laws, and especially its chairman, Mr. Moon. It was agreed that when section 254 of the judiciary act came up for consideration the first two sections of the association's bills, combined into one section, should be moved as an amendment to the reported bill.

[1] Church *v.* Hubbart (2 Cranch, 232).

Meanwhile Mr. Madison, of Kansas, had become so much impressed by the arguments presented in support of the association bill, that after conference with your committee he introduced in the House as a separate bill a section embodying the first two sections of the association bill in the form in which they had been agreed to before the Judiciary Committee. After considerable discussion this bill passed the House unanimously. It went to the Senate, was referred to the Judiciary Committee, but all the efforts of your committee were unavailing to procure a report upon it. The expressions of opinion from individual Members of the Senate were so favorable that we had reason to believe that if the bill could have been got out of committee it would have passed the Senate. The other method which had been planned to bring the bill before the Senate failed, because of the fact that there was so much debate in the House upon the early sections of the Judicial Code (as it is designated in section 296), which relate to judicial districts and to the jurisdiction of the district courts, that section 254 was not reached for consideration. The code, with numerous amendments which were made in the House, was finally passed under a suspension of the rules. The Senate meanwhile had passed the code in a different form. They both went to a conference committee and the Judicial Code finally passed in the form with which the association has already become familiar.

We may say that as this code was drawn by the Commissioners on the Revision of the Statutes it effected very little change in the practice of the Federal courts, with one single important exception. It did consolidate the courts of original jurisdiction into one court, to be known as the district court of the United States in each judicial district, and it did abolish the circuit courts. This is in accord with the recommendations of our report of 1910. As drawn by the commissioners it failed entirely to provide for the numerous instances in which it is desirable to have an order made by one judge operative in the whole circuit. For example, in railroad foreclosures it is of great importance that a receivership should extend throughout the entire circuit in which the railroad runs. This defect was, however, corrected in the House, the amendment was adopted in conference, and is included in the bill as finally passed and signed by the President.

We append hereto (schedule A) a copy of the bill recommended by your committee, which passed the House, and we recommend that the committee be authorized to present this bill at the next session of Congress in the form in which it passed the House as an amendment to section 269 of the Judicial Code, and urge its adoption upon both Houses of Congress.

2. The sixth section of the bill recommended by this association is incorporated in the Judicial Code. Section 128 of this code gives to the circuit courts of appeal jurisdiction to review by writ of error the judgments of the district courts in all criminal cases, including capital cases, and makes their judgment final, except in cases involving constitutional questions.

We also recommend that the remaining sections of the bill to regulate the judicial procedure of the courts of the United States, recommended by this association in 1910, be embodied in a separate bill and recommended for adoption by Congress.

3. It will be of interest to the association to put on record some results of the agitation for a change in the method of dealing with error alleged to have been committed by trial courts. In courts of justice in this country, quite apart from any legislation, the change is very manifest.

For example, in Vicksburg & Meridian Railroad Co. *v.* O'Brien (119 U. S., 99, 103; 30 Law. Ed., 299, 300), decided November 1, 1886, Mr. Justice Harlan said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt,

that the error complained of did not and could not have prejudiced the rights of the party."

Waite, C. J., and Field, Miller, and Blatchford, JJ., dissented.

The dissent on the part of these four eminent judges has received the approval of the court in subsequent cases. For example, in Standard Oil Co. *v.* Brown (218 U. S., 84, 86; 54 Law. Ed., 945, 946), decided May 31, 1910, the court said:

"The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required."

The court held that errors in the charge or refusal to charge would not be considered as reversible error when it was plain that the issues had been fairly presented to the jury.

The reason for the change is well stated by the Court of Appeals of the State of New York in People *v.* Gilbert (199 N. Y., 28), decided in 1910:

"The objection is purely technical, and technical objections are no longer regarded as serious unless they are so thoroughly supported by authority that they can not well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe as in many cases to shock the moral sense of lawyers, judges, and the public generally. When stealing a handkerchief, worth 1 shilling, was punished by death, and there were nearly 200 capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities, to a great extent, have lost their hold. We overrule the contention of the defendant in regard to the indictment, because it is founded on a technicality, with no support in authority and with but slight support in reason."

Judge Coxe, delivering the opinion of the circuit court of appeals in Press Publishing Co. *v.* Monteith (180 Fed., 357), thus states the change that some courts have already made in dealing with the subject of "reversible error."

"The defendant realizing, apparently, that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

"Prejudice must be perceived, not presumed or imagined.

"The writer, speaking only for himself, is in hearty accord with the modern tendency.

"The object of all litigation should be to arrive at a just result by the most direct, speedy, and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides:

"'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.'

"Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court, and the resources of the litigants become exhausted.

"Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

Legislation which embodied substantially the rule of decision recommended by this association has been adopted by the Legislatures of Kansas, Illinois, and Wisconsin, and has been under consideration in the Legislatures of Ohio and New York. We hope that during the present year it will appear that these changes have become part of the legislation of the latter State. It has been recommended by the State bar association and by the bar association of the city of New York, which is believed to be the oldest, and is certainly one of the most conservative, bar associations in America.[1]

4. While the association had under consideration the bill to diminish the expenses on proceedings of appeal and writs of error, the bar association of the State of Washington had prepared a different bill intended and adopted to accomplish the same purpose as our own. In justice to ourselves we feel bound to say that we think that the form recommended by this committee and adopted by the association was more in harmony with existing legislation than the bill drawn in Washington. It is, however, unnecessary to call the attention of the association more particularly to the difference, in view of the fact that the bill, as drawn by the association in Washington, received the approval of Congress and was signed by the President. It excited at first much unfavorable comment on the part of clerks of the circuit courts of appeals, and it was thought at first that the bill as drawn might make it impossible to meet those expenses of the court which were provided for by the fees of the clerk. We are informed that on more careful consideration this objection seems not to be well taken. Your committee is distinctly of opinion that this country ought not to expect that the expenses of the administration of jusice should be paid out of the fees exacted from suitors. The country can well afford to maintain its courts and provide from the Public Treasury for all suitable expenses of the administration of the law.

5. The third bill recommended by the association authorized the appointment of stenographers in the courts of the United States and fixed their duties and compensation.

There is a large and influential stenographers' union. This union had prepared a bill which undertook of itself to fix all compensation without leaving its determination to the judges in the different circuits. Neither of the proposed schemes received the approval of Congress.

6. The next subject which was referred to us was that of limiting the right of appeal from the courts of the District of Columbia to the Supreme Court of the United States. On this subject we have had full consultation with members of the bar of the District of Columbia. We have come to the conclusion that the right of appeal as it now exists, as amended by section 250 of the Judicial Code, is not productive of so much inconvenience or delay to other suitors from the States of the Union whose cases come before the Supreme Court as has been supposed, and your committee does not at this time recommend any change in the section of that code relating to such appeals.

7. We have prepared the following addition to the forty-fourth rule of the Supreme Court in admiralty, which we recommend for approval by this association:

"That in all cases of admiralty and maritime jurisdiction either party may introduce oral testimony and have examination of witnesses in open court."

The reasons for this amendment are so fully stated in our previous report that we think it unnecessary to repeat them here. If approved, we will submit it to the Supreme Court under the authority heretofore conferred upon us.

8. The same evils that have been felt to exist in admiralty cases in some of the circuits have also been felt in equity cases, caused by the fact that under the existing equity rules testimony in all cases is taken out of court. The complaints on this subject have been so numerous that the Supreme Court itself has appointed a committee, consisting of Chief Justice White, Mr. Justice Lurton, and Mr. Justice Van Devanter, "with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practice under the rules as they now exist." Mr. William J. Hughes has been appointed secretary of this committee, and he has requested your committee to aid the court in the performance of the task which it has undertaken.

Your committee is of opinion that the same reasons which led the association to recommend the adopton of the admiralty amendment are equally applicable

[1] Reference may also be had to the following cases: Savage *v.* Modern Woodmen (84 Kans., 63); Harris *v.* State (80 Nebr., [illegible]5; 114 N. W. Rep., 168); Byers *v.* Territory, Okla, (103 Pac., 532); State *v.* Bird, Mont. (111 Pac., 407).

to equity cases. It is a well-known fact that in England and many States of the Union testimony in equity cases on the main issues is taken in open court. This does not interfere with the practice of referring all matters of account to a master in chancery, but it leaves to the judge himself the determination of the fundamental questions in the case.

Among the objections that have been taken to this practice in equity cases is that the judge will say, "I do not care to hear the testimony, because I must read it." It is not for this committee to declare that no judge will ever make this statement, but we can affirm as a result of our own experience that judges in the State courts do not, and Federal judges, when they are hearing cases in admiralty, do not make such an unreasonable observation. We find the actual practice usually to be that when the judge hears the testimony he does not read it in extenso afterwards, but refers to it as his attention is drawn by the briefs of counsel or by his own investigation. It is possible that a judge who had not been in the habit of hearing oral testimony in cases of this sort might at first think that he would be obliged to read the testimony in extenso. But in point of fact one great object of the change is to relieve him from his burden, to give him the testimony in all its freshness and enable him to ask of the witnesses such questions as may tend to elucidate the case upon the merits. Experience shows that frequently these questions by the trial judge are illuminating and assist in a most important manner in the ascertainment of the facts.

We may be permitted to refer to the customary practice of one of the great judges of the United States Supreme Court, Mr. Justice Blatchford. He was the first district judge who was promoted to be a justice of the Supreme Court. His custom was to hear the oral testimony in admiralty cases with the greatest attention, and practically to make up his mind on the facts after the argument of counsel, just as a juryman is required to do when a verdict is asked of him upon the submission of the case. The questions of law arising upon these facts he took for more deliberate consideration. All lawyers who had the privilege of practicing before him know how admirably this method of dealing with litigated questions conduced to the ends of justice, and how satisfactory it was to the bar.

In New Jersey, which is one of the States where a separate court of chancery still exists, the practice of hearing the testimony viva voce in open court has proved satisfactory both to the bench and to the bar. We are distinctly of opinion that a change in this respect would be beneficial in the Federal courts. There is a reason for its adoption there that does not exist in those jurisdictions where there is a separate court of chancery. A Federal judge sits at law, in equity, and in admiralty. He has experience in hearing oral testimony in the trial of cases at law. In those circuits where the admiralty evidence is taken viva voce he also has that experience. The practice has been so successful in these branches of the Federal jurisdiction that your committee think that nothing but the conservatism, to which reference has been made, will prevent the adoption of the reformed practice in all equity cases. It may, perhaps, require the appointment of additional judges. If experience should prove this to be the case, we have the satisfaction of knowing that the country is well able to defray the expense which this would entail. Indeed, the entire annual cost of the judicial administration of the United States is less than that of one of the great battleships which we find it so easy to construct.

The objection is also taken that it would be difficult and expensive to procure the attendance of experts before the judge. We are of opinion that experience would show in equity, as it does now in admiralty cases, that the attendance of witnesses would be arranged for mutual convenience, that some depositions would be taken out of court, but that the most important witnesses would be examined in open court and that the judge would derive from their oral examination a much clearer understanding of the real judgment of the expert. We know that expert testimony sometimes obscures when it should elucidate. The judge would shorten the examination and arrive at the truth more certainly than he now can do.

Another committee of this association has had this subject under consideration. One of its members, Mr. Frederick P. Fish, has formulated the method, stated in schedule B, annexed to this report. Some members of this committee approve the proposition, but we have not been able to consider it in full committee. We submit it for the consideration of the association.

In this connection we call attention to the resolution of Mr. Florance. It was said in the debate at Chattanooga by one of the members, "Under the

Constitution of the United States the equity practice exists." It seems to your committee that this is a misapprehension.

What the Constitution does say is this (art. 3, sec. 2, subdivision 1):

"The judicial power shall extend to all cases of law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

This section of the Constitution, in our opinion, recognizes the fact that there is an intrinsic difference between the substantive rules and the remedies which prevail at law and those which prevail in equity. It has never, so far as we are aware, been proposed to abolish or destroy this fact. It certainly has not been destroyed in any of the code States. But the Constitution says nothing about the procedure of the courts. It says nothing about preserving the jurisdiction of the court of chancery as a separate jurisdiction. In fact, the original judiciary act of 1790 abolished this distinction entirely. There has never been since the foundation of the Government a separate Federal court of chancery. Every Federal judge, under the existing system, is a chancellor, and also in propria persona a judge at nisi prius, a judge of the admiralty court, and of the bankruptcy court. All that is necessary for the pleader in order to express the distinction is to put at the head of his pleading the words "at law" or "in equity" or "in admiralty."

There is no magic in these particular symbols. No one of them is a shibboleth or a fetish. The court is a unit. There can be no possible reason why the judge who to-day sits in the jury term, to-morrow holds the equity term, and on the third day holds the admiralty term should not have full power in either division to administer justice upon the merits. If the pleader by mistake has put the words "at law" in his pleading when he should have put the words "in equity" or "in admiralty," it should be the duty of the judge to make the amendment on the spot. It really seems absurd to say that such a mistake must injuriously affect the substantial rights of the adverse party. If the law is a mere game in which the man who is cleverest in the rules of the game will win, then by all means let us retain these tricks of the trade and add to them all those that once existed, but which have inconsiderately been abolished. But if it be, as we believe, the function of a court to do justice between the parties, all requirements which interfere with the administration of justice should be repealed.

The fears expressed that to break down the procedural distinctions in law and equity cases would impair the constitutional grant of judicial power in "cases of law and equity" is a revival of fears entertained in New York and other States at the time of the adoption of the codes. In Leroy *v.* Marshall (8 How., par. 373), Justice Barculo said:

"I am not prepared to deny that the authors of the code may have supposed that law and equity could be administered in precisely the same forms, nor that some sections of the code were designed for that purpose. But every judge knows, and every lawyer should know, that in practice the thing is impossible.

"Legal and equitable proceedings are essentially different from each other in their origin, nature, and object. * * * Indeed, it would be a matter of astonishment—if we were permitted to wonder at anything in this line—that any man of 'common understanding' should have suffered the idea to enter his head that legal and equitable proceedings could be molded in the same form and be measured by the same rules. Every person who has studied and understands the law as a science knows that there is substance in the distinctions between actions, and that those requirements which superficial observers call 'unmeaning forms and prolix statements,' were really wise and indispensable safeguards and protections in administering the most important as well as the most intricate of human sciences."

In New York & New Haven R. R. Co. *v.* Schuyler (17 N. Y., 592), Judge Comstock remarked that the code "with characteristic perspicacity had in fact abrogated equity jurisdiction in many important cases." Notwithstanding these alarming judicial statements, legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right.

It was for many years the practice in the Federal courts to dismiss a suit which was held to have been brought on the wrong side of the court and compel

the plaintiff to resort to another action. But in the recent case of Schurmeyer *v.* Connecticut Mutual (171 Fed., 1) a more liberal practice was adopted. Plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the circuit court of appeals and the case remanded to the circuit court. Judge Amidon, in the circuit court, made an order directing the plaintiff to transform his complaint at law into a bill in equity, and directed that the cause be transferred to the equity docket, there to be proceeded with the same as if it had been originally brought as a suit in equity. The circuit court of appeals approved this practice (ibid., p. 7). The court followed a very able opinion by Judge Shiras in United States Bank *v.* Lyon County (48 Fed., 632).

Your committee has prepared a bill (Schedule C), which undertakes to provide a remedy for the evil which has been mentioned. In view of the decision just referred to, it may be that the object of the first section of this bill could be accomplished by a rule of the Supreme Court in equity, which would regulate the practice in all the circuits and conform it to that adopted in the cases just cited.

9. So far as the subject of a general practice act is concerned, your committee has been entirely unable, within the time which has elapsed since the last meeting of the association, to formulate an act upon this subject. A subcommittee, however, is drafting a preliminary scheme to which your committee, if continued, will be glad to give further and more deliberate consideration.

10. There is one more subject within the scope of the general resolution creating this committee which we have considered, and which we bring to the attention of the association. In the first judiciary act jurisdiction was given to the Supreme Court to review, by writ of error, a judgment of the highest court of the State in which a party had asserted a claim under the Constitution and laws of the United States, and the decision of the State court had been adverse to this claim. In Cohen *v.* Virginia (6 Wheat., 414) the Supreme Court held that this grant of power was authorized by that clause of the Constitution to which reference has been had, that such a writ of error was a case arising under the Constitution and laws of the United States, and that it was competent for the Supreme Court to reverse the judgment of the State court. This jurisdiction has been exercised most beneficially, and some of the most important decisions of the Supreme Court have been made under the power thus conferred.[1] It is not too much to say that without the powers which the Supreme Court in these cases (in every one of which the decision of the lower court was reversed) maintained for the Federal Government, we should not have been a Nation and would have gone to pieces. Indeed, a government without the powers thus asserted would not have been worth preserving. The historic reason for the limitation in the original judiciary act, to wit, that the writ of error should only be permitted where the decision in the State court had been adverse to the clamant, was this: It was thought that the main ground for giving the jurisdiction was that there might be a jealousy of the Federal Government on the part of the State courts. In fact, this jealousy did exist in the earlier years of the country's history. Therefore, where the decision of the State courts was in favor of the right asserted under the Federal Constitution it was thought there would be no just ground for complaint.

In the present generation we are confronted with a new situation. There are many instances in which the language of portions of the Federal Constitution has been adopted by the constitutions of the several States. In litigated cases rights have been asserted under both constitutions. The rights thus asserted are of exemption from the provisions of laws which in the judgment of the great majority of the people of the States are essential to the public welfare. Take, for example, the subject of compensation for injuries to workmen. The evils which exist under the present system of making compensation for injuries caused by negligence are so great that they have excited universal attention. One of the most serious of them has been condemned by this association in its code of ethics; that is to say, the business which has grown up in large centers, commonly known as ambulance chasing. There are practitioners who keep their scouts on the lookout for accidents, seek employment at once from the injured party, engage to pay the expenses of the litigation upon contingent fees, often amounting to 50 per cent of the recovery. All this business we have condemned, and justly condemned.[2] Yet it is almost a necessary consequence of the failure of the State to make any provision for compensation to be ascertained in a more reasonable manner, and to be determined in advance. At its last term the Court of Appeals of the State of New York held that a workmen's compensation act, which had been adopted by the legislature of that State after very careful consideration and which the court admitted to be beneficial to the public, was in violation of that clause of the fourteenth amendment which has been embodied in the constitution of the State of New York, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law."[1] There is a similar clause in the constitutions of most of the States. Similar acts on the subject of compensation for injuries have been passed in many of the States. One very like the New York statute has been passed in the State of Washington, and the question of its constitutionality is under advisement by the supreme court of that State. It seems to many counsel, learned in the law, quite probable that the decision in Washington will be the reverse of that in New York. We shall then be in the position of having the Constitution of the United States mean one thing in New York and another in Washington.

[1] Dartmouth College *v.* Woodward (4 Wheat., 518); Gibbons *v.* Ogden (9 Wheat., 1); McCullough *v.* Maryland (4 Wheat., 316); The Passenger Tax cases (7 How., 288).
[2] Canons, 27, 28; 33 Reports American Bar Association, 582, 583.

The reason which originally prevailed for the adoption of this limitation upon the right of review has ceased. The reason having ceased, the law should cease. No such limitation is contained in section 250 of the Judicial Code relating to the review of decrees of the District of Columbia courts. We therefore recommend that this limitation be repealed, and report a bill, Schedule D, for that purpose.

We also submit a report from the subcommittee dealing with the subject of law and equity in the Federal courts. This is marked "Scehdule E."

One member of our committee, Mr. Allen, dissents from that portion of the report relating to Schedule D. We submit a copy of his dissenting memorandum, marked "Schedule F."

We recommend for adoption the following resolutions:

"*Resolved*, That the special committee to suggest remedies and formulate proposed laws be continued with the powers heretofore conferred upon it.

"*Resolved*, That it be discharged from further consideration of the subject of District of Columbia appeals.

"*Resolved*, That the American Bar Association approves the provisions of the bill to amend chapter 11 of the Judicial Code of the United States, reported by said special committee.

"*Resolved*, That the American Bar Association approves the provisions of the bill to extend the right of review in cases arising under the Constitution of the United States, reported by said committee, being an amendment to section 237 of the Judicial Code.

"*Resolved*, That the American Bar Association approves the amendment to admiralty rule No. 44, reported by said committee.

"*Resolved*, That the said committee be instructed to bring the portion of the report relating to equity practice to the attention of the Justices of the Supreme Court of the United States.

"*Resolved*, That the said committee be instructed to take such steps as it shall deem expedient to procure the introduction and passage of said bills at the next session of the Congress of the United States, and to recommend the same to the attention of the committees of Congress to which the said bills may be referred."

All of which is respectfully submitted.

EVERETT P. WHEELER, *Chairman*,
ROSCOE POUND.
CHARLES F. AMIDON.
JOSEPH HENRY BEALE.
FRANK IRVINE.
SAMUEL C. EASTMAN.
HENRY D. ESTABROOK.
CHARLES E. LITTLEFIELD.
EUGENE A. BANCROFT.
STEPHEN H. ALLEN.
ARTHUR STEUART.
JOHN D. LAWSON.
SAMUEL SCOVILLE, Jr.
WILLIAM L. JANUARY, *Secretary*.

BOSTON, *August 29, 1911.*

[1] Ives *v.* South Buffalo R. Co., decided May, 1911.

SCHEDULE A.

[H. R. 31165.]

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, No judgment shall be set aside, or reversed, or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

Passed the House unanimously, February 6, 1911.

SCHEDULE B.

I am satisfied that there can be no real reform in equity procedure and practice in the United States courts until there is a judge in control of each case from the time the pleadings are completed, with a definite feeling of responsibility on the part of the judge that he is to control the procedure. Specifically, I believe that the best possible plan would be this:

As soon as the pleadings are completed, the case should be assigned to a judge who will practically control it from that moment. He should immediately bring counsel together and find out what the case is about. He should learn specifically what is the nature of the controversy and definitely what are the defenses. He should then determine which of those defenses could properly and fairly be tried in open court. If he found, on this preliminary hearing, that there was testimony to be taken out of the circuit or that certain testimony could not be produced in open court, he should then and there appoint an examiner to take this particular testimony within a fixed time, which, of course, he could extend if necessary. If any questions arose in the course of this testimony, he should not refuse to pass upon them, but should recognize an obligation to do so.

At this preliminary hearing, having arranged for taking the testimony that must be taken before an examiner, the judge should set the case down for hearing at a fixed date, at which time the rest of the testimony would be taken orally before him. At the trial there would be the depositions taken before the examiner and a stenographic report of the testimony taken from day to day in open court. In all the great centers testimony taken one day could be in print the next morning.

If at any time during the trial there was a surprise or any ground for so doing, the court would adjourn the hearing for a time, that the parties might have the opportunity to meet the new conditions. The trial in open court would be resumed at the expiration of the period of adjournment.

The rule of Blease *v.* Garlington should be amended so that the trial judge could deal with testimony in equity substantially as he deals with testimony at law. The rights of a party offering testimony which the trial judge rejected could be protected by a statement from counsel offering the testimony as to what it was and what he expected to prove. The appellate court could then determine whether the testimony had been properly or improperly excluded, and if its view was that the testimony had been improperly excluded, the case could be sent back for the single purpose of taking this testimony.

It would be an enormous gain in patent cases if the experts should be forced to testify in the presence of the court. I have no doubt that the length of expert depositions would be reduced 75 per cent and the court would be sure to understand the experts. The court would check the expert whenever he got away from the points of the case and would check the cross-examination when the same was improper.

If cases were prepared in this way a very large number of them could be decided by the trial judge before he left the bench at the close of the hearing. His opinion would be taken down stenographically and subsequently revised by him if necessary. He would be spared the necessity of reading an enormous record, with the subject matter of which he was not familiar, for the sake of getting at the comparatively few points upon which every case ultimately is determined.

FREDERICK P. FISH.

SCHEDULE C.

AN ACT To amend chapter eleven of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the Judicial Code entitled "Provisions common to more than one court" shall be amended by adding at the end thereof new sections to be known as sections two hundred and seventy-four A and two hundred and seventy-four B, to read as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right at any stage of the cause to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

SCHEDULE D.

AN ACT To amend section two hundred and thirty-seven of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of the Judicial Code be, and the same is hereby, amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States [*and the decision is against their validity*]; or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States [*and the decision is in favor of their validity*]; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States [*and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority*], may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

The bracketed words in italics are to be omitted.

SCHEDULE E.

REPORT OF SUBCOMMITTEE UPON THE RESOLUTION OF MR. FLORANCE AND THAT OF MR. SHELTON.

I.

LAW AND EQUITY IN THE FEDERAL COURTS.

The first question in any proposed reform in Federal procedure with respect to the absolute separation of legal and equitable proceedings must be one of constitutionality. There are many dicta in the books to the effect that such a separation is required by provisions of the Constitution. It may be well to set forth these dicta.

"It is undoubtedly true, as contended for in the argument of the complainant in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States in administering the remedy for an existing right. The rule applied to the remedy and not the right. * * * It is the form of remedy for which the Constitution provides." (Taney, C. J., in Meade *v.* Beale, Taney, 339, 31; 1850.)

This dictum of Chief Justice Taney (at circuit) has been cited as meaning that the Constitution provides for a proceeding in chancery for all rights to which such proceedings were appropriate under the old English practice. But, properly apprehended, such is not its meaning. The learned Chief Justice saw what many have pointed out since, that the distinction was one of remedy; that for certain situations our legal system provides a remedy by a command addressed to and enforced against the person, and that the Constitution expressly provides that the Federal courts shall administer this type of remely in appropriate cases. It does not provide, nor does the dictum above quoted say that it provides any procedure by which the type of remedy in question is to be sought or in which it is to be awarded.

A number of subsequent dicta, however, are put more sweepingly:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law." (Taney, C. J., in Bennett *v.* Butterworth, 11 How., 669, 674; 1850.)

Here again what is meant is that one whose claim is legal must have a legal remedy; not that this remedy must be sought in any particular form of proceeding. The former was all that the court had to decide.

"In the last-mentioned case (Bennett *v.* Butterworth, supra) the Chief Justice, in delivering the opinion of the court, says: 'The Constitution of the United States has recognized the distinction between law and equity, and it *must* be observed in the Federal courts.' In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law, they *can not* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either." [Italics in the original.] (Grier, J., in McFaul *v.* Ramsey, 20 How., 523, 525; 1857.)

This protest against the attempt of the Federal district court for Iowa to apply the Iowa code of civil procedure was well taken. Beyond that, the passage is only one of many oracular pronouncements to be found in the books, when the codes of procedure were new, which have been refuted by the event.

"The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension, whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course he sought by interposing an equitable defense to defeat this action at law brought by the receiver under the statute. That can not be done, because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted." (Harlan, J., in Lantry *v.* Wallace, 182 U. S., 536, 550; 1900.)

"There is a fundamental distinction growing out of the Federal Constitution and legislation between legal and equitable procedure. The seventh amendment to the Constitution provides that in 'suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' And section 16 of the judiciary act of September 24, 1789, reproduced in section 723 of the Revised Statutes, enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' These constitutional and statutory provisions control the procedure of the Federal courts." (Bradford J., in Jones *v.* Mutual Fidelity Co., 123 Fed., 507, 517; 1903.)

Here the matter is put upon its true ground, namely, the seventh amendment and Federal legislation, and it may well be that the preceding extract in reality proceeds upon the same idea.

We have, then, three matters to consider when legal and equitable procedure in a Federal court are before us: (1) The constitutional recognition of law and equity in the provision conferring jurisdiction upon the courts of the United States; (2) the seventh amendment; (3) Federal legislation providing for distinct procedure at law and in equity. The first of these is the basis of some or even of all but the last of the judicial pronouncements above quoted. Yet if we go back to the fountain head of these statements in the original dictum of Taney, C. J., we see at once that he had in mind the remedy, not the form or procedure, and hence that his remarks afford no ground for assuming that the words "at law and in equity" require a distinct procedure. Rather those words were meant to give to Federal courts each of the two great classes of remedies of the Anglo-American legal system. Accordingly many dicta have recognized that a substantial, not a formal or procedural, distinction is the one recognized. For instance, that is evidently what Curtis, J., had in mind when he spoke of "the equity law recognized by the Constitution and by acts of Congress." (Neves *v.* Scott, 13 How., 268, 272; 1851.)

So also in the following:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles." (Davis, J., in Thompson *v.* Railroad Companies, 6 Wall, 134, 137; 1867.)

There remains one remark of an eminent judge sitting in a circuit court of appeals:

"But in the courts of the United States the distinction between actions at law and suits in equity and between legal and equitable defenses is carefully preserved, because it is clearly recognized in the Constitution and laws of the United States." (Van Devanter, J., in Anglo-American Land Co., *v.* Lombard (C. C. A.); 132 Fed., 721, 731; 1904.)

It is submitted that this means that the distinction between the remedies and the substance of the defenses is recognized by the Constitution and the distinction between the modes of procedure is established by the statutes.

In the requirement of the seventh amendment, that the right of trial by jury shall be preserved, we find a more serious matter. That this is the true basis of separate procedure at law and in equity has been recognized by many judges:

"The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' In the Federal courts this right can not be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact." (Field, J., in Scott *v.* Neely, 140 U. S., 106, 109; 1890.)

This evidently does not mean that the learned justice thought such a blending might not be provided for, if it did not impair the right to jury trial of legal issues. No such blending was permissible under the existing practice, and the reason is pointed out, namely, to preserve the right to jury trial. If, therefore, that right can be preserved, such a blending of legal and equitable issues in one cause might be established by proper authority. That this is so the Supreme Court of the United States has made clear abundantly in passing upon legislation in Territories where statutes had done this very thing:

"The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The seventh amendment, indeed, does not

attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself this prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law." (Brewer, J., in Walker *v.* Railroad, 165 U. S., 593, 596; 1896.)

"As in Oklahoma [then a Territory] the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked * * *—we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode." (Harlan, J., in Black *v.* Jackson, 177 U. S., 349, 364; 1899.)

In that case the suit was, in form, one for a mandatory injunction. The court held that the seventh amendment did not require that the cause be brought anew as an action of ejectment, but that a jury trial of the legal issue as to possession would suffice.

This construction of the effect of the seventh amendment upon procedure at law and in equity, which must commend itself to everyone's good sense, is borne out, moreover, by what the court, speaking through Matthews, J., said in Ex parte Boyd (105 U. S., 647, 656; 1881):

"And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in anywise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether by the adoption of that instrument all progress in the modes of enforcing rights, both of law and in equity, was arrested and their forms forever fixed. To state the question is to answer it."

It would seem, therefore, that:

(1) The Constitution gives the courts both legal and equitable jurisdiction; that is, the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which can not be taken away, though it may be waived by the party entitled.

(3) If the remedies and the right so secured are not taken away or impaired the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in Federal procedure.

The second question may well be, How far may rules of court achieve the desired reforms and how far must they be achieved by legislation? As has been seen, the judiciary act of 1789, chapter 20, section 16, recognized the substantive distinction. But section 19 of the same act recognized, or at least assumed, a procedural distinction. Section 21 of that act and section 36 of the act of May 8, 1792 (1 Stat. L., 276), do the same. Since that time the distinction has been assumed in all subsequent legislation. Whether it is required thereby is not so clear. But the Federal courts have said that it is so emphatically so many times that resort to legislation may be the better course. There is good precedent, however, for allowing amendment from law to equity and vice versa without express legislation, in the decision of Chief Justice Doe, of New Hampshire, in Metcalf *v.* Gilmore (59 N. H., 417, 433). In that cause the court held that the fact that the statute of jeofails allowed amendments at law and that amendments were always allowed in equity, coupled with the union of legal and equitable powers in one court, was enough to justify such amendments. Doe, C. J., said:

"Against an amendment based on the existing unity of jurisdiction it might be asserted that nothing can be done in court without a precedent, and that there is no precedent for such an amendment. But the unity of jurisdiction authorizes such an amendment as could have been made if the unity had been coeval with the common law. In a writ of entry on a mortgage it is found that the mortgage should be re-formed. If law and equity had not been disjoined in England (as by the true principle of the common law they could not be) another suit with new process and new notice for the re-formation of the mortgage, would be no more necessary than a new suit to amend a town clerk's record or an officer's return, a re-formation of which becomes necessary and is made during the trial. By fair implication the legislative act uniting the disjointed function prescribes whatever new proceedings are requisite for giving due effect to the union."

In some ways the Federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the Federal courts the practice at law by statute conforms to the State practice, which almost everywhere allows amendment from law to equity, or vice versa. The practice in equity by statute is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the Federal courts it would seem that, unless the long line of dicta above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good Federal precedent for such amendment without even a Federal equity rule. (Schurmeyer *v.* Life Ins. Co., 171 Fed., 1.)

Thirdly, we must ask what reforms in the relation of law and equity in Federal procedure are desirable? It is submitted that three are desirable at once (1) Power of amendment from law to equity, and vice versa; (2) power to allow equitable defenses and equitable replications at law; (3) power to grant anciliary equitable relief in pending legal proceedings without requiring an independent suit with new process.

The first of these raises no questions other than those already discussed. Its desirability would seem beyond argument. It exists not only in the 27 code jurisdictions, but also in the more advanced common-law jurisdictions. As has been seen, in New Hampshire it exists by judicial decision as a corollary of the granting of legal and equitable jurisdiction to one set of courts. Noteworthy statutes giving the same power, where legal and equitable procedure are kept distinct, are: Massachusetts, Revised Laws, chapter 173, section 52; Illinois, Laws of 1907, page 435, section 40. In this respect practice in the Federal courts is far behind that in the State courts.

The second proposed reform involves three items: (*a*) Allowing equitable defenses at law, (*b*) allowing equitable cross-demands in legal proceedings, where to make one's defense he must have affirmative equitable relief, such as reformation, cancellation, or specific performance, (*c*) allowing equitable replications at law, as, for instance, where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud. That this is not permitted in the Federal courts, see Hill *v.* Northern Pacific R. R. Co. (C. C. A., 113 Fed., 914). All of these powers are possessed by the majority of our State courts, and their desirability need not be argued. The sole difficulty lies in the necessity of carefully preserving the constitutional right to jury trial of legal issues. This has not proved a serious obstacle in the 27 code jurisdictions, though the legislative solutions thereof have not always been happy. Three classes of cases have arisen under codes and practice acts: (1) Pure equitable defenses used defensively only. Here many jurisdictions submit the facts to a jury, as the party who interposes the defense at law may not well complain thereof. But, if the court itself passes on the facts on which such a defense is predicted and directs what legal effect shall be given to the facts so determined, according to what a court of equity would have done in a separate suit for that purpose, no constitutional right is impaired. (Marling *v.* Railroad Co., 67 Ia., 331.) (2) Cross-demands for equitable relief of an affirmative nature, which, if granted, will cut off or dispose of plaintiff's case, but if denied will leave his case yet to be tried on its purely legal issues, or some of them. Here the latter only are triable to jury as of constitutional right. Hence the court may try the claim for equitable relief, and then, if any legal issues remain to be tried, a jury trial may be had. (Fish *v.* Benson, 71 Cal., 428; Stono *v.* Weiler, 128 N. Y., 655.) (3) In some cases a legal cross-demand has been set up in a suit in equity. Here the party who so sets it up and asks that it be adjudicated in the equity cause has been held to have waived a right to jury trial. Yet the other party may not choose to waive such right. Then the question obviously ought to depend upon whether, as may sometimes be done, this legal issue can be used defensively in equity under the chancery practice. If so, obviously no jury trial may be had; if not, the right must be preserved. (Larkin *v.* Wilson, 28 Kan., 513; Davison

v. Associates of the Jersey Co., 71 N. Y., 333.) Some of the codes have trial to formulate these rather obvious conclusions, to which the courts have come wherever legislation would allow them by the use of general phrases, such as "actions for the recovery of money only," "legal issues," "equitable issues," and the like. Such formulas have made much difficulty, since questions have arisen as to how far they may have altered the preexisting rights as to mode of trial. On the whole, no better formula is to be found than that announced by Harlan, J., in Black *v.* Johnson (177 U. S., 349, 364), that a party must have as of right "a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suit in equity, are determinable in that mode."

Still another difficulty may be suggested here, namely, the different mode of review in the Federal courts of actions at law and suits in equity, respectively. It may be asked what is to be done where an action at law involving equitable defenses or an equitable replication must be reviewed? Shall there be error as to the legal part and appeal as to the equitable part, which would produce great confusion? The question is not a new one. In many of the code States separate forms of review for law and equity were preserved till recently, and hence this very situation arose. The solution adopted was to look to the nature of the main proceeding in the course of which equitable or legal claims had been interposed. It was stated thus by Maxwell, C. J.: "The rule seems to be that where the action is at law to review the action itself or a final order in any special proceeding therein the proper practice is by petition in error; but where the action is in equity the decree itself or any special proceeding in the action * * * may be reviewed on appeal." (Morse *v.* Engle, 26 Nebr., 247.) In like manner in Massachusetts, where certain equitable defenses may be made at law, an action at law in which such a defense is raised is reviewed by exceptions like any other action at law. (Page *v.* Higgins, 150 Mass., 27.)

There remains the matter of injunctions to preserve the status quo pending actions at law. It is a needless expense to require a separate suit with new process and pleadings for this purpose. But no statute is necessary here. The Supreme Court has power by equity rules to prescribe the forms of procedure for exercise of all equitable powers of the court. Surely it may provide that this power of granting an injunction auxiliary to a pending legal proceeding may be exercised upon petition and notice in the legal controversy itself. Indeed it would seem arguable that it might by rule allow a plea or answer or replication in an action at law to serve the purpose of a bill, and so, without legislation, provide for equitable defenses and equitable replications.

II.

MR. SHELTON'S RESOLUTION.

If this resolution is taken literally, no one can have any objection to it. Certainly none of those who advocate reform of procedure propose or have proposed that a court in deciding a controversy should, or should be permitted to, consider anything not legally before it in pleadings, by way of judicial notice, in the form of a presumption or in the form of legal evidence. What they urge is that when a cause is before the court in the form of legal evidence the court should be empowered to act upon it, and its decision should not be set aside, even if not exactly presented by pleadings, unless some injury has resulted from want of notice of the case or defense to be made. In other words, they urge that pleadings should have but two functions: (1) To furnish notice of the claims, defenses, or cross demands of the parties; (2) to make a record of what has been passed upon, so as to furnish a basis for subsequent pleas of res judicata. This matter was fully argued in our report a year ago. We need not repeat the arguments then urged. It is enough to say that if the pleadings give due notice they subserve every useful purpose of judicial presentation of a cause.

It is suspected, however, that the purpose of the resolution is to impose upon the committee a doctrine, which has been much urged, to the effect that a court ought not to be permitted to deal with a cause in any way unless and until a technical statement of a cause of action, including all the legal elements of the case, is before it. It has been asserted somewhat dogmatically (*a*) that this is a fundamental requirement of the judicial administration of justice, without which there can be no law; (*b*) that it has always obtained in all legal systems; (*c*) that without it constitutional government is impossible, since the courts would operate arbitrarily and despotically. As to the first, it may be enough to say that justice is very well administered to-day in many kinds of cases without anything of the sort—in magistrates' and justices' courts on indorsed writs or informal bills of particulars, in the trial of claims against the estates of deceased persons in many jurisdictions on informal claim bills, in the English courts and in the courts of Canada on informally indorsed writs or informal statements of claim, designed to afford notice. As to the second, it may be remarked that in all three periods of Roman procedure the plaintiff's case was stated in a manner which would be open to demurrer at common law, and that in modern German procedure, after citation containing a mere notice, the issues are settled by a process of tentative pleading and amendment between court and counsel in which common-law demurrers would lie to nearly every pleading. As to the third, in view of the wide powers of interpretation and ascertainment of the law which our common-law system confides to the courts, it seems puerile to tie the courts hand and foot with procedural details lest they act arbitrarily. But notice pleading affords no more scope for arbitrary action than a pleading which requires a case to be stated with all its legal elements in common-law form. The action of the court on the case made by the proofs is always open to review, and that is the real concern of the law and of society; any deprivation of a fair chance to meet the case so made is also perfectly open to review. Variance ceases to be a matter for technical sparring for advantage and becomes one of substantial rights, namely, Has the party who claims it had a fair opportunity to meet the case against him?

It has been urged that a court can not act until a case is fully and technically made in a pleading before it. Why not? Courts do so act in the cases above enumerated and in others set forth in the report last year with no untoward results. The truth is the requirement of a technically correct pleading to sustain a good case fully proved by legal evidence after a fair hearing is purely historical. It arises from the common-law mode of review by writ of error at a time when the parchment judgment roll was the sole mode of setting forth what the tribunal had done. Unless a case was made by the pleadings to sustain the judgment rendered, the reviewing court had no means of knowing upon what the judgment proceeded. To-day, with better modes of review in vogue in almost all jurisdictions and with ample facilities for review of the actual case, to continue to review the pleadings and to require new trial of a good case because of a bad pleading, supposing all requirements of notice have been duly fulfilled, is an anachronism. The committee has no desire to see anything judicially considered that is not juridically presented, but it does desire to see the modes of juridical presentation in many of our jurisdictions much simplified.

ROSCOE POUND
(For the subcommittee).

SCHEDULE F.

MEMORANDUM OF DISSENT OF MR. ALLEN.

I very heartily approve of all the recommendations of the report except Schedule D. The decision rendered by the Court of Appeals of New York in the case you mention certainly presents an instance in which it would be highly desirable to have a review in the Supreme Court of the United States and a uniform construction of the Constitution of the United States; but I hesitate at any extension of the jurisdiction of that overloaded court. I fear that the amendment proposed would add materially to the number of cases taken to that court, and that in a very large majority of them the inconvenience would outweigh the advantage. Great delay, expense, and inconvenience inevitably result from an appeal to the Supreme Court of the United States, and we ought to be exceedingly careful that we do not open the door wider than necessity requires.

STEPHEN H. ALLEN.

BRIEF FOR AMERICAN BAR ASSOCIATION IN SUPPORT OF BILL RELATING TO PROCEDURE OF UNITED STATES COURTS.

[S. 3750; H. R. 16461.]

This bill was drawn by a committee of the American Bar Association. It has been under consideration by that association for five years. At the meeting at Seattle in August, 1908, it was much discussed and received the almost unani-

mous support of a large and representative meeting of the association. The bill was presented to the Sixtieth Congress, was discussed fully before the Judiciary Committee, and was amended to meet the criticisms of some members of the committee. In its amended form it passed the House of Representatives unanimously February 6, 1911 (H. R. 31165). It was approved unanimously by the American Bar Association at its last meeting in Boston. The bill represents and was drawn and approved by three professional elements—the bench, the practicing lawyer, and the university.

I. So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in the consideration in an appellate court of a writ of error or appeal judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision below was right, and that if it was erroneous in some detail the error did not affect the result.

Perhaps no better argument can be stated for this proposition than a passage in the opinion of Mr. Justice Martin, of the Court of Appeals of New York. It expresses the great embarrassment that lawyers feel in the trial of important cases. In Lewis *v.* The Long Island Railroad Co. (162 N. Y., 50, 67) the judge delivering the opinion of the court says:

"After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered we are surprised, not that a single error was committed, but that there were not many more."

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such procedure needs revision. The State of New York within a few years created a commission to inquire into the causes of the law's delay. Several judges of the supreme court of that State were examined before the commission. Presiding Justice Hirschberg said, in the course of his examination:

"I think that one great difficulty is that our system is distinctly an appellate system, and it is based upon the fundamental idea that a trial and a decision are always wrong. The result of it is that people indulge in litigation because the opportunities are great. They are sure of two appeals, and until the final decision is made they are in no hazard." (Law's Delay Commission Report, p. 269.)

"I have always thought it was a fatal feature of our judiciary system * * * the idea that if a man tries a suit and loses, he can appeal on the assumption that that was wrong, instead of appealing on the assumption that it was right." (Ibid., p. 270.)

Mr. Justice Scott agrees with this view:

"Mr. Hayes. Have you any suggestion to make on appellate procedure?

"Judge Scott. You should change that rule of presumption; in the first place I think the appellant should have cast upon him the burden of establishing that there had been error below, and also of showing that that error had been prejudicial. None of us is so wise that he can try a long case without committing some error. In addition to that the appellate division should have the power of awarding judgment." (Ibid., p. 288.)

Mr. Justice (now Senator) O'Gorman says:

"One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

"We have a rule in our State that the commission of an error upon the trial of a cause by a trial justice is presumptively prejudicial to the appellant, and instead of the appellant being required to persuade an appellate court that he has suffered substantial wrong, the moment that he can place his finger on a technical error the burden is at once shifted, and the respondent required to persuade the court that there was no harm following that particular ruling. Now, we all know, and there are very few who seek to vindicate the practice,

that very many cases are sent back from the appellate division upon alleged errors which have never affected the merits of the case. (Ibid., pp. 316–317.)

"At the present time nearly every defeated party is willing to take a chance of securing a reversal on appeal. They have every encouragement." (Ibid., p. 319.)

In opposition to all the rules of technicality, which work such injustice and cause such delay, we urge that laid down by Chief Justice Marshall in Church *v.* Hubbart (2 Cranch, 232):

"It is desirable to terminate every cause upon its real merits if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."

The amendment proposed is the equivalent to that already adopted by the Legislature of New York in criminal cases. We quote from the opinion of the court of appeals in People *v.* Strollo (191 N. Y., 42).

At pages 61, 67, the court said:

"Under the statutes our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial rights of a defendant. Guided by this rule, we feel constrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal. * * *

"These various elements of the question, considered in connection with the functions and powers of this court, bring us face to face with the situation that is apparently paradoxical but actually logical. That is to say, we might have a condition in which we would be compelled, in a civil case, to grant a new trial for a loss of original documentary evidence, although under similar conditions, in a case involving human life and liberty, we may be bound to deny such relief. And why should this seemingly anomalous difference exist? Because this is a court of statutory origin and vested with none but statutory jurisdiction. Thus it happens that in civil cases our powers are limited to the review of errors which are raised and presented by exceptions, while in criminal cases we are not only empowered but commanded to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Proc., sec. 542.) This power of review on criminal appeals is still further broadened in capital cases by the legislative direction that "when the judgment is of death, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below." (Code Crim. Proc., sec. 527.)

Similar legislation to that now proposed has been adopted in Illinois, Kansas, Ohio, and Wisconsin, and by constitutional amendment in California.

In dealing with this important subject, we ask you to put yourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is not this the attitude you always want to occupy? Doubtless we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. When we look at our profession from the standpoint of the Commonwealth; when we consider that we are not only attorneys for a client but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system, so that these means of procrastination shall no longer be available.

The objection that is commonly taken to this doctrine, so far as it applies to the review of cases that have been tried before a jury, is that expressed in a letter that we have received from one of the Federal judges, to whom we submitted the proposed bill. He put it thus:

"If an appellate court either affirms or reverses because of its own opinion as to the merits, it substitutes a trial by judges for a trial by jury."

Our reply to this is that it misconceives the scope of the proposed reform. So far from depriving the verdict of the jury of its value, it tends to establish the verdict. Long experience in the trial of cases before a jury and conversation

with intelligent jurors of our acquaintance has convinced us that jurors pay must less attention to fine points of evidence or to nice distinctions in the charge than judges generally seem to suppose. In more than half the cases where judgments have been reversed on questions of evidence, the ruling in the court below did not affect the verdict in the slightest degree. This being the case, it is unjust that the parties should be put to the expense and delay of a new trial.

Therefore, as practicing lawyers, it is clear to us that the presumption of the appellate court should be that a ruling on the evidence, which it deems erroneous, did not affect the result. It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him upon the merits.

While we can not say that any of the Federal courts has ever sinned as much as some of the State courts, yet we would put upon the statute books a uniform rule for all the circuits, which will embody the rule that prevails in some of them, and which will make it impossible for some of the decisions to be made that the former chairman of this committee, Mr. Lehmann, of St. Louis, adverts to in an address he has recently delivered. We call attention to one, because it seems to us, on the whole, the most flagrant. Yet, under the existing system in some States, it is not only possible, but it has actually occurred. That was an indictment for rape. The proof was clear and the man was convicted, but a writ of error was sued out and the lawyer discovered this defect in the indictment. The constitution of Missouri requires that the indictment should conclude "against the peace and dignity of the State," but in engrossing the indictment the article "the" was omitted before the word "State." The Supreme Court of Missouri held, in State *v.* Campbell (210 Mo., 202), that the omission was fatal, although they said (p. 234): "The testimony as disclosed by the record in this case was amply sufficient to warrant the court in submitting the question to the jury." They reversed the judgment of conviction. The indictment being held void, of necessity the guilty man would go free unless a new indictment should be found and the case tried again.

There are other cases that might be cited where courts on appeal, particularly in criminal cases, have stretched the rule of error to the furthest limit. It is not in the interest of justice that this should be permitted. The maxim of the common law was that the judge himself is condemned when he acquits the guilty; but we have come, in many jurisdictions, to the very opposite of that, dependent, we may say, a little upon the character and temper of the judge who happens to sit on the case. Some judges are more technical than others and attach more importance to points like this than others do. That ought not to be the condition of the law. There ought to be a general rule formulated by Congress which shall control in all the circuits of the United States, so as to make these reversals for purely technical defects impossible in any of the Federal courts.

Society has an interest in the punishment of the guilty. Under our system the accused has every chance in the first instance. The judge must charge that he can only be convicted if the jury find him guilty beyond a reasonable doubt. His counsel will probably argue that it is better that 99 guilty men should escape than that one innocent man should be convicted. If, after all that, the jury find the accused guilty, there is a strong presumption of his guilt; and it ought not to be possible for a person in that situation to be allowed to take advantage of such technical errors, which do not affect the merits and which have nothing to do with the question of his guilt or innocence. We do not always get the most skillful prosecuting attorneys, and under the present rule, as it is often administered, there is required of them almost preternatural skill and foresight in order to guard against question and objections taken in this way.

II. The second clause of the bill was drawn so as to provide a method by which a verdict on questions of fact may be taken on the trial, reserving questions of law for more deliberate consideration, either by the trial judge or in the appellate court. It authorizes the court to direct judgment to be entered upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

This amendment gives additional value to the trial by jury. It will prevent the delay, expense, and consequent injustice caused by new trials upon every issue, when the judgment of the appellate court differs from that of the trial court upon some point of law.

To quote from the opinion of the New York Court of Appeals in a recent case:

"It frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony, in order to meet the varying fortunes of the case upon appeal."

This is a direct encouragement of fraud and perjury. (Walters *v.* Syracuse Rapid Transit R. Co., 178 N. Y., 50.)

On the other hand, a just cause may be lost on the second trial because of the death of witnesses, or their departure to parts unknown.[1]

The practice we propose is the common-law practice. It prevails in England to-day under the judicature act. In that country final judgment is rendered on appeal in 90 per cent of the cases in which the judgment below is reversed; and in only 10 per cent of the reversals is a new trial ordered.

As a matter of fact, the existing procedure in criminal law was framed at a time when it was really needed to protect the criminal, especially from political prosecutions. This is no longer necessary. The criminal is well protected. He must be first indicted by a grand jury of at least 13 men. They say, in finding the true bill, that the man is guilty of the offense. As Sir James Stephen points out in one of his books on criminal law, it is a remarkable thing to say that a man who by 13 of his neighbors has been declared guilty shall start off on his trial with a presumption of innocence. Still he does. The courts tell the jury all the way through. "This man starts and carries through the trial with him this presumption of innocence." Yet at least 13 of his neighbors have already said that he is probably guilty of the crime of which he is accused. The presumption of innocence must be rebutted by sufficient evidence before the jury beyond a reasonable doubt, whereas in a civil case merely a preponderance of the evidence is sufficient. Then, when the prosecutor overcomes all those advantages of the accused, there must be a unanimous verdict. One man can hold up the whole case or compel a mistrial. Again, under the present procedure, if there has been any technical error, even though it does not affect the merits, there must be a new trial. Every rule possible is made to protect the criminal.

American courts are far more technical than the English. They have amended their old law. We have adhered to it. They know that the intricacy and technicality of criminal procedure are obsolete, and no longer fitted for civilization. We pride ourselves on our business capacity and our way of doing things in a common-sense way, and yet we cling to these old technicalities that the Englishman dropped 30 years ago. They pass over little things that we get a new trial for; they decide cases upon the merits more expeditiously and more in consonance with justice than we do.

The American Bar Association, speaking for the bar of every State, urges upon Congress to reform these abuses and redeem the promise of Magna Charta that justice shall be denied or delayed to no man, and that the administration of justice shall not be so cumbrous, dilatory, and consequently expensive that it shall be obtainable only by the rich.

In the President's message, sent to Congress December 21, 1911, we find the following recommendation (p. 16):

"The American Bar Association has recommended to Congress several bills expediting procedure, one of which has already passed the House unanimously, February 6, 1911. This directs that no judgment should be set aside or reversed, or new trial granted, unless it appears to the court, after an examination of the entire cause, that the error complained of has injuriously affected the substantial rights of the parties, and also provides for the submission of issues of fact to a jury, reserving questions of law for subsequent argument and decision. I hope this bill will pass the Senate and become law, for it will simplify the procedure at law."

The President's experience as a lawyer and a judge gives especial weight to this recommendation. We submit that it should receive careful consideration.

We conclude with a quotation from the great Italian statesman, Cavour, which seems to us timely:

"I am not an alarmist; nevertheless, without being one, I think we can see at least the possibility, if not the probability, of stormy times. Well, gentlemen, if you wish to take precautions against these stormy times, do you know the

[1] A notable instance of the delays under the present system is the Hillmon case (145 U. S., 285; 188 U. S., 208). Second judgment of reversal was 23 years after trial begun. In Springer *v.* Westcott (166 N. Y., 117), there were four appeals. The recovery was $900—for the contents of a trunk.

best way? It is to push reforms in quiet times, to reform abuses when these are not forced upon you by the extremists."

EVERETT P. WHEELER, *New York*,
RUSSELL WHITMAN, *Illinois*,
R. E. L. SANER, *Texas*,
(For American Bar Association.)

BRIEF OF EVERETT P. WHEELER, ROSCOE POUND, AND FRANK IRVINE FOR AMERICAN BAR ASSOCIATION.

Three objections are urged to the former bill referred to by its Senate number, 4029. They relate to the first section of the proposed bill, which has for its object to authorize amendment from law to equity and vice versa. The objections summarily stated are:

(1) That the distinction between procedure at law and procedure in equity is essential, so that it is impossible, by amendment, to transform a proceeding of the one sort into the other.

(2) That the provision in question would break down an established practice and give rise to great confusion.

(3) That the effect of the measure would be simply to protect the incompetent pleader and compel the court to correct his mistakes.

(4) That the power exists without a statute.

I.

The question whether the distinction between procedure at law and in equity is essential and fundamental may be argued in two ways:

(*a*) From actual experience in systems where the distinction has been done away with.

(*b*) A priori. Abundant judicial experience is at hand in about 30 code jurisdictions in the United States; also in England, Ontario, and Australia. In the jurisdictions in question the practice goes very far beyond anything which is proposed in the act in question. Perhaps the best statement of the modern view on this subject may be found in Sillaway *v.* Toronto (20 Ont., 98), in which case Boyd, C., says: "Modern procedure endeavors to work out the right and liabilities of all parties as far as possible in the same action."

Doubtless the code provisions in the States where code procedure obtains are sufficiently well known. It may be worth while, however, to call attention in this connection to section 24 of the English judicature act, and to the Ontario judicature act (sec. 57, subtitle 12). The latter statute was enacted as long ago as 1881, and no question has ever been made but that it works admirably.

In addiion, reference should be made to Massachusetts revised laws (chap. 173, sec. 52), and Illinois laws of 1907 (p. 435, sec. 40), which provide for amendment from law to equity and vice versa.

In the light of the foregoing it is folly to contend at the present day that any confusion can arise from permitting a cause once instituted on one side of the court to be transferred to the other without the necessity of discontinuance or dismissal and the bringing of an entirely new proceeding.

It is not the purpose nor will it be the effect of this bill to obliterate or confuse the distinction between law and equity. That there is necessary in the nature of things any great distinction in the procedure by which legal and equitable rights are to be adjudicated and legal and equitable remedies administered by no means follows. That there is necessary such a difference in procedure as to render it impossible to amend proceedings begun on one side of the court so as to conform them to the practice on the other side, we strenuously deny.

It is not necessary in support of this measure to advocate any merging or confusion of legal and equitable rights and remedies. It is not necessary to advocate any assimilation between the two systems of procedure. The bill carefully preserves the power to proceed under existing forms. Its sole object is to prevent a suitor from dismissal because it develops during the progress of the case that he has mistaken his remedy. The bill does not authorize the court under pleadings at law to administer equitable relief, or under pleadings in equity to proceed as at law. It merely authorizes the court to permit the

parties to amend their pleadings so as to conform the proceedings to the practice prevailing on the appropriate side of the court. To use expressions taken from the brief of Messrs. Doran & Reath it is not an "essential" or "unchangeable" or "changeless" practice that throws the suitor entirely out of court and compels him to commence anew under the circumstances indicated.

Over against the pronouncements of the judges in earlier cases under the New York code of 1848, which are cited in the brief of Messrs. Doran & Reath, we may put the following from a recent decision in a well-known code jurisdiction:

"The cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to incorporate into the code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators."

Courts no longer deal with practice acts and statutes relating to improvement in procedure in this spirit. The Supreme Court of the United States, especially in recent cases where it has been called on to review proceedings from jurisdictions where a newer procedure obtains, has taken an attitude quite different from that which was taken in that court when the codes were first enacted. It will suffice to invite a comparison of McFaul *v.* Ramsey (20 How., 523, 525), Bennett *v.* Butterworth (11 How., 669), Farni *v.* Tesson (1 Black, 309, 315), with the remarks of Mr. Justice Matthews in Ex parte Boyd (105 U. S., 647, 656), and Mr. Justice Harlan in Black *v.* Jackson (177 U. S., 349, 364).

It should be remembered that equity, as it has been put, is "a system of remedial law." (Langdell, Brief Survey of Equity Jurisdiction, 22, 23.) One of the greatest legal scholars of modern times has told us that "the day will come when lawyers will cease to inquire whether a good rule be a rule of equity or of common law," and that it will suffice "that it is a well-established rule administered by the high court of justice." In other words, outside of the United States, a very complete fusion of law and equity in substance is going forward rapidly and producing no ill consequences; but nothing so radical is proposed by anyone for our courts. All that is proposed is that the necessity of throwing a party out of court because his proceeding is on the wrong side of the court be put an end to, and that, without the delay, expense, and annoyance of bringing a new proceeding, he be permitted to transform the misconceived proceeding into the proper one.

When the old procedure was in force in England, in a well-known case, Vice Chancellor James, afterwards Lord Justice James, said, on one occasion:

"I am obliged to do that which is almost a scandal to our law, drive a man to * * * the other side of Westminister Hall and say I will dismiss your bill without prejudice to an action." (Hood v. Northeastern R. Co., 8 Eq., 666.)

See also the remarks of Dr. Odgers, in A Century of Law Reform (208).

These remarks were made with reference to a system where law and equity were administered in different courts, and consequently amendment from one to the other was substantially impossible. In our Federal courts there is very much less excuse for such a situation, because in those courts law and equity are administered by the same tribunal, and it is a mere matter of the form of proceeding. Hence the scandal, as Vice Chancellor James called it, is even greater.

One concrete example from the United States reports may be adduced to show how the separation of law and equity in procedure too often works in practice. A building association took out a policy of insurance in the sum of $2,500 on a building. The building was vacant at the time, and was known to be vacant by the agent who issued the policy, but the policy contained the usual vacancy and nonvacancy clause, and no slip providing for vacancy was attached. Upon destruction of the building by fire action was brought upon the policy in a State where the State can administer both legal and equitable relief in the same proceeding. The cause was removed to the Federal circuit court by the insurance company. Here it became necessary for the insured, at its peril, to determine whether it would proceed at law on a theory of estoppel or would proceed in equity for re-formation of the policy. As some 29 States in which the question had been passed on had held there was an estoppel available at law in such cases, the plaintiff went on at law accordingly. Trial was had and a verdict and judgment for the building company resulted. This judgment was affirmed on error by the circuit court of appeals. (Northern Assurance Co. *v.* Grand View Building Association, 101 Fed., 27.)

On certiorari the Supreme Court of the United States reversed the judgment on the ground that parol evidence was not admissible at law to show this estoppel. (Northern Assurance Co. *v.* Grand View Building Association, 183 U. S., 308.)

Whether any relief might be had in equity on the case presented the court could not consider. (Northern Assurance Co. *v.* Grand View Building Association, 203 U. S., 106, 107.)

Thereupon the building association sued in the State court in equity for re-formation of the policy and limited its claim to $2,000, so as to prevent removal. The State court granted re-formation and decreed payment of the sum claimed, and this decree was affirmed by the State supreme court on appeal. (Grand View Building Association *v.* Northern Assurance Co., 73 Nebr., 149.)

The case was then taken on error to the Supreme Court of the United States, which this time affirmed the decree on the ground that its first decision merely held that the plaintiff was on the wrong side of the court. (Northern Assurance Co. *v.* Grand View Building Association, 203 U. S., 106.)

Thus eight years of litigation, involving two trials, one hearing in the circuit court of appeals, one in the State supreme court, and two in the Supreme Court of the United States were required to recover $2,000 of insurance on the right side of the court.

Surely comment upon such a situation, in view of the practice which prevails in the great majority of English-speaking jurisdictions in the twentieth century, is unnecessary.

II.

The second objection is that established precedents would be broken down, and that confusion in practice for many years would result. To this proposition, which is laid down in a somewhat dogmatic and confident a priori fashion, there is a ready and conclusive answer. Exactly such provisions as are contained in the act proposed have been in force in Massachusetts and in Illinois for several years, and there has not been the slightest complaint that anyone has been injured thereby or that any confusion has resulted. On the contrary, testimony is uniform that a considerably more expeditious procedure and saving of expense has resulted.

III.

The third objection is that the measure proposed would operate merely to protect the incompetent pleader from his blunders, and that it would compel the court to assume the burden of correcting his mistakes. With respect to the first two propositions involved in this objection reference may be made to the Grand View Building Association litigation above related. There the mistake was not that of an incompetent blunderer. On the contrary, the condition of the law was such that counsel of great experience and learning, finding themselves compelled to choose between two lines of authority, chose the line which had the support of an overwhelming majority of jurisdictions which had passed upon the question, and a line which was adopted by the Circuit Court of Appeals for the Eighth circuit. Ultimately the judgment of the Supreme Court of the United States was that they had chosen the wrong line to the right result. It ought to have been possible for them to change the proceeding then and there into a suit for re-formation. Instead of this they were compelled to bring an entirely new proceeding, involving considerable delay and expense.

With respect to the other proposition involved in the objection, it is enough to say that the parties themselves will seek the amendments. All that the court will do is what it does now—clearly determine whether a proceeding is properly one at law or in equity. This done, instead of the party being thrown out of court and compelled to begin anew, he will be permitted to transform his proceeding into the one which he should have taken in the first instance.

IV.

The last objection is that no statute is necessary to confer the power in question upon the Federal courts. We should like to think that this is so, and admit that a strong argument to that effect is possible. On the other hand, it must be admitted that many of the most eminent judges upon the Federal bench believe the contrary. The case of Schurmeier *v.* Connecticut Mutual Life Insurance Co. (171 Fed., 1) is by no means conclusive to the question. In

that case one of the three judges who sat dissented, making a very strong argument upon the basis of the existing statutes and decisions. We are advised that Federal courts in other circuits which are not bound by the decision in question are refusing to follow it. Under such circumstances it would seem that the simple statutory relief provided for ought to be granted.

V.

The particular reform in equity practice embodied in section 2 is analogous to that which has so long been adopted at common law. A set-off for many years has been pleadable there. In the code States it is called a counterclaim. Before this practice was adopted the satirists keenly called attention to the injustice of the former method. For example, Haliburton, in Chapter V of Sam Slick:

"JUSTICE PETTIFOG.

"If the poor defendant has an offset, he makes him sue it, so that it grinds a grist both ways for him, like the upper and nether millstone."

Why perpetrate in Federal equity practice this antiquated injustice?

EVERETT P. WHEELER,
ROSCOE POUND,
FRANK IRVINE,
(For American Bar Association).

The CHAIRMAN. If there are no other gentlemen desiring to be heard, the committee will now adjourn.

Mr. DODDS. In connection with H. R. 16460, section 274A, as proposed does not in any wise state or make provision for delay or continuance in case of changes that might be allowed?

The CHAIRMAN. Yes.

Mr. DODDS. It seems to me that section should make provision.

The CHAIRMAN. Would you not think that under the rules of the court that the court would have discretion?

Mr. DODDS. It may have, but it seems to me it ought to be compulsory.

The CHAIRMAN. The bill which I introduced last summer, and which I have reintroduced at this session, known as H. R. 18236, does specially provide that whenever a cause is to be transferred from one docket to the other that then the terms may be indorsed by the court—that is, as to cause, and so forth—and I think whichever one of these bills we will bring out ought to preserve that idea perhaps better than to leave it as a matter of inference.

Mr. DODDS. I think it ought to make the terms compulsory.

The CHAIRMAN. We invite your attention to the criticism just advanced by Mr. Dodds.

Mr. WHEELER. It seems to me, Mr. Chairman and gentlemen, that these two bills might very well be united. Now, the section of bill 12365——

The CHAIRMAN. Now known as 18236.

Mr. WHEELER. That possibly is not covered by the bar association bill, and I see no reason why that should not be added to the bar association bill as an additional section, and that the clause which you have in the first clause of your bill, "upon certain terms that the court may impose," would be suitable to add to the first section of our bill. Then the second section of 18236 could be added on the same subject and be perfectly harmonious.

Mr. FAULKNER. H. R. 18236 seems not to be touched upon by your bill, and it ought to be the law.

Mr. WHEELER. It ought to be the law, certainly.

Mr. FAULKNER. That is where diverse citizenship is effectively urged, and whenever that point is raised, and even in the appellate court, it is permitted to be sufficiently alleged.

Mr. WHEELER. I knew a case, Mr. Chairman, where a party designedly did not take that objection in the court below, but raised it for the first time in the Supreme Court, and they felt obliged under the law that it should be reversed on the ground of jurisdiction—gross piece of injustice, probably necessary under the law. These bills would relieve that entirely, and our committee would certainly favor that strongly.

The CHAIRMAN. Without objection, the committee will stand adjourned.

Thereupon, at 12 o'clock m., the committee adjourned.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 13, 1912.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

Representative Burton L. French, of Idaho, appeared and made a statement relative to H. R. 16459, H. R. 16808, and H. R. 17249.

H. R. 16808 and H. R. 17249, not previously printed in this record, are as follows:

[H. R. 16808, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 4, 1912.

Mr. Lenroot introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

[H. R. 17249, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 8, 1912.

Mr. French introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend section two hundred and thirty-seven of an act to codify, revise, and amend the laws relating to the judiciary.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a final judgment or decree in any suit in the highest court of a State in which a decision in a suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States or where is drawn in question the validity of the statute of or an authority exercised under any State, on the ground of either being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or under treaty or statute of or commission held or authority exercised under the United States, may be reexamined or reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

STATEMENT OF REPRESENTATIVE BURTON L. FRENCH, OF IDAHO.

Mr. FRENCH. Mr. Chairman, the bill introduced by you and the other bills all propose an amendment to section 237 of the judiciary code, and have to do with the matter of appeal in certain cases from decisions from the State courts to the Supreme Court of the United States.

Under our present system section 237 of the judiciary act provides for an appeal to the Supreme Court of the United States from a State court—

First. In cases in which a decision affects the question of validity of a treaty or statute of or authority exercised under the United States, and the decision is against their validity.

Second. Where there is drawn into question the validity of a statute of or authority exercised under the State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision sustains the State law.

Third. Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against their validity.

Probably I should say that the bill of Representative Lenroot (H. R. 16808) seeks to modify the present statute, so as to provide for an appeal to the Supreme Court of the United States in the second class alone; that is, in cases where is drawn into question the validity of the statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States.

The bills of Representative Clayton and myself go further than that, and provide that an appeal shall lie, irrespective of the decision, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, or where any title,

right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States.

The gist of the matter that I would be glad to modify is included in the bill as introduced by Representative Lenroot. However, I see no reason why a similar appeal should not lie to the Supreme Court of the United States in cases referred to in the bills of Mr. Clayton and myself.

So far as I am concerned, I shall be glad to urge the passage of either bill, and I would say to the committee that I was not aware that Mr. Clayton or Mr. Lenroot had introduced a bill on the subject until after I had prepared and introduced the bill touching this section.

About one year ago I had occasion to be very deeply interested in the question that is referred to in these several bills.

The Supreme Court of the United States, in the case of Lockner *v.* New York (198 U. S., 45), held that the New York statute was invalid under which the State of New York sought to limit the number of hours of labor of employees in bakeries to not more than 60 hours per week or 10 hours per day, the Court of Appeals of New York having previously sustained the statute.

In the case of Muller *v.* Oregon (208 U. S., 412), the Supreme Court of the United States sustained the Supreme Court of Oregon upon the validity of a statute which limited the hours of employment of women in laundries to not more than 60 hours per week.

It is true that these two cases are not identical, and yet they are very similar. However, following the decision in the Lockner case, the Court of Appeals of New York in the case of State *v.* Williams (189 N. Y., p. 131) declared the State statute invalid which forbade night labor by women.

This latter case, it would seem, is closely parallel to the Muller *v.* Oregon case, which was sustained by the Supreme Court of the United States. Yet, under our present statute, there is no way by which an appeal may be taken from the decision of the Court of Appeals of New York to the Supreme Court of the United States.

If the decision had upheld the State law, of course an appeal could have been taken and the matter reviewed by the United States Supreme Court. The State court in the Williams case undoubtedly relied much upon the decision of the Supreme Court of the United States in the case of State *v.* Lockner.

So much for these particular cases. Probably during the next few years, as never before, the various States will enact legislation looking to the solution of various economic problems. It is important that this legislation should be harmonious, and it is important that all States may know within the earliest possible time what provisions of law will be sustained by the Supreme Court of the United States.

It has been suggested that the amendments which I advocate would to some extent minimize the prerogatives of the States. However, I can not agree with this criticism. The bills to which I have referred would provide an appeal to the Supreme Court of the United States, no matter what the decision of the State court, so long as it involved the question arising under the Federal Constitution, laws, or treaties.

At present there is that right to appeal whenever the decision of the State court is adverse to the Federal contention; otherwise not.

It is altogether probable that at some time, from some State, the particular questions disposed of by the Court of Appeals of the State of New York in the Williams case will be reviewed by the Supreme Court of the United States.

Why should we wait until an appeal shall be taken from the supreme court of some State that, having enacted a similar law, has sustained its validity? Why not let the appeal go at once from the Court of Appeals of the State of New York? As I see it, our present statute merely means delay, and does not, in fact, conserve to the State any prerogative.

It is not my purpose to detain the committee at any further length upon this subject, other than to ask that there be printed as a part of the hearings upon this question a paper prepared by Prof. W. F. Dodd, and which was published in the December number of the Illinois Law Review. Prof. Dodd is assistant professor of political science in the University of Illinois, and his paper is most illuminating upon this subject.

In talking with Prof. Dodd last summer he told me of his interest in this subject, and I urged him to prepare a statement or paper upon the question setting forth his views. I am sure that the committee and the Members of Congress or those who may be interested will find his discussion of exceedingly great value in connection with this subject:

The United States Supreme Court as the Final Interpreter of the Federal Constitution.[1]

[By W. F. Dodd, assistant professor of the University of Illinois.]

In every governmental organization where there exist both a central legislature and legislatures for subordinate territorial divisions—and particularly in countries organized under a federal system—there must be somewhere power to prevent encroachment by the local legislatures upon the powers of the central legislature. In strict theory, encroachments upon the powers reserved to the local bodies should be guarded against as carefully as encroachments by these local bodies upon the powers of the central legislature. But if a central government under a federal organization is to exercise its powers effectively, it in any case must have authority to prevent the states from exercising powers which conflict with its own. As a practical proposition, the National Government in the United States must be able to maintain its supremacy when the States seek to exercise powers which have been conferred upon the National Government. In theory the States should be equally as free to maintain their supremacy in the fields reserved to them, but in the absence of some organ independent of both state and central governments which might decide questions of conflict, it has been usual in all modern federal governments to intrust the decision of such questions to some organ or organs of the central government. In this way a decision of the question in conflict is obtained and the supremacy of Federal law over that of the component States is maintained, but the deciding body is one apt to be more tender of the powers of the Federal Government than of the reserved powers of the States.[2]

A number of the members of the Federal convention of 1787 clearly perceived that if the new Government were to be an effective one, it should possess, through some one of its organs, power to annul conflicting State laws, and proposals were repeatedly urged which should expressly confer such a power upon the National Legislature, upon the courts, or upon a council of revision com-

[1] Reprinted from the December number of the Illinois Law Review.

[2] In subordinate Federal organizations, such as Canada and Australia, power may be vested in an independent organ of the British Imperial Government to preserve a balance between State and Federal powers, and the judicial committee of the English privy council actually exercises such power to a certain extent.

posed of the Executive acting with "a convenient number of the national judiciary."[1] Such proposals were rejected, and the only express provision of the Federal Constitution which seeks to establish the supremacy of the Federal Constitution and laws is the one which provides that—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."[2]

But it was quite clear that the National Government could not be effective if its powers were subject to conflicting interpretations by courts in 13 separate States, with the interpretation of the Federal Constitution and laws by the highest court of any State final and conclusive within the borders of that State. And in the third article of the Constitution it had been broadly declared that—

"The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

And after enumerating the cases in which the Supreme Court should have original jurisdiction, it was provided that—

"In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[3]

These provisions were assumed by many of the framers of the Constitution to authorize the review of State decisions upon Federal questions by the Supreme Court of the United States, and no constitutional objections seem to have been raised in 1789 to the passage of that section of the Federal judiciary act which provided for the review of such State decisions. Not until later was the question of constitutional power raised, and it was effectually set at rest by the decisions of the United States Supreme Court in Martin *v.* Hunter's Lessee (1816) and Cohen *v.* Virginia (1821).[4]

Section 25 of the Federal judiciary act of 1789 was repealed and reenacted with some changes in 1867, this revised form being substantially incorporated in the United States Revised Statutes as section 709. Somewhat amended again in 1875, the section now forms section 237 of the new Federal Judicial Code and reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title right, privilege, or immunity is claimed under the Constituton, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the right, title, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."[5]

A writ of error from the United States Supreme Court to the highest State court is given only where the decision in the State court is against the Federal right set up. Where the State decision sustains the Federal right, it is final and conclusive, and, in such a case, the State court is the final interpreter of the Federal Constitution and laws. The purpose of the Federal review was twofold: (1) To safeguard the powers of the United States, and (2) to safeguard the rights which individuals might claim under the Constitution, statutes, or authority of the United States.

[1] Hamilton's proposal that State governors should be appointed by the Federal Executive sought to accomplish th same purpose.
[2] Art. VI, clause 2.
[3] Art. III, sec. 2.
[4] Wheat., 304; 6 Wheat., 264. W. E. Dodd, Chief Justice Marshall and Virginia, 1813–1821, American Historical Review, XII, 776.
[5] 36 U. S. Statutes at Large, 1156 (Mar. 3, 1911).

The first of these purposes was well stated by Chief Justice Taney in Commonwealth Bank of Kentucky *v.* Griffith:

"The power given to the Supreme Court by this act of Congress was intended to protect the General Government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this court to reexamine the judgments of the State courts, where the relative powers of the General and State Governments had been in controversy, and the decision had been in favor of the latter. It may have been apprehended that the judicial tribunals of the States would incline to the support of State authority against that of the General Government; and might, moreover, in different States give different judgments upon the relative powers of the two Governments, so as to produce irregularity and disorder in the administration of the General Government. But when, as in the case before us, the State authority or State statute is decided to be unconstitutional and void in the State tribunal, it can not, under that decision, come in collision with the authority of the General Government; and the right to reexamine it here is not necessary to protect this Government in the exercise of its rightful powers. In such a case, therefore, the writ of error is not given."[1]

The power of reviewing State decisions granted by the judicial code is sufficient to prevent encroachments by the States upon the powers properly belonging to the Federal Government, and such was its primary purpose. As to the other purpose of review, that of safeguarding rights which may be claimed under the Constitution of the United States, the best statement is that made by Justice Story in Martin *v.* Hunter's Lessee:

"The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. Yet, if the construction contended for be correct, it will follow that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty we are referred to the power which it is admitted Congress possessed to remove suits from State courts to the national courts."[2]

To what extent does the Federal judicial code permit a final decision by the United States Supreme Court of claims of private right which may involve questions of Federal constitutional law? If a Federal question is set up in the State court and the decision of the State court upholds the Federal right set up, it is quite clear that there is no review by the United States Supreme Court,[3] although one of the parties to the suit in the State court is injured by such holding—the party against whom the Federal question is set up has no right to a final decision of this question by the highest Federal court, although he may be as much interested and his rights as much affected as is the other party. He may, perhaps, avoid this difficulty in some cases by bringing his action in an inferior Federal court, but usually he has not even this recourse, because if the action is a criminal action under a State law or an effort to enforce rights under such a law it must ordinarily be brought in the State court. To take a specific illustration, in the recent case of Ives *v.* South Buffalo Railway Co.,[4] Ives sought to recover compensation from the railway company under the New York compulsory workmen's compensation law, and this law was held invalid, in part as a violation of the Federal Constitution. Clearly, there were here three parties in interest: Ives, who desired to obtain compensation; the railway company, which desired to avoid payment of compensation; and the State, which desires a final determination as to whether an important policy which it has sought to inaugurate is in conflict with the Federal Constitution. Yet the railway company, had the decision gone against it in the State court, would have had a right of review by the United States Supreme Court. The State decision, however, was in

[1] 14 Peters, 56 (1840). See also Martin *v.* Hunter's Lessee, 1 Wheat., 304, 347, 348; Murdock *v.* Memphis, 20 Wall., 590, 631, 632; Missouri *v.* Andriano, 138 U. S., 496; Whitten *v.* Tomlinson, 160 U. S. 231, 238.
[2] 1 Wheat., 304, 348, 349.
[3] Murdock *v.* Memphis, 20 Wall., 590, 631–632.
[4] 201 N. Y., 271 (1911).

favor of the Federal constitutional right set up by the railway company, and this decision is final and conclusive upon Ives and upon the State. From what has been said above, it must appear that the review granted by the terms of the Federal judicial code does not permit a final decision of the Federal question by the United States Supreme Court (1) where an individual asserts a right under a State statute which is held by the highest State court to be a violation of the Federal Constitution, and (2) where the powers of a State and the interests of its citizens may be affected by the decision of a State court that a State law violates the Federal Constitution.

When the Federal judiciary act was first framed, it was assumed that the State courts would be too liberal in upholding State laws attacked as violative of Feberal rights; to quote Chief Justice Taney again, it was "apprehended that the judicial tribunals of the State would incline to the support of the State authority against the Federal Government," and there was thought to be need only of checking State encroachments on Federal power in this way, not of protecting the States themselves from State courts which might enforce Federal limitations more strictly than the United States Supreme Court itself. The condition assumed by Chief Justice Taney quite clearly existed until well into the nineteenth century, and probably until the freer use within recent years of the judicial power to annul legislation. But now we find that conditions have changed and that the States and their citizens really need the protection of the United States Supreme Court against the strict, and often illiberal, decisions of their own courts on Federal questions.

A State decision adverse to a State enactment on Federal grounds is final under the provisions of the Federal judicial code. On this account the State courts should resolve every doubt in favor of a State enactment in such case, and in this way permit a final decision of the question of Federal constitutional law by the highest Federal court. Prof. Thayer stated very clearly the rule which should be followed by State courts in such cases:

"As to how the State judiciary should treat a question of the conformity of an act of their own legislature to the paramount Constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the judiciary act an appeal does not lie from every decision; it only lies when the State law is sustained below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the coordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that it is necessary in order to preserve the right of appeal."[1]

Until recent years State courts seem to have followed the rule laid down by Prof. Thayer and to have taken a view favorable to State powers when such powers were questioned on Federal grounds. The strict attitude of the State courts has developed since the Supreme Court of the United States acquired, under the fourteenth amendment, a wide control over State legislation. This attitude may be said to be due in part (1) to the narrower outlook of many of the State courts as compared with the Federal Supreme Court, and (2) to the narrow view which the Supreme Court of the United States has taken in many cases, and to the doubt upon the part of State courts as to just how liberal they may dare to be. No court likes to be overruled on appeal, and a State court, in case of doubt, may often prefer to decide against a State law, thus settling the question finally, rather than to decide in favor of the law and run the risk of being overruled on appeal by the Supreme Court of the United States. State courts can not go beyond the United States Supreme Court in liberality toward State enactments, and this almost necessarily means that they will be too cautious in order to avoid decisions which may later be overruled on appeal.[2]

Under the terms of the judicial code State courts are, therefore, free to construe the Federal Constitution as they please, so long as they exercise their power to invalidate rather than to sustain State enactments. Some illustrations will indicate more clearly the present situation.

In State ex rel. Johnson *v.* Chicago, Burlington & Quincy Railroad Co.[3] there was under consideration a validly adopted State constitutional amendment

[1] Thayer, Legal Essays, 37–38.
[2] Some of the matter in the succeeding pages is taken from my book on the Revision and Amendment of State Constitutions, pp. 244–258.
[3] 195 Mo., 228 (1906).

permitting counties and townships to levy a special road and bridge tax, but from the provisions of the amendment were excepted the cities of St. Louis, Kansas City, and St. Joseph. The court held this amendment invalid as a deprivation of "equal protection of the laws" under the Federal Constitution, on the ground that it was a discrimination in favor of the excepted cities as against other parts of the State, and this, although other parts of the State were permitted, not required, to levy the tax. It is unthinkable to suppose that the amendment here under discussion would have been held invalid by the Federal Supreme Court on the Federal grounds assigned by the State court for its decision.

The New York Court of Appeals in People ex rel. Rodgers *v.* Coler,[1] and in People *v.* Orange County Road Construction Co.,[2] held invalid a State law regulating hours and conditions of labor on State and municipal public works, the court in the latter case saying, through Judge Cullen, that:

"The question is settled by the decisions both of this court and the Supreme Court of the United States."

About seven months after this utterance Justice Harlan, speaking for the Supreme Court of the United States upon a similar Kansas statute, said, upon the question raised as to its agreement with the Federal Constitution:

"Indeed its constitutionality is beyond all question."[3]

The Supreme Court of Utah in 1904 and the Court of Appeals of New York in 1905 declared invalid, as violating both the State and Federal Constitutions, State statutes restricting sales of stocks of merchandise in bulk, Judge Werner for the New York court saying:

"No one will have the temerity to suggest that this drastic and cumbersome statute is not a restraint of the rights of 'liberty' and 'property' as these terms have been judicially declared to have been used in the Federal and State Constitutions."[4]

The Supreme Court of the United States had the "temerity" in 1910 to hold that an almost identical law was not a violation of the Federal Constitution.[5]

The New York Court of Appeals in the case of State *v.* Lochner[6] took a very liberal attitude toward legislation regulating hours of labor in bakeries and upheld the legislation, but was overruled by the Supreme Court of the United States in Lochner *v.* New York.[7] In the later case of State *v.* Williams,[8] the State court, seeking to profit by its previous experience, took a very strict view and annulled State legislation forbidding night labor by women. The State court in this case took the ground that there was no constitutional warrant for making a discrimination between men and women, while the Federal Supreme Court in Muller *v.* Oregon,[9] decided but a short time afterwards, took a different view and sustained a law limiting the labor women to 10 hours. The argument adopted by the Federal court would probably also have sustained the New York statute, but the State decision in New York was final under the terms of the Federal judiciary act.

The Illinois Supreme Court in the case of Ritchie *v.* People[10] held invalid a State law limiting the labor of women to eight hours a day in factories and workshops. A law of this sort pretty clearly would not have been upheld by the United States Supreme Court in 1895, and it is doubtful if it would be upheld to-day, but the vice of this Illinois decision is that it took such a strict position against any legislation applicable simply to women as to prevent or rather discourage such legislation in Illinois for about 14 years. After the liberal position taken by the United States Supreme Court in Muller *v.* Oregon (1908) the Illinois Legislature was, in 1909, induced to pass a law limiting to 10 hours the labor of women in mechanical establishments, factories, and laundries. This law was then sustained by the State court, which distinguished its

[1] 166 N. Y., 1 (1901).
[2] 175 N. Y., 84 (1903).
[3] Atkin *v.* Kansas, 191 U. S. 207 (1903). After the Federal decision the State statute was again declared invalid as a violation of the State constitution, and the State court was overruled by a constitutional amendment of 1905. People ex rel. Cossey *v.* Grout, 179 N. Y. 417.
[4] Block *v.* Griff, 27 Utah 387 (1904). Wright *v.* Hart, 182 N. Y. 330 (1905). The Indiana statute held invalid in McKinster *v.* Sager, 163 Ind. 671 (1904), was in terms discriminatory and was for this reason properly held an impairment of Federal constitutional rights. The New York appelate division held valid in 1908 an amended bulk sales law. Sprintz *v.* Saxton, 126 App. Div. 421.
[5] Kidd *v.* Musselman, 217 U. S. 461. See also Lemieux *v.* Young, 211 U. S. 489.
[6] 177 N. Y. 145.
[7] 198 U. S. 45.
[8] 189 N. Y. 131 (1907).
[9] 208 U. S. 412 (1908).
[10] 155 Ill. 98 (1895).

decision from that of 1895, but the point of view of the two decisions is fundamentally different.[1]

The recent case of Ives *v.* South Buffalo Railway Co.[2] presents clearly some of the difficulties of the present situation. A compulsory workmen's compensation law has been declared invalid as a violation of the "due process of law" clauses of the Federal and State constitutions, whereas many persons think that the law would have been upheld by the United States Supreme Court as not a violation of the Federal Constitution. As suggested below, if the Federal question were out of the way, it would be possible by a constitutional amendment to overcome the opposition of the State court on State constitutional grounds, but under present conditions the State decision on the question of Federal constitutional law is final.

Of course the question will probably in time come to the United States Supreme Court. A compulsory workmen's compensation law has been enacted in Washington, and the recent New Jersey statute on the same subject has features which may be considered compulsory. Should either of these laws be upheld by the State courts, the matter may in the near future reach the Federal Supreme Court.[3] But should the State decisions be unfavorable, an immediate settlement of the question is impossible, although some one State court may finally be found which would sustain such a law and thus permit a final decision of the Federal question by the highest Federal court.[4] This process may take 10 years, and in the meantime the States are left in uncertainty as to their powers. They are, it would seem, entitled to know more promptly whether they have or have not power under the Federal constitution to establish a system of compulsory workmen's compensation or to exercise any other power which may be contested.[5]

But to what extent are the States at liberty to proceed to exercise the contested power, even after a final decision upon the Federal question has been obtained? Where the Federal Supreme Court has spoken, the State courts are in legal theory bound to follow it in their interpretation of the Federal Constitution, but there is no way in which this duty may be enforced in favor to State enactments, because no appeal lies to the United States Supreme Court if State enactments are declared invalid by the State court. In fact, State courts do not always follow the Federal Supreme Court in their interpretation of the provisions of the Federal Constitution. Then, too, no two acts are apt to be precisely alike, and a State court may plausibly hold an enactment invalid on Federal grounds if it varies in the slightest degree from a similar enactment upheld by the United States Supreme Court.

Over against the legal theory that State courts must follow the Supreme Court of the United States in their interpretation of the Federal Constitution, it may be well to place a recent statement of one of our most eminent State judges. The Supreme Court of Iowa had held invalid as an interference with interstate commerce a State statute prohibiting any person from soliciting, taking, or accepting "any order for the purchase, sale, shipment, or delivery of any liquors." After the decision of Delamater *v.* South Dakota[6] by the Supreme Court of the United States, it was contended that the statute was not a violation of the Federal Constitution as interpreted by the United States Supreme Court, and the State court, following the Federal decision, held the statute valid. But Judge McClain, in rendering the opinion of the court, used the following language:

"We are of course not bound to follow the views of the Supreme Court of the United States in passing upon the validity of our statutes further than that we recognize our obligation not to enforce a statute which is in violation of the Constitution of the United States. We are not bound, therefore, by any obligation imposed upon us in the Federal Constitution to uphold a State statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional. But on the other hand, when we have held a State

[1] **Ritchie *v.* Wayman, 244 Ill. 509 (1910).** For other Illinois cases of this character see a note by Prof. Henry Schofield in 3 Illinois Law Review 303.
[2] 201 N. Y., 271 (1911).
[3] The Washington law was upheld by the State supreme court in the case of State ex rel. Davis-Smith Co. *v.* Clausen, 117 Pac., 1101 (Sept. 27, 1911).
[4] Prof. Ernst Freund in the Survey, XXVI, 196 (Apr. 29, 1911).
[5] It may perhaps be suggested that in many cases it may be desirable in the interest of progressive measures to delay rather than to hasten a final decision by the United States Supreme Court—that a strict decision at first would retard development, while a more liberal opinion may be expected after a 10-year period of discussion and education. There may be something to this suggestion, but even at the first a more liberal opinion may perhaps be expected from the United States Supreme Court than from many State courts.
[6] 205 U. S., 93.

statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the Federal Constitution that the supposed conflict is found not to exist, there is no good reason why we should not change our ruling so as to sustain the policy of the statutes of the State."[1]

Prof. Schofield has stated the situation clearly:

"De facto the highest courts of the several States are, within the borders of their respective States, ultimate judicial expounders of the Constitution and laws of the United States, and as such they have the de facto, though not the de jure, power to shut their eyes to, refuse to follow, and go directly against decisions of the Federal Supreme Court expounding the Constitution and laws of the United States, subject to this important limitation, however, namely: That in the exercise of this de facto power, the courts of the several States confine their activity to pressing the screws of the limitations of the Constitution and laws of the United States down onto their respective States tighter than the Federal Supreme Court does."[2]

State courts are therefore in practice now free to construe the Federal Constitution as they please, so long as they exercise this power to invalidate rather than to sustain State enactments. They have absolute and final power to annul any State enactment on any Federal ground which they may assign. For example, in the recent case of Jordan *v.* State[3] the Texas court of criminal appeals held invalid, as a violation of the State and Federal Constitutions, a State law which made it unlawful for any person, firm, association, or corporation to pay laborers in checks or orders redeemable in goods or merchandise. The decision, based in large part on Federal grounds, entirely ignored the contrary holding in Knoxville Iron Company *v.* Harbison,[4] although discussing cases in which this decision had been summarized.

Summing up briefly the situation as to the review of State decisions by the United States Supreme Court, it may be said: (1) That individual rights involving a Federal question are not properly safeguarded, because the party who sets up the Federal question has a right of appeal if the decision goes against him, while the party against whom the Federal question is raised has no such right, although his interests may be equally affected; (2) a State, one of whose laws is contested as violating the Federal Constitution, has no way of obtaining from the United States Supreme Court a final settlement of the question should its own court decide against the validity of its law; (3) a uniform interpretation of the Federal Constitution is not obtained, because until a decision upon the particular question at issue is rendered by the United States Supreme Court, each State court is entirely free to interpret the Federal Constitution as it pleases, provided it employs its power to sustain Federal rights which may be claimed before it; and, even after a decision of the particular question is obtained from the United States Supreme Court, State courts still have the power to disregard such decision, so long as they interpret the United States Constitution and laws more strictly than does the highest Federal court.

This situation may, it seems, be remedied by an amendment to the present section 237 of the Federal judicial code, so as to permit a review by the Supreme Court of the United States of State decisions involving Federal questions, irrespective of whether the decision of the State court sustained or denied the Federal right set up; that is, by striking out the italicized words in this section, as quoted on page 291. The more serious difficulties of the present situation may, in fact, be obviated simply by striking out the words "and the decision is in favor of their validity" from the phrase, "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." The striking out of this clause would permit a final Federal decision in the most important series of cases in which such a decision is not now available, although many cases would remain in which a review by the United States Supreme Court would be desirable.

Three arguments will probably be offered in opposition to the above suggestion: (*a*) That such an amendment will increase Federal power, and correspondingly reduce the powers of the States; (*b*) that it will increase the work of the United States Supreme Court; (*c*) that the result aimed at would not be accomplished, because most State decisions holding State statutes invalid are

[1] McCollum *v.* McConaughy, 141 Iowa, 172 (1909).
[2] 3 Illinois Law Review 303.
[3] 51 Tex. Crim. App. Rep. 531 (1907).
[4] 183 U. S. 13 (1901).

based on both State and Federal constitutional grounds. It may be well to devote some attention to each of these arguments:

(*a*) The proposed amendment to the Federal judicial code does in fact enlarge the jurisdiction of the Supreme Court of the United States to review decisions of the highest State courts, and in this way diminishes to a certain extent the power of the State courts. But there can result from it no diminution of State powers as a whole, for the enlarged review would apply primarily where a State court has taken a narrow view of State powers, and would obtain a prompt determination as to whether a State legislature has, under the Federal Constitution, powers which the State court has alleged that it does not possess. No State court can at present take a more liberal view of State powers, under the Federal Constitution, than does the United States Supreme Court, for, if it does, an appeal may be taken to the highest Federal court. It is only when a State court restrains State legislative powers under the Federal Constitution that its decision is now final, and the State court in restraining State powers is itself limiting them. A right of appeal in such cases can result in only one of two conclusions: Either (1) the United States Supreme Court will affirm the State decision, denying the power of the State legislature, but in no way diminishing the power conceded to the State legislature by the State court; or (2) the United States Supreme Court will reverse the State decision and declare that the State legislature possesses, under the Federal Constitution, powers which the State court has said that it did not possess. The only result is either to concede to the State legislature powers which before it could not exercise because of the State decision, or to determine finally that, under the Federal Constitution, the State has not a power already denied to it by the State court.

Let us illustrate again from the recent case of Ives *v.* South Buffalo Railway Co.,[1] where the New York court of appeals held a compulsory workmen's compensation law invalid as a violation of the "due process of law" clauses of the State and Federal Constitutions. At present, this decision is final on both State and Federal constitutional grounds. A right of appeal would permit a final determination as to whether the law is actually a violation of the Federal Constitution, and, if not, the State would be able to overcome the decision on State grounds by a State constitutional amendment and to exercise the disputed power. A Federal decision here could not further limit State powers; it might, and, perhaps would, remove a limitation placed upon State power by the State decision.

(*b*) It can not, of course, be definitely determined to what extent an enlarged right of review under the suggested amendment would increase the work of the United States Supreme Court, and it must be agreed that this court is already overburdened. Confining our discussion for the moment to cases in which the Federal court might, under such an amendment, review State decisions holding invalid a State authority or statute as violative of the Federal Constitution, treaties, or laws, it is difficult to see how the work of the United States Supreme Court would be materially, if at all, increased. The important difference will be that the question will come to that court more promptly. For example, the question as to the validity of a compulsory workmen's compensation law will almost certainly come before the highest Federal court at some time, for some State court will be found liberal enough to uphold such a State enactment on Federal grounds, and to permit a review by the United States Supreme Court under the terms of the present judicial code. The question must be passed upon at some time; under the present judicial code, such a decision may be postponed for 10 years—under the proposed enlargement of Federal review, it could be decided more promptly.

As to cases in State courts involving questions as to the "validity of a treaty or statute of, or an authority exercised under, the United States," a grant of review where the decision is in favor of, as well as where it is against, their validity, would probably not increase materially the work of the United States Supreme Court, and the same would probably be true as to State decisions where "any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States." If there is serious question as to the constitutionality of any power exercised or sought to be exercised under the authority of the United States, this question must sooner or later be presented to the United States Supreme Court, by virtue of an adverse State decision, or through a proceeding commenced in the inferior Federal courts. The result

[1] 201 N. Y., 271 (1911).

here also would probably be a prompter settlement of such questions, rather than a material increase in the number of cases presented to the Federal Supreme Court.

(*c*) In order to discover whether the amendment suggested above to the Federal Judicial Code would accomplish the purpose aimed at, we must discuss somewhat fully the extent to which the United States Supreme Court takes or declines jurisdiction in cases brought from State courts under the terms of the present law.

In perhaps the greater number of cases in which the United States Supreme Court is asked to review State decisions, the State decision sought to be reviewed involves both a Federal and a State question. Inasmuch as the United States Supreme Court confines itself to the review of the Federal question only, that court has uniformly declined to consider a State case on its merits if the decision of the State court might properly have been sustained on non-Federal grounds, even though a Federal question were also presented and decided in such a way as to give jurisdiction. The rule is stated as follows by Justice Bradley:

"Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did in fact base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case, but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."[1]

Section 25 of the Federal judiciary act of 1789 contained the clause: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." This clause was omitted in 1867, and in the case of Murdock *v.* Memphis[2] the contention was advanced that this omission left all questions raised in the State court open to review by the United States Supreme Court on writ of error. Justice Bradley, in a dissenting opinion, contended that all questions, either State or Federal, should be reviewed by the writ of error, and a somewhat similar position was taken by Justices Clifford and Swayne; under these views the Federal question should have been reviewed, irrespective of whether there was adequate non-Federal ground for the decision of the State court. But a majority of the court took the opposite view, and Justice Miller in rendering the decision said:

"But when we find that the State court has decided the Federal question erroneously, then, to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or, on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court. * * *

"If it [judgment of State court involving Federal question] erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that

[1] Klinger *v.* Missouri, 17 Wall., 257 (1872). [2] 20 Wall., 590 (1875).

court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered or remand the case to that court, as the circumstances of the case may require."[1]

In order to indicate clearly the operation of this rule, it will be well to discuss several cases in which it has been applied by the United States Supreme Court. In the case of Giles *v.* Teasley,[2] Giles alleged that the provisions of the Alabama constitution of 1901, with respect to registration and voting, were a violation of the fifteenth amendment, and brought actions in the State courts—one to recover damages against the board of registrars of Montgomery County because of their refusal to register him as a qualified voter, and the other for a mandamus to compel his registration as a qualified voter. On demurrer, both suits were dismissed by the State courts, and writs of error were sought to the United States Supreme Court. The writs of error were dismissed because the United States Supreme Court thought there was sufficient non-Federal ground to sustain the State decision. This position was, perhaps, not open to question as far as concerns the application for mandamus, for Giles, himself contesting the legality of the registration board, could not, as the State court said, have mandamus to compel action by a body which he alleged to be unlawful. As to the action for damages, the position of the United States Supreme Court will sufficiently appear from a statement in the opinion of the court, as rendered by Justice Day:

> The first ground of sustaining the demurrer is, in effect, that, conceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which had for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise. In such a decision, no right, immunity, or privilege, the creation of Federal authority, has been set up by the plaintiff in error and denied in such wise as to give this court the right to review the State decision. In the ground first stated we are of the opinion that the State court decided the case for reasons independent of the Federal right claimed, and hence its action is not reviewable here."

The State court assuming, simply for the purpose of argument, that the State provisions were invalid, said, in effect, that an interference with a Federal right under an unconstitutional State enactment is not an interference with a Federal right, and the United States Supreme Court said that this constituted a sufficient non-Federal ground to sustain the decision. The Federal court overlooked entirely the fact that Giles had been deprived of an alleged Federal right under color of State authority and that the State court had decided against him. This question was clearly a Federal question which formed the whole ground of the State decision with respect to the action for damages. The argument adopted by the United States Supreme Court would permit it to avoid the review of any Federal question presented.

The recent case of Berea College *v.* Kentucky[3] presents another illustration of what the United States Supreme Court considers a sufficient non-Federal ground to sustain a State decision without making necessary a review of the Federal question. In this case there was involved a Kentucky statute making it unlawful for "any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction." Berea College contested the validity of this statute as a deprivation of "due process of law" under the fourteenth amendment; the statute was sustained by the State court, and the case was brought to the United States Supreme Court on writ of error. The United States Supreme Court, in an opinion rendered by Justice Brewer, declined to consider the Federal question raised, but affirmed the State decision on the ground that the State law might properly be considered an amendment to the corporate charter of Berea College, and that this presented a sufficient non-Federal ground to support the decision of the State court. Justice Harlan's dissenting opinion seems more satisfactory, in its view that the State statute was not separable so as to be applied to corporations only, and that the case

[1] 20 Wall., 635, 636. Chief Justice Waite took no part in this decision. *See also* Eustis *v.* Bolles, 150 U. S., 361 (1893).
[2] 193 U. S., 146 (1904).
[3] 211 U. S., 45 (1908).

fairly raised the Federal question as to whether it is "due process of law" to forbid the coeducation of whites and negroes.

But the cases of Giles *v.* Teasley and Berea College *v.* Kentucky involved questions as to the social and political rights of negroes, subjects upon which the United States Supreme Court has uniformly shown itself loath to pass. The case of Steamboat Navigation Co. *v.* Reybold[1] may also throw some light on what is regarded as a sufficient non-Federal question to sustain a State decision. Reybold, in violation of a Federal statute, obtained an assignment from the steamboat company of a claim which it had against the United States, and through Reybold's efforts the claim was collected and paid to the company. He then sued to recover the money on two counts: (1) For money had and received and (2) on a quantum meruit, for work and labor performed. The lower court charged in favor of Reybold on both counts, and the jury returned a verdict for Reybold, but for a sum slightly less than that collected from the United States. This judgment was affirmed by the highest State court and the case brought to the United States Supreme Court on writ of error. This court, speaking through Justice Lamar, held that the non-Federal ground of quantum meruit was sufficient to sustain the judgment; and that the case, therefore, did not necessarily involve any question under the Federal statute forbidding the assignment of claims. The court overlooked the fact that Reybold recovered substantially the whole amount which he might have recovered had the assignment of the claim been valid, and that the position taken in this case would permit a complete evasion of the purpose of the Federal statute.

The bearing of the above discussion upon the subject here under consideration will be appreciated when it is suggested that State decisions declaring State laws invalid are frequently, perhaps usually, based on both State and Federal constitutional grounds. Practically all the State constitutions contain guaranties substantially equivalent to that of the fourteenth amendment, "that no person shall be deprived of life, liberty, or property without due process of law." Now, the State courts are the final judicial interpreters of their State constitutions, and "due process of law" in any State constitution means what the court of that particular State interprets it to mean.

Under these conditions it is perhaps not surprising to find that "due process of law" often means one thing in one State and another thing in some other State, and that it means something still different as interpreted by the Supreme Court of the United States. Under State constitutional provisions identical with, or substantially equivalent to, those in the fourteenth amendment, State courts have frequently annulled legislation when similar legislation has been upheld by the United States Supreme Court.

So, in Colorado an eight-hour day for miners and smelters was held to be a violation of the State constitution, although upheld by the United States Supreme Court as not violative of the Federal Constitution.[2] Under the Federal "due process of law" clause it is not unlawful to forbid payment of wages in store orders not redeemable in cash, but under a practically identical clause in Missouri such action is unlawful.[3] Under the Constitution of the United States it is not improper to require that coal be weighed before screening in order to determine the wages of miners, but under similar State constitutional provisions such legislation is invalid in Illinois, Ohio, and Pennsylvania.[4] Laws placing limitation upon the sale of stocks of merchandise in bulk are not violative of the "due process of law" clause of the Federal Constitution as interpreted by the United States Supreme Court, but do violate similar provisions in the State constitutions of Ohio and Illinois.[5] A law regulating hours and conditions of labor on State and municipal public works in New York was at first held invalid as violating both the State and Federal Constitutions; a decision of the United States Supreme Court then held such a law not violative

[1] 142 U. S., 636 (1892).
[2] Holden *v.* Hardy, 160 U. S. 366 (1898); in re Morgan, 26 Colo., 415 (1899).
[3] Knoxville Iron Co. *v.* Harbison, 183 U. S. (1901); State *v.* Missouri Tie & Timber Co., 181 Mo., 536 (1904).
[4] McLean *v.* Arkansas, 211 U. S., 539 (1909); Millet *v.* People, 117 Ill., 294 (1886); Ramsey *v.* People, 142 Ill., 380 (1892); Harding *v.* People, 100 Ill., 459 (1896); In re Preston, 63 Ohio St., 428 (1900); Commonwealth *v.* Brown, 8 Pa., Super. Ct., 339 (1897). The Ohio case appears to be in part based on the Federal Constitution, as was also the Colorado advisory opinion, In re House bill No. 203, 21 Colo., 27 (1895). It should be noted that these State decisions antedate by a number of years the decision of the United Stats Supreme Court. The statute involved in Harding *v.* People, 160 Ill., 459, was discriminatory, but perhaps no more so than that involved in McLean *v.* Arkansas.
[5] Lemieux *v.* Young, 211 U. S., 489 (1909); Kidd *v.* Musselman, 217 U. S., 461 (1910); Miller *v.* Crawford, 70 Ohio St., 207 (1904); Off *v.* Morehead, 235 Ill., 40 (1908). The Ohio statute, however, was stricter than those upheld by the United States Supreme Court.

of the Federal Constitution, and a subsequent decision of the New York Court of Appeals declared the same statute invalid as a violation of the State constitution; and the Supreme Court of Ohio also holds similar legislation to be violative of State constitutional provisions not dissimilar from those in the fourteenth amendment.[1]

In some States, as, for example, in Illinois, decisions as to "due process" and the "equal protection of the laws" are usually based on the State constitutional provisions alone, and results are reached which limit State legislative action to a much greater extent than would the similar Federal clause as interpreted by the United States Supreme Court.[2] Since the fourteenth amendment has placed private rights under the protection of the Federal Constitution the power of State courts to annul legislation on State "due process" and "equal protection of the laws" clauses has ceased to be of any advantage for the protection of private rights. The power of State courts, on the basis of such State provisions to annul State enactments, may under present conditions be likened to a fifth wheel on the governmental coach. Such State constitutional provisions and State decisions based upon them perform no useful function in protecting individual rights; they simply serve to retard a final and uniform settlement of questions of public policy in so far as they are dependent upon constitutional construction. A conservative or reactionary State court may, under present conditions, block for a while legislation approved by other State courts and by the United States Supreme Court, but even though such action may at times prove of advantage, the advantage is much more than offset by the distrust of the courts resulting from it.

But under the present situation we have both Federal and State constitutional guaranties as to "due process of law" and "equal protection of the laws," and a State court, in declaring a State law invalid, may base its decision upon both of these guaranties or upon either of them. If a State court bases its decision on a State constitutional provision alone, such decision may be overcome by a State constitutional amendment, if the people are sufficiently interested to do this, and the power denied by the State court as a violation of the State constitution may be placed in the State constitution itself. Such a proceeding was resorted to in Colorado to overcome the decision In re Morgan, and in New York to overcome decisions in that State with respect to labor on public works,[3] and action of this sort is possible in all States except those whose constitutions, as in Illinois, are practically unamendable.

Under present conditions if a State court held a statute invalid as a violation of the State constitution or as a violation of both State and Federal Constitutions, the people of the State may overcome the court's State grounds by a constitutional amendment, but the State court may then hold the State constitutional amendment invalid as a violation of the Federal Constitution, and such decision is final.[4] So that, by its State constitutional amendment, no advance would have been made. If a State court declares a State statute invalid on Federal grounds alone, such a decision, as has already been suggested, is not now open to review by the United States Supreme Court, but would become so under the amendment proposed in this paper to the Federal judicial code.

But if a State law is declared invalid on both State and Federal grounds, what will be the situation if the judicial code is amended in accordance with the suggestion made above? Let us take again, by way of illustration, the situation presented by the recent decision of the New York court of appeals in the case of Ipes *v.* South Buffalo Railway Co.[5] Here the decision is based on both State and Federal grounds, but in the conclusion of the opinion of the court Judge Werner said:

"How far these late decisions of the Federal Supreme Court[6] are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare we are not prepared to decide. All that is necessary to affirm in the case before us is that in our view

[1] People ex rel. Rodgers *v.* Coler, 166 N. Y., 1 (1901); People *v.* Orange County Road Construction Co., 175 N. Y., 84 (1903); Atkin *v.* Kansas, 191 U. S., 207 (1903); People ex rel. Cossey *v.* Grout, 179 N. Y., 4 (1904); Cleveland *v.* Clements Bros. Construction Co., 67 Ohio St., 197 (1902).

[2] See Starne *v.* People, 222 Ill., 189 (1906), and Massie *v.* Cessna, 239 Ill., 352 (1909).

[3] For other cases of this character see my Revision and Amendment of State Constitution, 238, 239.

[4] In State ex rel. Johnson *v.* C., B. & Q. R. R., 195 Mo., 228 (1906), the State court held a State constitutional amendment invalid on Federal grounds which appear not well taken, but the decision was final. In the cases referred to above of constitutional amendments overcoming State decisions on State constitutional grounds, the Federal constitutional questions had already been settled by the United States Supreme Court.

[5] 201 N. Y., 271 (1911).

[6] In bank guaranty cases, Noble State Bank *v.* Haskell, etc., 219 U. S., 104–127 (1911).

of the constitution of our State the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."

And Chief Justice Cullen, in a concurring opinion, said that—

"The decision in the Noble Bank case is not controlling upon this court in the construction of the constitution of our own State."[1]

Clearly this decision is based in large part on the State constitution, and announces the view that "due process of law" in the State constitution is different from "due process of law" in the Federal Constitution. But both clauses are involved. As already suggested, this decision is, under present conditions, conclusive as to both State and Federal questions. But let us assume for the moment that the judicial code has been extended so as to give the United States Supreme Court power to review State decisions on Federal questions, irrespective of whether the decisions below were in favor of or opposed to the Federal ground set up, and that an amendment to the State constitution expressly authorizes compulsory workmen's compensation.[2] The State court, if it again holds the State enactment invalid, must do so on Federal grounds alone, and the enlarged right of review would permit the case to be taken promptly to the United States Supreme Court for a final decision of the Federal question.

But the original decision having been based on both State and Federal grounds, is there no way by which the Federal question alone may be presented to the United States Supreme Court for review and a decision obtained as to the State's powers under the Federal Constitution before the State resorts to the long and cumbersome process of amending its constitution? For before resorting to the amending process a State would prefer, if possible, to know whether an amendment will be worth while or whether the proposed legislation will be held by the United States Supreme Court to be a violation of the Federal Constitution. Now, inasmuch as a Federal question was directly passed upon in Ives *v.* South Buffalo Railway Co., let us suppose that Ives seeks to obtain a review by the Federal Supreme Court, again assuming that the judicial code has been amended so as to confer jurisdiction where the decision of the State court was in favor of the Federal right set up and against the validity of the contested State law. What would the United States Supreme Court do under the principle of Murdock *v.* Memphis? It would dismiss the writ of error for the reason that there was sufficient non-Federal ground to sustain the decision of the State court, and the question of Federal constitutional law would remain undetermined.

The Federal Supreme Court will decline to consider the Federal question where a non-Federal question is found to furnish a sufficient basis for the State decision. A State "due process" clause and the Federal "due process" clause being both made the basis of decision in the State court, the non-Federal ground is sufficient for the disposition of the case, and the United States Supreme Court would decline, for this reason, to exercise its power of review. And the non-Federal ground being clearly sufficient to support the case, the Federal question may be considered merely a moot question upon which Congress, under the principle of the separation of powers, has no authority to require a decision by the United States Supreme Court. A suggestion made by the minority of the court in Murdock *v.* Memphis presented another possible way of having the United States Supreme Court review the Federal question on a writ of error, even though the non-Federal question were sufficient to dispose of the case. Here three members of the court contended that the judiciary act as altered in 1867 brought the whole case decided in the State court to the United States Supreme Court for review, and that if the Federal question were found to be wrongly decided all questions, whether Federal or non-Federal, should be subject to review. In such a view all Federal and also all State questions might be reviewed. But the majority of the court took the view that such an enlargement of the power of review was not intended by the act of 1867. Suppose, however, that Congress should clearly enact that in cases brought to the United States Supreme Court on writ of error from State courts all questions, both Federal and non-Federal, should be subject to review. This would quite clearly extend the appellate power of the Federal Supreme Court over purely State questions not covered by the constitutional grant of jurisdiction to the Federal courts, and it is doubtful whether the mere presence of a Federal question in the case could be relied upon to give power to pass upon

[1] 201 N. Y., 271, 298, 317, 319.

[2] In New York proposals to amend the State constitution are already under way.

questions not otherwise within the jurisdiction of the United States Supreme Court.[1]

It may be said, then, to be very doubtful whether jurisdiction can be vested in the United States Supreme Court, on writ of error to a State court, to consider a Federal question when the State decision may properly be sustained on non-Federal grounds alone. But in a great number of cases, in which State courts declare laws invalid, the question of Federal constitutional law is bound up with that of State constitutional law. As to such cases, the proposed amendment to the Federal Judiciary Code would accomplish merely this: Should a State constitutional amendment be adopted for the purpose of overcoming a State decision, a subsequent State decision holding such an amendment to be a violation of the Federal Constitution would be subject to review by the United States Supreme Court. A final decision of the highest Federal court as to Federal constitutional questions could be obtained in two classes of cases: (1) Those in which the original State decision adverse to State authority is based solely or primarily on Federal constitutional grounds. (2) Those in which a State enactment has been placed in the State constitution, so that it is necessary that a State judicial decision adverse thereto be based entirely on Federal constitutional grounds.

And this would accomplish, in great degree, the desired result of making the United States Supreme Court the final interpreter of the Federal Constitution. The difficulties presented by a double series of identical or almost identical constitutional limitations are not overcome, and in each case a State decision on State constitutional grounds may have to be overcome by a long and cumbersome process of State constitutional amendment. Again, in a number of States the machinery for constitutional amendment is so cumbersome as to be practically unworkable, and in such States the people may be practically helpless, no matter how narrow an attitude the State courts may take in the interpretation of the State constitutions. But such cases are not numerous, and in all the States a fair degree of ease in altering State constitutions may finally be attained. Better still, the States, in amending their consitutions or in framing new constitutions, may omit from them the broad guaranties of "due process" and "equal protection of the laws." As has been suggested above, such guaranties in our State constitutions have proven useless, and wore than useless since the nationalization of private rights by the Fourteenth Amendment of the Federal Constitution.[2]

SUPPLEMENTAL NOTE.

The Constitution says that "the judicial power [of the United States] shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority." It may be argued that Congress has no power to extend the jurisdiction of the United States Supreme Court to hear cases on appeal from State courts, as suggested in this article; that the person against whom the Federal constitutional question is set up and against whom that question is decided in the State court has no case arising under the Constitution of the United States, because he has no right which is granted or safeguarded by Federal constitutional law. It is extremely doubtful whether the words "cases arising under the Federal Constitution" can be so limited as to mean "cases involving rights granted by the Federal Constitution." To illustrate again by the case of Ives *v.* South Buffalo Railway Co., assuming that only a Federal question is involved, the argument suggested above would be as follows: Ives claimed no right which is granted or safeguarded by the Federal Constitution; he merely claims under a State law, and his claim is based entirely upon rights sought to be conferred by that State law. The law has been declared unconstitutional by the State court as a violation of the Federal Constitution, it is true, but it is urged that he has no case arising under the Federal Constitution, because he has no right which is granted by that instrument. But he has a claim the determination of which depends upon the Federal Constitution, and if he had an appeal to the United States Supreme Court that court would dispose of the case finally. There is clearly "a case arising" under the Constitution of the United States, as this language is ordinarily used; for there is a case involving a final interpretation of the Federal Constitution, and one the decision of which determines rights at issue between the parties to the suit.

"What constitutes a case thus arising was early defined in the case cited from 6 Wheaton—Cohen *v.* Virginia. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either." (Justice Strong, speaking for the court in Tennessee *v.* Davis, 110 U. S., 257.)

But even if the language of Article III, section 2, does not expressly include such a case, this is not conclusive as to the Federal power to enlarge the appellate power of the United States Supreme Court, as referred to above. Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (Art. I, sec. 8.) It would be appropriate under this clause for Congress by legislation to assure the uniform interpretation of the Federal Constitution and to prevent one's being deprived of rights by an erroneous interpretation of the Constitution in a State case. In this way would be guaranteed the supremacy of Federal law expressly provided for by Article VI, and clearly implied throughout the United States Constitution.

The question here raised has never been passed upon and can not arise so long as the judicial code remains as it is now, but in Martin *v.* Hunter's Lessee and Cohen *v.* Virginia decisions were based in part upon the importance of having a uniform interpretation of the Federal Constitution and laws, and the obtaining of such a uniform interpretation in cases involving the Federal Constitution is within the implied if not within the express powers of Congress. If the power to enact such a law may be said to be one within the competence of Congress, a case arising under it then is clearly one "arising under" the Constitution or laws of the United States.

[1] The point referred to in the text above is simply that as to whether congressional legislation can vest in the United States Supreme Court power to review all questions presented in a case coming from a State court by a writ of error, and in thus reviewing all questions presented, either State or Federal, to review the decision in so far as it is based on Federal ground, even if there be sufficient non-Federal ground. The position of the minority in Murdock *v.* Memphis, however, is broader than this and lends support to the notion that where a Federal question is involved sufficient to give jurisdiction on writ of error to the highest State court, Congress may confer upon the United States Supreme Court power to determine finally the State questions involved, to interpret for itself independently the constitutions and laws of the States, even though in their interpretation no Federal question is involved. The United States Supreme Court declined to pass upon the question as to whether this may be done (20 Wall., 633, 641). Should the view of the minority in this case ever be adopted, and should Congress expressly extend the United States Supreme Court's power of review in accordance therewith, the State courts would be to a large extent displaced as final interpreters of State constitutions.

[2] This article was prepared during the summer of 1911 at the suggestion of some Members of Congress who had become interested in the proposed amendment of the Federal Judicial Code. A recommendation identical to that contained in this article was made to the American Bar Association during the latter part of August by its special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation; and this recommendation was unanimously approved. The American Bar Association, therefore, now stands committed to the proposal to strike from section 237 of the Federal Judicial Code the limiting words which are italicized on page 291 of this article, and bills for this purpose are now pending in the Senate and House of Representatives.

79084—13——5

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PAUL HOWLAND, Ohio.
FRANK M. NYE, Minnesota.
GEORGE W. NORRIS, Nebraska.
FRANCIS H. DODDS, Michigan.

J. J. SPEIGHT, *Clerk.*
C. C. BRANNEN, *Assistant Clerk.*

REFORMS IN LEGAL PROCEDURE.

AMERICAN BAR ASSOCIATION BILLS, H. R. 16459, H. R. 16460, AND H. R. 16461, TO ALLOW AND REGULATE AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES; H. R. 16808, TO AMEND THE JUDICIAL CODE.

SERIAL NO. 2.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 29, 1913—10.20 o'clock a. m.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

STATEMENT OF MR. EVERETT P. WHEELER.

The CHAIRMAN. The committee will be in order. The chairman of the committee had sometime ago agreed that Mr. Wheeler and his associates might be heard very briefly this morning on two measures—I believe it is only two—the American Bar Association desires. Mr. Wheeler.

Mr. WHEELER. Mr. Chairman and gentlemen of the committee, we simply want to remind the committee——

The CHAIRMAN. Mr. Wheeler, of course we all know you, but I wish you would give to the stenographer, so that he may have it, your name and address and in what capacity you appear.

Mr. WHEELER. Everett P. Wheeler, of New York City, chairman of the committee of the American Bar Association on Reform of

Judicial Procedure, and I am here by the unanimous instruction of the association.

I appear in support of two bills that have passed the Senate and are now before this committee; that is to say, Senate bill 3749 and Senate bill 4029. Now, the first is the appeal bill. That allows the Supreme Court to grant a writ of certiorari to review a decision of the State court that a State statute is in violation of the Constitution of the United States. The need for this arose from the difference of opinion in the State courts as to workmen's compensation bills. The Ives case, in New York, as you know, held that our State statute was unconstitutional. Now, in other States—right across the river in New Jersey, and in Wisconsin, and in the State of Washington—the courts have come to a different conclusion, and yet there is no way of bringing a review of the decision in the Ives case to the Supreme Court of the United States. Now, it certainly seems unjust that the Constitution should mean different things in different States.

Mr. HOWLAND. They have different laws.

Mr. NORRIS. But the Ives case could not be reviewed by the Supreme Court, could it?

Mr. WHEELER. But the New Jersey case and the Washington case have not been decided by the other courts. It could be, but no one has seen proper to review it. We are not satisfied in New York with the decision, and we would like to review it if we could, and this allows the Supreme Court to grant a certiorari; it doesn't give a right to a writ of error, but it allows it, and we know by experience with that court that it only grants certioraris in really important cases. It does seem to us that it is the great function of that court to interpret the United States Constitution and to make it uniform throughout the country.

That is all, I think, that I need to say in reference to that bill, beyond what we have already said, all of us, last January.

Then there is the law and equity bill, which is Senate bill 4029, which allows an equitable defense to be set up in an action at law, and allows the court, in case an action is wrongly brought at law, to transfer it to the equity side without the necessity of bringing a new suit. The Supreme Court, since we were here in January, has made a rule allowing the converse; that is to say, they have jurisdiction to make equity rules——

The CHAIRMAN. Mr. Wheeler, pardon me one minute. To which bill are you now speaking?

Mr. WHEELER. I am now speaking of Senate bill 4029, the law and equity bill. That was House bill 16460. That has passed the Senate in exactly the form it was introduced in the House by yourself—Senate bill 4029 and House bill 16460.

The CHAIRMAN. Now, what has become of House bill 16460 in the Senate?

Mr. WHEELER. It passed the Senate, but it never has passed the House. It comes to you, therefore, as a Senate bill.

The CHAIRMAN. House bill 16460?

Mr. WHEELER. Precisely. The House bill has not passed the House; it has never been reported out of this committee.

The CHAIRMAN. Well, Mr. Wheeler, the House bill on this subject, allowing the transfer of a cause from the equity side to the law side of the docket, was reported by this committee.

Mr. WHEELER. Yes; but that did not cover the converse: that did not allow an equitable defense to be set up in an action at law.

The CHAIRMAN. I want to get at the status of the particular measure. Now, that bill that passed the House, you say, also passed the Senate?

Mr. WHEELER. No; the bill that you have just referred to, which allowed a bill in equity——

The CHAIRMAN. H. R. 16460.

Mr. WHEELER. Well, that bill has not been reported by this committee. It was another bill; there were two bills in the House.

The CHAIRMAN. Well, then, 16461?

Mr. WHEELER. That is the technical-error bill. That did pass the House and that has been reported favorably in the Senate, and we are trying to get it to a vote there, but under the courtesy of the Senate that is sometimes a little difficult. But that has been reported favorably in the Senate.

The CHAIRMAN. You are not asking us to further consider that particular bill?

Mr. WHEELER. No; not at all. That has passed the House.

The CHAIRMAN. That is one of the bills that your association wanted passed?

Mr. WHEELER. Recommended; that is it exactly; but we have nothing to say to the House about that, because they have passed it; and it is only the other two that have passed the Senate that we are anxious to get reported out from this committee.

The CHAIRMAN. And they are what numbers?

Mr. WHEELER. The Senate bill is No. 3749, which is amended House bill 16459—I don't know which numbers you would rather I would give you, and I, therefore, give you both. Senate bill 3749——

The CHAIRMAN. Which is House bill 16459?

Mr. WHEELER. Yes; only it is an amendment. It gives the review by certiorari instead of by writ of error.

The CHAIRMAN. Are you asking us to take up and consider S. 3749 in lieu of H. R. 16459?

Mr. WHEELER. That is it exactly; and I am asking you to take up Senate bill 4029 instead of H. R. 16460.

The CHAIRMAN. And are those bills identical—the House and the Senate bills—the last two referred to? I say, are they identical?

Mr. WHEELER. The last two are identical. The former has been amended in the Senate, as I said, by giving review in certiorari. We feel very confident, Mr. Chairman and gentlemen, that if these bills are reported they will pass the House; there has been such a general expression in the newspaper press and from organized bodies in favor of them that we feel that if your committee can bring them to a vote and report them we may hope to see them enacted into law, which will, we are sure, be a great public benefit.

The CHAIRMAN. I may say that several bills relating to the process of the court, looking to better administration of public justice, have been passed by this committee and passed the House, and they are now under fire in the Senate Committee on the Judiciary. The President has talked with me about one of them, and the Attorney General about several of them. We are unable to get the Senate to act with very much speed, I might say, on some of these measures that this committee, the House itself, and the President, and the

Attorney General deem of importance; and I do not know what the views of the committee are, but until the Senate has acted on some of these measures to which I understand there is no objection, I do not feel like taking up the Senate bill and rushing it through here. I think that this committee is entitled to some deference, and I do not see why we should do all the deferring and nobody defer to us.

Mr. WHEELER. Well, as I say, the Judiciary Committee of the Senate has reported this bill which you ask about, favorably, and we are hoping that it will be brought up—both the Senators from New York have interested themselves in it, and have assured us that they will do their best to bring it to a vote.

The CHAIRMAN. The Senate is always quite willing for us to take what it does, and to put it through with the utmost haste, I might say, but they do not seem inclined to consider always what we want to have; so much so that in one case, particularly, the President called my attention to the fact that a bill which he favored very much, and the Department of Justice favored, had not been acted on.

I thought it was due to the committee to make this statement. Of course you have nothing to do with that, and we are going to do our best to accommodate you and to meet the views of the American Bar Association as far as we can. We have been considering these matters which you have suggested to us before, and what you have said to us has been of very great assistance to us, but it seems that when you illuminate us and we act, there is no action had in the Senate, and we are asked to pass Senate bills and the Senate doesn't pass any House bills—or rather, does not pass some that we deem quite important.

Mr. WHEELER. Well, I am very glad to be able to say that in the case of these reform bills, one of them has been reported favorably in the Senate, and these others, as I have said, have been passed. They were the same as the bills introduced here, so that I hope what ever difficulty there may be in further laws of reform, we may not lose these important efforts.

We are very much indebted to the committee for giving us this time, and we trust that the bills may be reported.

The CHAIRMAN. The committee is indebted to you and your associates for the explanation of these matters, not only to-day, but those you have made heretofore.

The following statement was submitted by Mr. Wheeler for incorporation in the record:

STATEMENT OF POSITION OF AMERICAN BAR ASSOCIATION BILLS.

S. 3749 (H. R. 16459) is the appeal bill. This allows a writ of certiorari from the Supreme Court in cases arising under the United States Constitution, when the decision of the highest court of the State is against the constitutionality of the State statute. It has passed the Senate.

S. 3750 (H. R. 16461) is the technical error bill. This provides that judgment shall not be reversed for technical errors that do not affect the merits, and that the judge in the Federal court may take verdict on the facts, reserving questions of law. It has passed the House, and been amended in Senate committee so as to apply only to civil cases. It was reported favorably to the Senate August 24, 1912. (S. Rept. 1066.)

S. 4029 (H. R. 16460) law and equity bill. This allows the Federal court to transfer a case from the law to the equity docket and vice versa, and permits equity defenses to be set up to suits at law. It has passed the Senate.

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PROCEDURE IN THE UNITED STATES COURTS

HEARING

BEFORE A

JOINT MEETING OF SUBCOMMITTEES

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SIXTY-SECOND CONGRESS

ON

BILLS S. 3749 AND S. 3750

BOTH INTRODUCED BY SENATOR NELSON (BY REQUEST)
DECEMBER 13, 1911

AND

S. 4029

INTRODUCED BY SENATOR ROOT DECEMBER 27, 1911

ALL RELATING TO PROCEDURE IN THE
UNITED STATES COURTS

JANUARY 25, 1912

Printed for the use of the Committee on the Judiciary

WASHINGTON
GOVERNMENT PRINTING OFFICE
1912

SUBCOMMITTEE ON S. 3749 AND S. 3750

SENATORS ROOT, BROWN, AND CULBERSON

SUBCOMMITTEE ON S. 4029

SENATORS ROOT, BORAH, AND RAYNER

PROCEDURE IN THE UNITED STATES COURTS.

JANUARY 25, 1912.

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

The subcommittees met in joint session at 3 p. m.

Present: Senators Root (chairman of both subcommittees), Borah, and Culberson.

Also present: Representing the American Bar Association, Everett P. Wheeler, Esq., of the New York bar; Russell Whitman, Esq., of the Chicago bar; and R. E. L. Saner, Esq., of the bar of Dallas, Tex.

Senator ROOT (chairman). There are gentlemen present representing the American Bar Association who desire to be heard on three bills pending before the Judiciary Committee. Two of the bills are in the hands of a subcommittee of which Senator Culberson and I are members, and one of them is in the hands of a subcommittee of which Senator Borah and I are members. Senator Rayner has stated to me that we may vote him in favor of Senate bill 4029. If you have no objection, Senator Culberson, we will let these gentlemen take that bill up first.

Senator CULBERSON. I have no objection if that is agreeable to these gentlemen who are here.

The bill (S. 4029) is as follows:

[S. 4029, Sixty-second Congress, second session. In the Senate of the United States. December 21, 1911. Mr. Root introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL To amend chapter 11 of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the Judicial Code, entitled "Provisions common to more than one court," shall be amended by adding at the end thereof new sections, to be known as sections two hundred and seventy-four A and two hundred and seventy-four B, to read as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

Senator ROOT. The two sections which it is proposed by this bill to add to the present law are designed to prevent the miscarriage of justice which sometimes occurs by reason of the fact that people get into court on the equity side when they ought to be on the law side or vice versa; and to authorize equitable defenses in common-law actions. Mr. Wheeler, we should be very glad to hear anything on that.

STATEMENT OF EVERETT P. WHEELER, ESQ., OF NEW YORK.

Mr. WHEELER. Senators, it gives me pleasure to say a few words on behalf of these amendments. Our experience has shown us, as members of the American Bar Association, practicing in the Federal courts, that there is sometimes a miscarriage of justice by reason of a mistake in the beginning of a suit. It seems a very simple thing whether you shall write the words "at law" at the top of the first page of your declaration, if it be a declaration, or "in equity" on your bill, or "in admiralty" on your libel.

All that is required in Federal courts to put the case in the one branch or the other is to say "At law" or "In equity" or "In admiralty"; and yet we do sometimes find that if there is a mistake in that, and the lawyer gets the wrong word in, it is very serious in its result under the present practice. Usually the suit must be dismissed, and you must begin all over again. Sometimes the statute of limitations runs before you can begin the new suit. At any rate, there is great delay and additional expense.

There seems to be no reason why in such a case you should not be allowed to amend at once.

Then, again, in many of the States, where the practice has been revised, there is a convenient and simple method by which when an action, for example, is brought at law, and there is an equitable defense, you can set that up in the same suit. You bring, for example, an action on a contract, a policy of insurance, if you please, and the defendant claims that there has been a mistake in drawing it. Under the Federal practice you have to file a separate bill in equity, get your injunction against the proceedings at law, and try that out, delaying thereby the progress of the suit; but in many of the States the legislature has provided that in such a case as that you can set up your equitable defense by way of answer, and then the whole matter is tried at once. The court may order issues to be tried by jury if they think proper.

I tried a case of that sort last March, where there was an equitable defense set up on an action on a promissory note. The court ordered it tried before a jury. The whole thing was disposed of, whereas if it had been necessary to bring a separate suit there would have been at least a year's delay and possibly more. To some extent the testimony was the same in both. Under the system in the Federal courts you would have had double expense, double delay, and double inconvenience.

Now, inasmuch as the real object of a lawsuit is to get at the merits of the case and to promote the attainment of justice, it does seem as if the procedure ought to be as simple as possible, directed to that end, and so we trust that it may meet the views of the committee to report this bill favorably. The bill has been carefully drawn by a large committee of the American Bar Association. It was considered

at the meeting of the association last August and unanimously recommended to Congress.

The only point, so far as I know, that has ever been made against it is that there is intrinsic difficulty caused by the Constitution of the United States. That does provide undoubtedly, as we point out in our report, that courts of the United States shall have jurisdiction of cases "at law and in equity"; but there is nothing said about how the legal rights or the equitable rights shall be enforced. The judiciary act of 1789 provided that the same court held by the same individual should have jurisdiction at law and in equity and in admiralty. The judge, in the same array and with the same surroundings, the same clerk, and the same marshal and on the same bench, hears an equity case and an admiralty case and a law case. The dividing line between law and equity is shadowy. What possible objection can there be to providing that when the judge is sitting in the law branch of the court hearing a case at law, and it appears that the remedy is in equity, he may direct the complainant to amend his declaration, or whatever it is called—it is called a complaint in New York, and in some States it is called a petition, but the name is immaterial—to amend so as to ask for the suitable equitable relief and then go on and administer it on proofs. Vice versa, if the court is sitting in equity, he should be able to require the parties to amend if he finds that the remedy sought should be at law. We submit that there is nothing in that which blots out the distinction between law and equity. In some cases it is clear and there never could be any question; but there are cases on the borderland, where it is not so easy to say whether your relief should be in law or equity; and if a lawyer makes a mistake, why should his client suffer?

Senator CULBERSON. I am not a member of this particular subcommittee, but I am a member of the Committee on the Judiciary, and it occurs to me to ask you whether this matter is proposed to be dealt with by the new rules that are under consideration by the Supreme Court.

Mr. WHEELER. To some extent it can be dealt with by the new rules.

Senator CULBERSON. Do you know whether it is contemplated to deal with this question by the new rules?

Mr. WHEELER. I am informed that it would be very agreeable to the court to have this subject dealt with by Congress so as to cover the whole ground. What the rules could do would be this: The rules could say that if a bill is filed on the equity side of the court, and under the present practice you would be required to file a cross bill, you could get the same relief on answer that you can now on a cross bill. But under the present statutes the Congress has provided that in all cases at law the practice shall be similar to that in the State courts, and it has not given to the Supreme Court the power to make rules regulating the proceedings in actions at law, so that if an action were brought at law and the court should be of opinion that it ought to have been brought on the equity side the Supreme Court could not provide by rule this change which we are now empowering it to provide. They have no power to do that. Neither have they power to provide that an equitable defense should be set up in an action at law. That is within the jurisdiction of Congress.

I have been in conference with their secretary and in correspondence with some of the members of the court in regard to the amendments to the rules and recommendations made by the bar in different circuits. While I am not at liberty to quote individuals, I think I am authorized to say that it would be agreeable to the court if Congress should deal with the subject so as to enlarge the power of the court to deal with this class of cases, so that the modification, as it were, of the equity rules might provide for the details of the relief which in general is given in this act.

If you should pass this bill, for example, and it should be approved by the President, there would have to be rules made, either in the circuits or by the Supreme Court, to provide the method for carrying out the object of the bill. The bill was drawn in general terms. The court could not by any amendment to the equity rules under the existing statute do what is here proposed.

Senator ROOT. Do the other members of the committee representing the Bar Association wish to be heard on this matter?

STATEMENT OF RUSSELL WHITMAN, ESQ., OF CHICAGO, ILL.

Mr. WHITMAN. I might refer to another objection which has come up and might perhaps be urged, a rather insidious and dangerous objection, to this effect: That this mixing up of law and equity, as it is called in the brief of the objectors in their discussion of the matter, is really sweeping away the old land marks with which we are all familiar. The common law has established forms, and we know what they mean; and equity is established, and we know what it means. And then the suggestion is made that this honorable body and other honorable bodies seek to kindly draw the curtain of oblivion over mistakes of attorneys. The gentlemen who assert and maintain these objections always assume that in the case of a competent attorney—I modestly refrain from mentioning them—but in the case of a competent attorney this would be entirely superfluous, and it is only to correct the mistakes of incompetent attorneys who do not know the difference between law and equity.

Senator BORAH. That would only apply to the first section?

Mr. WHITMAN. Yes; that is what I was speaking to.

Senator ROOT. Is not this a fact that in many parts of the country there are a great many very competent attorneys—indeed, in all parts of the country many competent attorneys—whose practice is chiefly under the code procedure of the State courts and who are therefore not very familiar with the old equity practice and who are liable to make mistakes for which their clients may suffer?

Mr. WHITMAN. Yes, sir. You anticipate and make it unnecessary for me to state that which I was going to state, but I may add to the Senator's suggestion this: We work hard in Illinois. We have the old equity and the old common law, except a few modifications. But, Senators, I give you my word that, work as hard as we may, there are some cases, along in this No Man's Land that has been referred to—fraud cases and matters of that kind—where we can not always tell in advance whether we should be on the law side or the equity side, and it is that kind of thing—that produces expense and brings satisfaction to no one—that we hope an act like this could avoid.

Hard-working, high-minded lawyers may try their best to find out which side of the court they should be on, and if they happen to guess wrong, perhaps the statute of limitations has run against them and out they go, and there is an injustice done. What we want to do is to try to take care of the honest class of lawyers, for what clients have to pay, and if in spite of all their care and pains these lawyers go wrong once in a while we should not bother ourselves if also the proposed legislation might in some instances be to the disadvantage of the dishonest or incompetent lawyer.

Senator CULBERSON. Does this assimilate Federal practice to that in the code States?

Mr. WHITMAN. No; it simply does this: For instance, in Illinois, we go into the law side of a Federal court in a lawsuit on a promissory note; but in those cases, which are hard to tell, if we find our pleadings are wrong, they may be made to conform to the appropriate side of the court. That, I think, answers your question.

Senator ROOT. Mr. Saner, do you wish to say anything?

Mr. SANER. No, sir. I thank you, I do not think I do.

Senator ROOT. The hearing on this bill, then, will be considered closed.

However, here is a letter from Mr. Charles J. Faulkner, written to Senator Clark of Wyoming, saying that he would like to appear before the committee. I will send word to him that we will hear anything that he has to say and will suspend final action until we hear from him.

Mr. Faulkner, in lieu of an oral address, submitted the following to be incorporated in the record of the hearing:

[Copy of brief filed with the Committee on the Judiciary of the House of Representatives.]

In the matter of allowing and regulating amendments in judicial proceedings in the courts of the United States:

The bill H. R. 12365 is in two sections. The first section regulates the law and equity practice and is as follows:

"That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law."

In less drastic form this is somewhat the sole alteration which is proposed to be made by the bill known as S. 4029, which proposes to add to chapter 11 of the Judicial Code two new sections as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This last quoted bill is the one which a special committee of the American Bar Association reported favorably as a bill "To prevent delay and unnecessary cost of

litigation." (See report presented at the meeting at Boston, Mass., Aug. 29, 1911, pp. 14–16, and for the bill, pp. 23–24.) The report of the committee justifies the bill by the argument (p. 15):

"If the pleader by mistake has put the words 'at law' in his pleading when he should have put the words 'in equity' or 'in admiralty,' it should be the duty of the judge to make the amendment on the spot."

Again, speaking of the code system, at page 16 the report says:

"Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right."

If the bills accomplish no more than to permit transfer from the law to the equity side in such a case as that suggested by the committee's report where there was merely a clerical error in naming the writ, declaration, or other pleading, the bill would be unnecessary, for this could readily be accomplished, as the committee points out at page 17, by a rule of the Supreme Court in equity; and surely Congress ought not to be troubled to pass an act as to a matter which can and should be covered by a rule of court.

But the bills—and particularly S. 4029—run far beyond curing a mere clerical error of description. The proposed section 274 A provides that in case a court shall find that a suit at law should have been brought in equity or the reverse "the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice."

Proceedings at law or in equity are essentially different in origin, nature, and object. The two New York cases (Leroy *v.* Marshall, 8 How. Pr., 373, and Railroad *v.* Schuyler, 17 N. Y., 592) cited on pages 15 and 16 of the report of the special committee of the American Bar Association are correct. The equitable proceedings were devised to cover those cases wherein for some reason a court of law could not administer justice. Hence there is a difference in the essentials of pleading which must ever be maintained. We do not understand that the advocates of these bills dispute this. Yet they urge that the courts shall be directed to do an impossibility, namely, order an amendment to pleadings at law to convert them into pleadings in equity or the reverse, when, in point of fact, neither is germane to the other. An attempt to abolish distinctions so fundamental between these great fields of jurisprudence by an act so indefinite in its terms and summary in its language can only cause years of confusion in practice. Even to attempt to criticize the bill is to realize the impossibility of foreseeing its effects in practice. It is not unfair to say that one of its effects will be to impose upon the court the duty of amending and curing the careless work of the incompetent pleader.

If the bill S. 4029 should pass what would be the result? Instead of well-understood precedents and forms well known and easy to handle by any competent lawyer we shall momentarily have a complete breakdown of the distinctions and slowly the formation, at the expense of litigation to acquire precedents, of an entirely new system, based, however, upon the same general principles because those principles are changeless and have been evolved out of experience.

After all, such legislation is at best contrived to protect the few careless or incompetent practitioners from the consequences of their fault. Distinctions and forms, valuable in arriving at and effectually administering justice either at law or in equity, are to be sacrificed in order to save the few blunderers. The same argument, pushed to what was once well described by Mr. Justice Holmes as a dryly logical conclusion, would require the repeal of statutes of limitation because in their operation they foreclose just claims carelessly asserted or neglected. The idea of such legislation seems to be a hasty generalization from the few cases wherein injustice seems to have been done and the sacrifice of matters which are of value to save those few persons from the consequences of their own fault.

As to codes, we venture the assertion that lawyers who have had the opportunity of observing court procedure in code States and in States where the common-law procedure obtains have usually reached the conclusion that the code proceedings, instead of simplifying litigation, have created the necessity for a reconstruction of the very same controlling principles for the reasons already stated—that they are changeless and inhere in the subject. In Pennsylvania the practice act of 1887 was intended to simplify pleading and practice, but, as one of the great judges of Pennsylvania afterwards said, did no more than substitute for the orderly narratione or declaration the telling of the story as one old apple woman would tell it to another. And, at last, the courts in Pennsylvania had to come back to the common-law principles.

Thus in Emmens *v.* Gebhart (7 Pa. County Court Rep., 522 (1890)), Schuyler, P. J., said at page 525:

"Only the forms of special pleading have been abolished; its substance remains and must ever remain."

And in Fritz *v.* Hathaway (135 Pa., 274 (1890)), Mitchell, J., said at page 280:

"The act is unwise, and is founded on the erroneous and superficial view that, by abolishing technical forms, it can get rid of distinctions inherent in the nature of the subject, but it would be doing injustice to the purpose of its framers to hold that it was meant to sanction mere looseness of pleading. Accuracy and technical precision have no terrors except for the careless and the incompetent, and the act of 1887 was not intended to do away with them. As to all matters of substance—completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

To some lawyers and to most laymen it appears as though the distinctions between law and equity and many other actions of apparently formal pleading are mere technicalities. But nearly all of the so-called technicalities of which laymen complain and many of those of which some lawyers complain are really essentials in the orderly and right administration of justice. The decision of the supreme judicial court of Massachusetts in the case which changed William Cullen Bryant from an indifferent lawyer into a fair poet is of interest in this connection, though the case did cause Bryant to leave the bar and take up a literary career. That case is Bloss *v.* Tobey (2 Pick., 320 (1824)), and was an action of slander. The declaration in the first count charged that the defendant did falsely and maliciously say of the plaintiff "There is no doubt in my mind that he" (plaintiff) "burnt it" (his store) "himself." And in the second count the same phrase coupled with the further phrase: "He" (plaintiff) "would not have got his goods insured if he had not meant to burn it" (the store).

For lack of a colloquium showing that an illegal act was charged in the alleged slander, and showing the circumstances under which the words were spoken, this pleading was held bad after verdict, and properly so; for if any other rule had been announced the result would have been to allow recovery to that particular plaintiff, but a safeguard of litigation would have been lost, namely, the safeguard that all the essential circumstances of the cause of action shall be shown in the declaration, in order to warn the defendant of the cause of action he will be called upon to meet and enable him to prepare his case, summon the necessary and proper witnesses, etc.

The courts of the United States are already empowered to take care of the subject matter of the proposed bills in so far as the orderly and proper administration of justice requires or permits. (See Schurmeier et al. *v.* Connecticut Mutual Life Ins. Co., 171 Fed., 1, and the report of the American Bar Association's special committee, at p. 17.) The passage of any bill on the subject is unnecessary and unwise, and some of the bills suggested would be mischievous.

Respectfully submitted.

JOSEPH I. DORAN,
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JANUARY, 1912.

Senator ROOT. The two bills which are before the subcommittee, of which Senator Culberson, Senator Brown, and myself are members, are the bills S. 3749 and S. 3750. We will first take up 3750, which provides that no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, and so forth, unless, in the opinion of the court to which the application is made, substantial rights are affected.

The bill is as follows:

[S. 3750, Sixty-second Congress, second session. In the Senate of the United States. December 13, 1911. Mr. Nelson (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL Relating to procedure in United States courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground

of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

STATEMENT OF EVERETT P. WHEELER, ESQ., OF NEW YORK.

Mr. WHEELER. Senators, it is with pleasure that I appear in support of this bill. It has been before previous Congresses, and has been amended to meet the views that were expressed in committee. This is, I think, the third Congress at which it has been under advisement, and the American Bar Association has had it under consideration now for five years. So I may say that in its present form it has had very careful consideration both in Congress and out of it. It did pass the House of Representatives in the last Congress but failed to come up in the Senate. So it never has been brought to a vote here.

Senator CULBERSON. In this exact form, you mean?

Mr. WHEELER. In this exact form it passed the House, yes. The bill as it was before the Judiciary Committee in the last Congress was more extensive in scope. It covered to some extent some points that have been embodied in the judicial code. That is to say, one of the points included in that was in reference to appeals in capital cases, which formerly, as you know, were taken direct by writ of error to the Supreme Court. Under the judicial code they are now to be taken to the circuit court of appeals with a possible right of review by the Supreme Court on certiorari. That is out of the present bill.

Then, again, the phrase used in the bill as originally drawn was "and unless it should appear that the error complained of has produced a miscarriage of justice." We took that from the English rules, but the criticism was made of that in the subcommittee of the Senate, and in the Judiciary Committee of the House, that that phrase while it might be well understood in England, had not gotten an exact foothold in this country, and so it was thought it would be more clear, to use the phrase which has now been embodied in the bill, "injuriously affected the substantial rights of the parties."

Senator ROOT. This is a much milder expression, is it not?

Mr. WHEELER. Yes, sir.

Senator ROOT. Milder than "miscarriage of justice"?

Mr. WHEELER. Yes. The real object of the bill is twofold. First, to provide that any technical errors, defects that may exist in any of the rulings or in the pleadings themselves, which do not injuriously affect the substantial rights of the parties shall be disregarded. Then it is further provided, in order to make the practice in the Federal courts uniform in the different circuits in that respect, that it shall be competent for the judge trying a case before a jury to submit questions of fact to the jury, reserving his decision on questions of law.

The two provisions of the act go together. Now, it is true that in some States—I know in New York, and I am told it is true in Massachusetts and Connecticut, New Jersey and Pennsylvania—that practice now exists. On the other hand, my friend, Mr. Whitman, tells me that it does not exist in Illinois, and I am sure that in many circuits that is not the practice.

You will remember that the Federal courts in common-law cases are required by statute to follow the practice in their State courts, and unless the State practice, either by code or otherwise, gives this right the courts of the United States do not have it.

Now, then, you see how the thing would practically work in the trial of an important case. The judge would see that there were questions of fact involved. It might be the ascertainment of damages. It might be some other issue; but whatever it would be he could take a verdict, have that entered on the record, and reserve his decision on the questions of law arising upon that finding. Then, suppose, for example, he came to the conclusion that judgment must be ordered for the plaintiff upon the verdict; it would be competent for the court of appeals to look into the whole record and to say upon that record, upon the finding of the jury, that the defendant is entitled to judgment.

And then under this act as we have drawn it, in such a case as that, the court, instead of ordering a new trial and having the facts tried over again in order to render a judgment for the defendant, could render judgment at once. Then carry it a step further. In such a case as that, if the Supreme Court should grant a certiorari and the record should be taken there, they would have the same power that this confers upon the circuit court of appeals. So, in short, the thought underlying the bill is that in every stage of the cause the court shall have the whole record before it and shall give judgment upon the merits of the case without regard to any technical defects that do not affect the merits.

In a brief which we are going to ask the committee to receive in support of this bill—and I will hand up copies now, and shall I leave with the clerk copies for the other members?

Senator ROOT. Yes; I wish you would.

Mr. WHEELER. We will do so with pleasure. We point out some of the cases, some in Federal courts and some in the State courts, where under the present system, which deals with these questions as purely matters of error and not upon the whole record, the court feels bound to look at even trivial and very unimportant errors, and if they find an error they say, "We must in order to support this judgment declare that there has been no error in anything." The old English phrase was "In nullo est erratum." Unless they can do that they feel compelled to reverse. In many courts the suggestion has been made that that is a great misfortune, and yet the judges feel bound to do it. We had in New York a legislative commission to examine into the subject of the law's delay and the causes of it, and some of our judges were examined. We quote in the brief from what they say. One of them is now a Senator and a member of this committee, Senator O'Gorman. He points that out very clearly:

> One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

Then, we have tried the other plan in the State of New York. Curiously enough in criminal cases, we have given to the appellate court far greater rights to deal with cases on the merits and to over-

look technical errors than in civil cases. On page 4 of the brief we quote from the opinion of the court of appeals in the case of People *v.* Strollo.

That, of course, is quite in opposition to the old theory that any error in a criminal case can be taken advantage of for the benefit of the criminal. The courts and the legislature have come to recognize that society has an interest in punishing a guilty man. We should acquit an innocent man, of course, but the guilty should not escape. However, the criminal laws were once cruel—the punishment of death, for example, having been given, I think, for stealing 30 shillings in England—and that severity of the law led the judges to do everything they could to mitigate. But now we have abolished all those cruel statutes, and, we may add, cruel methods—because, as you know, originally a defendant in a criminal case had no counsel. The old English law was certainly most oppressive to a defendant in a criminal case. That we have changed. A man must first be found guilty prima facie by a grand jury and then is tried by a petit jury, and they must find him guilty beyond a reasonable doubt and by a unanimous verdict. Yet until the amendments which have been made in some of the States the court on appeal, although convinced of his guilt, felt bound to grant him a new trial. That has been so in criminal cases in New York, in Missouri, and in many other States. In many this technical practice has been reformed. What we are trying to get Congress to do is to make that change for the Federal courts.

Senator CULBERSON. Mr. Wheeler, I do not understand exactly the wording in line 11: "The trial judge may in any case submit to the jury the issues of fact," etc. Of course, if that passes it will regulate the trial of facts, in all trial courts, in the United States courts.

Mr. WHEELER. Yes, precisely.

Senator CULBERSON. Is that meant to leave it entirely with the judge as to whether a man shall have a trial by jury on the facts of his case?

Mr. WHEELER. No, not at all; but it leaves it open to him, even although his impression at the time is in favor of the points of law raised by the defendant to take a verdict on the facts, and reserve the decision on the law.

Senator ROOT. This does not apply to anything but jury trials, does it?

Mr. WHEELER. No.

Senator CULBERSON. I think it may apply to any but a jury trial, because it seems to leave it to the discretion of the court whether it may submit any questions of fact, in the case of appeal, to a jury.

Senator ROOT. Would this not cover it: "The trial judge may in any case tried before a jury submit to the jury the issues of fact arising upon the pleadings"?

Senator CULBERSON. That would leave it to his discretion, then. Of course, the sole object of the jury is to pass upon the facts on the pleadings, under the instructions of the court as to the law applicable. But I want to have this cleared up; this may leave it entirely discretionary with the court, the parties having nothing to do with whether there shall be a jury trial.

Mr. WHEELER. No; I do not think you could give it that construction.

Senator CULBERSON. It says "may in any case." It does not limit it to jury cases. It leaves it discretionary. Of course, if a court is trying a nonjury case and desires to submit a question of fact to the jury, this would apply.

Mr. WHEELER. Well, it is not intended to apply to that class of cases.

Senator CULBERSON. And apparently, to my mind, it ought not to apply to any other character of cases; because if it did the parties would be denied their right to trial by jury.

Mr. WHEELER. The parties, under the Constitution, if there is a question of fact, have the right to have it submitted to the jury, unless the judge on the trial is of opinion that there is some legal point that is fatal. The object of this statute is to enable the judge in such a case to reserve his decision on a point of law. Take, for example, a couple of cases that are found in 161 New York, 123,139. Two actions there were actions against the city of New York for negligence. Notice of the nature of the accident and its time and place was required by statute. In the two cases referred to the point was made on the trial that the notice was insufficient. In the first case (Missano *v.* The Mayor) the judge held it sufficient. In the second case (Sheehy *v.* The Mayor) he held it insufficient and dismissed the complaint. The court of appeals, to whom an appeal was taken, were of a different opinion, and held the notice sufficient. But they were obliged to send the case back to a new trial and put the plaintiff to the expense and delay of a new trial, although he had been in court once with his witnesses, simply because of the error on that point of law.

In the other case a verdict had been taken. The appellate court, of first instance—appellate division, as we call it in New York—held the notice insufficient and dismissed the suit, but the court of appeals reinstated the verdict holding that the notice was sufficient.

The difference was simply this: The question involved was the same; but by one method of procedure, a verdict was taken, and the plaintiff was enabled to get his verdict on record and hold it if the final court thought it right. In the other case, having put in all his testimony he was dismissed, and yet the court of final resort held him to be right on the law, and for no fault of his own he was sent back to another trial.

The purport of this section is to obviate such delay. There is no objection of course to any amendment which you may make that will have this effect. Mr. Root has suggested one which would be perfectly satisfactory: "May in any case tried by a jury submit to the jury the issues of fact arising under the pleadings."

Senator CULBERSON. That would be tautology. Of course the jury trial is to try the facts. Ought it not to be in nonjury trials?

Mr. WHEELER. No; it does not affect that. The present power of a court of equity to order issues to be tried by jury is sufficient. So I do not think it is necessary to make any change there.

Senator CULBERSON. This does not apply to that.

Mr. WHEELER. No; this applies to common law cases.

Senator CULBERSON. In civil or criminal cases?

Mr. WHEELER. In both.

Mr. WHITMAN. May I make a suggestion directed to the Senator's point? Might I read this in this way and see if this answers?

"The trial judge in any case submitted to the jury on issues of fact arising on pleadings may reserve any question of law," and then go on.

Would that obviate your point that there should be no discretion in the court about denying a man a jury trial if he is entitled to one? What the court then does is to give him his jury trial and reserve the question of law to go up on. I offer that as a suggestion.

Senator CULBERSON. I rather think that would obviate the criticism I had in mind, but I would like to examine it more carefully.

I want to reserve the jury trial if the parties are entitled to it and not to leave it to the discretion of the court, and I would compel the Federal judges to deliver charges in writing. Of course, if oral it may be taken by a stenographer, so it can be reviewed properly. That is the only suggestion I care to make about it. I rather agree to the first paragraph, but I do not want anything that can possibly be construed to mean that the right of trial by jury is to be left to the discretion of the court.

Senator ROOT. My understanding of the effect of the last section would be this: In the first place, I thought it was intended to apply only to causes triable before a jury, not to nonjury cases, that it was designed to enable the court to call for a special verdict instead of a general verdict, so that instead of leaving to the jury to find for the plaintiff or for the defendant, upon a charge stating a number of doubtful propositions of law, the court can leave to the jury the questions, Did the defendant make the note; did the defendant pay the note; did the plaintiff and defendant agree that such and such would be accepted in satisfaction of the note; and taking a special verdict upon the specific issues of the case, then determine whether the judgment upon those findings of fact of the jury should be for the plaintiff or the defendant; so that the case could be reviewed all the way up, without the necessity of sending the parties back for another trial upon the questions of fact.

In other words, the first trial on the issue of facts would be final for all purposes of the case, a thing which seems to me to be very greatly in the interest of the honest litigant of slender means, as compared with the present practice, which I think enables the dishonest litigant of abundant means, who can afford to litigate until kingdom come, an opportunity to hinder justice by delay. That is the idea I have about that.

Senator CULBERSON. The language would seem to me to imply a trial on the whole case and not any special verdict. It says: "The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings." Now, if this read: "The trial judge may in any case submit to the jury any issue of fact," then it would rather imply that the Senator from New York is correct in the object to be accomplished.

Senator ROOT. Why not make that "any issues of fact"?

Mr. WHEELER. You might say any "specific issues of fact."

Mr. WHITMAN. Under our practice in Illinois, which is under the old common law practice, we have special findings of fact there that we may ask for and have submitted if they are properly requested. The special verdict that the Senator speaks of we do not use in just that way. My impression of the effect, taking our own practice there, would be that the clause would be elastic enough to cover a special verdict or a verdict that had the simple phrase in it, did he or did he not pay; and if not, how much does he owe? That does not have to be tried again.

Senator CULBERSON. It used to be that in Texas they could submit special issues to the jury, but this as it reads now appears to me to leave it to the authority of the judge as to whether he shall submit all the facts at issue to a jury.

Mr. WHEELER. That is not the intention.

Senator CULBERSON. That may not be so, but I would like to think it over.

Mr. WHEELER. If it strikes you so, I am sure we would like to have it amended. You might have it read: "The trial judge in any case tried before a jury may submit specific questions to be answered by the jury and may reserve any question of law," and go on.

Senator CULBERSON. I do not think I would have any objection to that, because that would leave the question of the right of trial by jury as it is now.

Mr. WHEELER. That was the intention.

Senator CULBERSON. And would apparently carry out Senator Root's suggestion as to giving authority to submit special questions. I will ask the stenographer to read that last suggestion of Mr. Wheeler.

The stenographer read as follows:

The trial judge in any case tried before a jury may submit specific questions to be answered by the jury and may reserve any question of law, etc.

Senator CULBERSON. What do you think of that?

Senator ROOT. That strikes me rather favorably.

Mr. WHEELER. How does that strike you, Mr. Whitman?

Mr. WHITMAN. I think it would be all right. The only question is on the word "question." It is a finding of some sort they are to make, whether special or general.

Mr. WHEELER. We call them "questions" in New York.

Mr. WHITMAN. What we really mean, I think, is "findings," but the judge submits the questions. I merely make that as a suggestion—as a broader word.

Mr. WHEELER. You see it does not become a finding until the jury have answered it. The question and the answer make a finding.

Mr. SANER. Would not the word "issue" be the better word?

Mr. WHEELER. That would be satisfactory to me. That is the old common law.

Senator ROOT. Submit "specific issues" I would say.

Mr. WHEELER. And you say "to be passed upon."

Senator CULBERSON. There will not be any trouble about the language if you agree upon the substance.

Mr. WHEELER. "To agree upon specific issues to be passed upon."

Senator CULBERSON. The words of the proposed act are all right, "the issues of fact;" you can not very well improve upon that language.

Senator ROOT. Mr. Wheeler has made a suggestion that we should say "specific issues of fact."

Mr. WHEELER. Perhaps this would cover it: "The trial judge in any case tried before a jury may submit specific issues of fact arising upon the pleadings." That would cover it.

Senator ROOT. "The trial judge may in any case tried before a jury submit specific issues of fact to be passed upon." I think that covers it.

Senator CULBERSON. I think I will be favorable to this, but we have to submit it to the other members of the committee.

Senator ROOT. We will now take up Senate bill 3749, which is designed to authorize the Supreme Court of the United States to pass on the Federal question, whichever way it is decided in the courts of the States. That is the substance of it.

[S. 3749, Sixty-second Congress, second session. In the Senate of the United States, December 13, 1911. Mr. Nelson (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.]

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of chapter ten of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in the court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

Senator CULBERSON. I think the jurisdiction of the Supreme Court is pretty far-reaching already, and I want to know at the outset whether this enlarges it.

Senator ROOT. It does undoubtedly, I think.

Mr. WHEELER. I think it does.

Senator CULBERSON. It used to be that you could only take a writ of error when the decision was against. Now you can take it in either case.

Mr. WHEELER. Under this proposition. In the District of Columbia the right exists; there may be a writ of error whichever way the constitutional question is decided in the court below. What has brought this to our attention, and led us to consider it seriously, is the situation which has arisen under the various acts of the different States with regard to workmen's compensation. As you know, there have been laws in many of the States providing a more extended remedy in the case of workmen who are injured in our great manufactories. It has come to pass that the development of machinery is such that such accidents ought to be considered more a risk of the business than they were at common law, when business was on a smaller scale and the employer and employee were more nearly on the same ground.

The complaint has been made against those statutes that inasmuch as they took from the employer a certain amount of money to which the workman was not entitled, at common law, they were depriving the employer of his property without due process of law, and the court of appeals in New York has so decided in the Ives case. That is found in 201 New York, 271. In other States, notably in Wisconsin, and in the State of Washington, the decision has been the other way. So, in these different States the Constitution of the United States means different things. In New York it means one thing, and

it means another thing in the two other States I have referred to. Well, that is not the only sort of legislation that is being considered. There is a general, you might say a world-wide, spirit of bringing about a more equitable method of dealing with the management of great railroads and manufactories, and we, I think, ought to recognize that.

Senator CULBERSON. May I interrupt?

Mr. WHEELER. Certainly.

Senator CULBERSON. So as to get it clearly in my mind.

Mr. WHEELER. I am very glad to have you interrupt.

Senator CULBERSON. Is it the purpose to strike out the words in section 237, "and the decision is against validity," and the other words in italics shown in your committee report?

Mr. WHEELER. Yes; that is what it does strike out.

Senator ROOT. Whenever you are through, Mr. Wheeler, I want to ask a question.

Mr. WHEELER. I will give you this copy of our Bar Association Report. I intended to bring enough copies to give every member one, but I find I have not sufficient.

Senator ROOT. I thought maybe you had them printed in parallel columns.

Mr. WHEELER. In this report of the special committee of the American Bar Association you will find it printed in italics, with the words desired to be struck out indicated.

Senator ROOT. Will you please send enough copies so that each member of the Judiciary Committee may have one?

Mr. WHEELER. I will be glad to do so.

It turns on the importance of having the Constitution of the United States interpreted alike in all the States. The Constitution gives to the highest court the power to pass upon the validity of the laws of the different States. The Constitution declares that the Constitution itself, and the laws made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or the laws of any State to the contrary notwithstanding. Legislation has given the Supreme Court the right to review a decision by a State court when that court decides in favor of the State law, but if the State court decides against the State law there is no right of review. And yet one man may be just as much interested personally in supporting the State law as another man is in opposing it. Take this workmen's act, which I have used for illustration. A man that has lost an arm or leg by machinery in a factory may not be able to prove that the employer is at fault. The object of the workmen's compensation law is, on the one side, to limit the amount of liability, and, on the other side, to extend it to more cases. If the State court says "No; we will not let you recover damages in such a case, because that law you rely on is in violation of the Constitution," why should you not give the plaintiff a right to be heard before the Supreme Court in support of what he claims under the State law?

It seems to me manifestly just that you should, and this extension of the jurisdiction of the Supreme Court is an equitable extension, and one that will tend to promote the welfare of our people and to bring about a uniformity of law.

We lawyers know the history of this clause, but you can not explain to the man in the street the justice of having the Constitution mean

one thing in one State and another thing in another State. You tell him that the Constitution means what the court says it means. That ist rue. But when one court says one thing and another court says another thing, it would seem obvious that there should be some supreme tribunal that can settle that. Unless this Washington defendant should choose to bring a writ of error—it is a test case, and the amount involved is not much, and we have no reason to believe that he will bring it—we remain under the present difficulty.

Well, this act would apply not only in that class of cases, but in a great many other cases affecting the relation of the workman and the employer which have been made the subject of controversy under this clause of the Constitution declaring that no man shall be deprived of property without due process of law. I think that we must admit that there is a great deal of dissatisfaction vaguely spread throughout the country growing out of this diversity of judgments in the State courts. Sometimes that dissatisfaction has been very unreasonably expressed, and I have no sympathy with that. I believe that the courts are one of the most important parts of our system and that respect for them is to be cultivated and impressed; but you do not secure that respect by having a diversity of opinion on the constitutional rights of the citizen which there is no way to cure.

We submit, therefore, with a good deal of confidence, that this bill may fairly receive the favorable consideration of the Senate.

Senator ROOT. Mr. Wheeler, may I ask whether the same result you seek to accomplish could not be accomplished by giving the Supreme Court the right to bring up by certiorari, so it would not give to the parties in every case where the Federal question was involved, and where the decision was in favor of the claim under the Constitution or statutes of the United States, the right to go to the Supreme Court of the United States and cumber their calendar and delay the proceedings of others? Would not the jurisdiction vested in the Supreme Court to bring up by certiorari such a decision, which they could exercise whenever there is a conflict, answer every purpose?

Mr. WHEELER. Personally, I should think so. I have not talked to the other members of the special committee representing the bar association about the matter.

Mr. WHITMAN. Senator, would that mean that as at present, for instance, the employer, we will say, for short, might go up if the law were declared constitutional by the court in which he was——

Senator ROOT. That is, if the State law was declared constitutional?

Mr. WHITMAN. Yes.

Senator ROOT. Yes.

Mr. WHITMAN. But would that mean if the plaintiff were to go up he would have to go by the certiorari route? In other words, are you going to give a writ of error to the losing party if one party loses, but if the other party loses are you going to give him certiorari? I think that would be subject to severe criticism if such a thing were done. I do not know that I make it clear.

Senator ROOT. It would not be giving a writ of error to the litigant who makes a claim under the Constitution or laws of the United States and has his claim disallowed, for he has that already.

Senator CULBERSON. Under the old statute?

Senator ROOT. Yes. The question is when a claim under the Constitution and laws of the United States is allowed, so that there

can be no claim of violation of the Constitution and laws of the United States, whether then for the purpose of securing uniformity of decision upon the constitutional questions, you should let everybody come up or merely confer upon the Supreme Court the power to bring up by certiorari. The theory of the present statute is, when a claim under the Constitution and laws of the United States has been made and allowed, that no one has any grievance which is properly the subject of Federal cognizance, because all his rights under the Federal statute have been preserved by the State court and he has nothing to complain about to the national authorities.

Senator CULBERSON. The present law is that "where there is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity"—that is in favor of the State laws.

Mr. WHEELER. Yes.

Senator CULBERSON. Now, you want to strike out "and the decision is in favor of their validity"?

Mr. WHEELER. Yes, sir.

Senator CULBERSON. And make it subject to a writ of error if it is for or against?

Mr. WHEELER. Either way; yes.

Senator ROOT. So that would be that when a State court has held a statute of a State to be invalid you could appeal to the Supreme Court of the United States as against their decision.

Mr. WHEELER. If it holds that it is invalid by reason of the question of constitutionality.

Senator CULBERSON. From the Federal standpoint?

Mr. WHEELER. Yes.

Senator ROOT. It seems to me the only justification for that is in what you have just presented, and that is on account of the importance of securing uniformity of decision in regard to the meaning and effect of the Federal Constitution and laws, and that that can be accomplished by vesting in the Supreme Court the power to bring up a case by certiorari, and that that is as far as it is desirable to go.

Senator CULBERSON. I understand that some of the courts in New York have held the employers' liability act void.

Mr. WHEELER. Yes.

Senator CULBERSON. As being against the Constitution of the United States?

Mr. WHEELER. Yes.

Senator ROOT. That is the Ives case.

Senator CULBERSON. And that is not now subject to writ of error.

Mr. WHEELER. That is correct.

Senator CULBERSON. And you want to make it so?

Senator ROOT. That is the Ives case, 201 New York, 271.

Mr. WHEELER. Yes.

Senator ROOT. The New York Court of Appeals, with many expressions of regret and a very strong statement in their belief of the wisdom of the statute, held that, nevertheless, the statute contravened the fourteenth amendment, taking the words "without due process of law," whereas in Washington the court has held that a similar statute did not contravene that provision.

Senator CULBERSON. They can bring that up on a writ of error.

Mr. SANER. If they are disposed to do so; yes.

Senator ROOT. The Washington people can, but the others can not.

Senator CULBERSON. You say the opinion in New York was against the constitutionality of the statute? How was that opinion; was it unanimous?

Mr. WHEELER. Yes, sir; but they reversed the opinion in the appellate division of the Supreme Court of the State of New York.

Senator CULBERSON. Who rendered the opinion?

Mr. WHEELER. Judge Werner.

Senator CULBERSON. Is Judge Gray still on the bench?

Mr. WHEELER. Yes, sir.

Senator CULBERSON. And Judge Cullen is chief justice?

Mr. WHEELER. Yes. It is very interesting to us to see that you keep up with the personnel of our judiciary so well.

Senator CULBERSON. In other words, here is the same identical question presented by the courts of Washington and New York, where the question involved has been decided by the supreme court of each of those States, and only one of those is subject to review by the Supreme Court of the United States.

Mr. WHEELER. Precisely.

Senator ROOT. Are there any further remarks to be made?

Mr. WHITMAN. I hardly know of anything to add. There it is.

Senator ROOT. Do you desire to add anything, Mr. Saner?

Mr. SANER. No; I have nothing to add.

Mr. WHEELER. We are very much indebted to the committee for their attention and consideration, and, as I said before, I will send copies of the report of the special committee so that each member of the committee may have one.

The report was ordered included in this record and is as follows:

REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION.

[To be presented at the meeting of the American Bar Association at Boston, Mass., August, 1911.]

To the American Bar Association:

The special committee appointed at the meeting of this association in 1907 and continued at each annual meeting since then was charged with the duty of considering carefully alleged evils in judicial administration and remedial procedure, and suggesting remedies and formulating proposed laws.

We were authorized at the last meeting to present to Congress at its next session the bills heretofore reported by the committee and recommended by this association, in such form as to obviate as far as possible the objections thereto that have been taken in Congress, but retaining the essential principle of the bills heretofore recommended by the association. These bills were specifically recommended by the President in his annual message, December, 1910 (p. 44).

The association at that meeting approved the recommendation of our committee respecting the practice in admiralty, and we were instructed to bring the subject to the attention of the Supreme Court of the United States and to request that honorable court to adopt a rule in admiralty which should direct that the testimony in admiralty cases be taken in open court, subject to the provisions of the statute in regard to depositions de bene esse.

We were also authorized to consider a general-practice act and to report thereon at this meeting. In this connection two resolutions were referred to us for consideration. The first of these was presented by Mr. Thomas Wall Shelton, and is as follows:

"*Resolved*, That in whatever form of pleading that may be adopted there shall be preserved the common-law limitation upon the court—that whatever is not judicially presented can not be judicially determined."

The other resolution was offered by Mr. Ernest T. Florance:

"*Resolved*, That the committee to suggest remedies and formulate laws, etc., be instructed to consider the preparation of a bill providing for the abolition of difference of forms of procedure between actions at law and cases in equity in the Federal courts."

I. In accordance with the instructions of the association we presented to Congress at its last session beginning in December, 1910, the bills which had been recommended and approved by this association, which are to be found in full on pages 7 to 10 of our last report (pp. 620 to 623, vol. 35, for 1910). The bills were referred in each House to the Committee on Judiciary. We had a hearing before the full committee of the House of Representatives and before the subcommittee of the Senate consisting of Senators Nelson, Dillingham, and Overman. We also had many interviews and much correspondence with individual members of both committees. The question whether the amendments to procedure proposed in the first two sections of the bill would interfere with the province of the jury was debated very fully at the public hearing and in discussions with individual members. We endeavored to convince the committees to whom the matter was referred that so far from impairing the value of a trial by jury the amendments proposed tended to increase its value and to promote the determination of causes upon the merits rather than upon technical objections which do not affect the merits and to which juries pay no attention. We pointed out that by giving more finality to the verdict of a jury, rendered when the facts of a case are fresh in the memory of witnesses, and permitting the appellate courts to pass directly upon the questions of law involved, without the necessity of ordering a new trial, we would make it possible to terminate every cause upon its real merits, present these merits fairly to the court, and put an end to the litigation as soon as this can be done consistently with giving a full and fair hearing to both parties.[1]

We could not discover that there was any serious objection in either committee to these two sections except that arising from a conservatism which is reluctant to make any change whatever. Nevertheless our efforts failed to obtain a report to the House or the Senate from the full committee of either body. The subcommittee of the Senate reported the bills to the full committee of that body.

There were also objections made to the third, fourth, fifth, and sixth sections of the bill to regulate judicial procedure. These relate to writs of error and appeals in criminal cases and habeas corpus proceedings. Some members of each committee were unwilling to put any limitation whatever upon the right of appeal in criminal cases.

Meanwhile the pending bills had attracted much attention in the House of Representatives. Many Members had become interested in them. It will be remembered that there was pending in the House of Representatives a bill which had been originally prepared by the Commissioners to Revise the Statutes of the United States, and which had been referred to a committee of the House of Representatives known as the Committee on the Revision of the Laws. Of this committee, Hon. Reuben O. Moon, of Pennsylvania, was chairman. He was also a member of the Judiciary Committee. When this measure was first under consideration before a joint committee of both Houses in 1906, a meeting of the lawyers of New York who practice in the Federal courts was held at which several amendments were agreed upon and suggested to the joint committee. Among the amendments which were suggested at that time there were six which substantially proposed the reforms in procedure which were afterwards recommended by this association and embodied in the bill to regulate the judicial procedure of the United States already referred to.

These amendments in 1906 were drawn so as to correspond to the bill in the form in which it was then before the joint committee. It seemed, however, that there was no likelihood of this bill being seriously taken up by Congress, and in the original report of this committee we thought it expedient to recommend these amendments as separate measures drawn with reference to the Revised Statutes as they then existed. But the unexpected happened. The new committee of the House of Representatives on the Revision of the Laws reported to the House, with some amendments, the bill which had been drafted by the commissioners, and succeeded in getting their report upon the calendar in such a form that it had the right of way, and did receive during several successive weeks, on the days set apart for the reports of committees, very full consideration. In view of this fact your committee conferred with several members of the Committee on Revision of the Laws, and especially its chairman, Mr. Moon. It was agreed that when section 254 of the judiciary act came up for consideration, the first two sections of the association's bills, combined into one section, should be moved as an amendment to the reported bill.

Meanwhile Mr. Madison, of Kansas, had become so much impressed by the arguments presented in support of the association bill that after conference with your com-

[1] Church *v.* Hubbart (2 Cranch, 232).

mittee he introduced in the House as a separate bill, a section embodying the first two sections of the association bill in the form in which they had been agreed to before the Judiciary Committee. After considerable discussion this bill passed the House unanimously. It went to the Senate, was referred to the Judiciary Committee, but all the efforts of your committee were unavailing to procure a report upon it. The expressions of opinion from individual Members of the Senate were so favorable that we had reason to believe that if the bill could have been gotten out of committee it would have passed the Senate. The other method which had been planned to bring the bill before the Senate failed because of the fact that there was so much debate in the House upon the early sections of the judicial code (as it is designated in sec. 296), which relate to judicial districts and to the jurisdiction of the district courts, that section 254 was not reached for consideration. The code, with numerous amendments which were made in the House, was finally passed under a suspension of the rules. The Senate meanwhile had passed the code in a different form. They both went to a conference committee and the judicial code finally passed in the form with which the association has already become familiar.

We may say that as this code was drawn by the Commissioners on the Revision of the Statutes it effected very little change in the practice of the Federal courts with one single important exception. It did consolidate the courts of original jurisdiction into one court, to be known as the District Court of the United States in each judicial district, and it did abolish the circuit courts. This is in accord with the recommendations of our report in 1910. As drawn by the commissioners it failed entirely to provide for the numerous instances in which it is desirable to have an order made by one judge operative in the whole circuit. For example, in railroad foreclosures it is of great importance that a receivership should extend throughout the entire circuit in which the railroad runs. This defect was, however, corrected in the House, the amendment was adopted in conference, and is included in the bill as finally passed and signed by the President.

We append hereto (schedule A) a copy of the bill recommended by your committee which passed the House, and we recommend that the committee be authorized to present this bill at the next session of Congress in the form in which it passed the House as an amendment to section 269 of the judicial code, and urge its adoption upon both Houses of Congress.

2. The sixth section of the bill recommended by this association is incorporated in the judicial code. Section 128 of this code gives to the circuit courts of appeal jurisdiction to review by writ of error the judgments of the district courts in all criminal cases, including capital cases, and makes their judgment final, except in cases involving constitutional questions.

We also recommend that the remaining sections of the bill to regulate the judicial procedure of the courts of the United States, recommended by this association in 1910, be embodied in a separate bill and recommended for adoption by Congress.

3. It will be of interest to the association to put on record some results of the agitation for a change in the method of dealing with errors alleged to have been committed by trial courts. In courts of justice in this country, quite apart from any legislation, the change is very manifest.

For example, in Vicksburg & Meridian R. R. Co. *v.* O'Brien (119 U. S., 99, 103; 30 Law. Ed., 299, 300), decided November 1, 1886, Mr. Justice Harlan said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Waite, C. J., and Field, Miller, and Blatchford, JJ., dissented.

The dissent on the part of these four eminent judges has received the approval of the court in subsequent cases. For example, in Standard Oil Company *v.* Brown (218 U. S., 84, 86; 54 Law. Ed., 945, 946), decided May 31, 1910, the court said:

"The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required."

The court held that errors in the charge or refusal to charge would not be considered as reversible error when it was plain that the issues had been fairly presented to the jury.

The reason for the change is well stated by the Court of Appeals of the State of New York in People *v.* Gilbert (199 N. Y., 28), decided in 1910:

"The objection is purely technical, and technical objections are no longer regarded as serious unless they are so thoroughly supported by authority that they can not well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe as in many cases to shock the moral sense of lawyers, judges, and the public generally. When stealing a handkerchief worth 1 shilling was punished by death, and there were nearly 200 capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities, to a great extent, have lost their hold. We overrule the contention of the defendant in regard to the indictment, because it is founded on a technicality, with no support in authority and with but slight support in reason."

Judge Coxe, delivering the opinion of the circuit court of appeals in Press Publishing Co. *v.* Monteith (180 Fed., 357), thus states the change that some courts have already made in dealing with the subject of "reversible error."

"The defendant, realizing apparently that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

"Prejudice must be perceived, not presumed or imagined.

"The writer, speaking only for himself, is in hearty accord with the modern tendency.

"The object of all litigation should be to arrive at a just result by the most direct, speedy, and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides:

" 'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.'

"Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court, and the resources of the litigants become exhausted.

"Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hestiate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

Legislation which embodied substantially the rule of decision recommended by this association has been adopted by the legislatures of Kansas, Illinois, and Wisconsin, and has been under consideration in the legislatures of Ohio and New York. We hope that during the present year it will appear that these changes have become part of the legislation of the latter State. It has been recommended by the State Bar Association and by the Bar Association of the City of New York, which is believed to be the oldest, and is certainly one of the most conservative, bar associations in America.[1]

4. While the association had under consideration the bill to diminish the expenses on proceedings of appeal and writs of error, the Bar Association of the State of Washington had prepared a different bill, intended and adopted to accomplish the same purpose as our own. In justice to ourselves we feel bound to say that we think that the form recommended by this committee and adopted by the association was more in harmony with existing legislation than the bill drawn in Washington. It is, however, unnecessary to call the attention of the association more particularly to the difference, in view of the fact that the bill as drawn by the association in Washington received the approval of Congress and was signed by the President. It excited at first much unfavorable comment on the part of clerks of the circuit courts of appeals, and it was thought at first that the bill as drawn might make it impossible to meet those expenses of the court which were provided for by the fees of the clerk. We are informed that on more careful consideration this objection seems not to be well taken.

[1] Reference may also be had to the following cases: Savage *v.* Modern Woodmen, (84 Kans., 63); Harris *v.* State (80 Nebr., 195, 114 N. W. Rep., 168); Byers *v.* Territory of Oklahoma (103 Pac., 532); State *v.* Bird (Mont., 111 Pac., 407).

Your committee is distinctly of opinion that this country ought not to expect that the expenses of the administration of justice should be paid out of the fees exacted from suitors. The country can well afford to maintain its courts, and provide from the Public Treasury for all suitable expenses of the administration of the law.

5. The third bill recommended by the association authorized the appointment of stenographers in the courts of the United States and fixed their duties and compensation.

There is a large and influential stenographers' union. This union had prepared a bill which undertook of itself to fix all compensation without leaving its determination to the judges in the different circuits. Neither of the proposed schemes received the approval of Congress.

6. The next subject which was referred to us was that of limiting the right of appeal from the courts of the District of Columbia to the Supreme Court of the United States. On this subject we have had full consultation with members of the bar of the District of Columbia. We have come to the conclusion that the right of appeal as it now exists, as amended by section 250 of the judicial code, is not productive of so much inconvenience or delay to other suitors from the States of the Union whose cases come before the Supreme Court as had been supposed, and your committee does not at this time recommend any change in the section of that code relating to such appeals.

7. We have prepared the following addition to the forty-fourth rule of the Supreme Court in admiralty, which we recommend for approval by this association:

"That in all cases of admiralty and maritime jurisdiction either party may introduce oral testimony and have examination of witnesses in open court."

The reasons for this amendment are so fully stated in our previous report that we think it unnecessary to repeat them here. If approved, we will submit it to the Supreme Court under the authority heretofore conferred upon us.

8. The same evils that have been felt to exist in admiralty cases in some of the circuits have also been felt in equity cases, caused by the fact that under the existing equity rules testimony in all cases is taken out of court. The complaints on this subject have been so numerous that the Supreme Court itself has appointed a committee, consisting of Chief Justice White, Mr. Justice Lurton, and Mr. Justice Van Devanter, "with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practice under the rules as they now exist." Mr. William J. Hughes has been appointed secretary of this committee, and he has requested your committee to aid the court in the performance of the task which it has undertaken.

Your committee is of opinion that the same reasons which led the association to recommend the adoption of the admiralty amendment are equally applicable to equity cases. It is a well-known fact that in England and many States of the Union testimony in equity cases, on the main issues, is taken in open court. This does not interfere with the practice of referring all matters of account to a master in chancery, but it leaves to the judge himself the determination of the fundamental questions in the case.

Among the objections that have been taken to this practice in equity cases is that the judge will say, "I do not care to hear the testimony, because I must read it." It is not for this committee to declare that no judge will ever make this statement, but we can affirm as a result of our own experience that judges in the State courts do not, and Federal judges, when they are hearing cases in admiralty, do not make such an unreasonable observation. We find the actual practice usually to be, that when the judge hears the testimony he does not read it in extenso afterwards, but refers to it as his attention is drawn by the briefs of counsel or by his own investigation. It is possible that a judge who had not been in the habit of hearing oral testimony in cases of this sort, might at first think that he would be obliged to read the testimony in extenso. But in point of fact one great object of the change is to relieve him from this burden, to give him the testimony in all its freshness, and enable him to ask of the witnesses such questions as may tend to elucidate the case upon the merits. Experience shows that frequently these questions by the trial judge are illuminating, and assist in a most important manner in the ascertainment of the facts.

We may be permitted to refer to the customary practice of one of the great judges of the United States Supreme Court, Mr. Justice Blatchford. He was the first district judge who was promoted to be a Justice of the Supreme Court. His custom was to hear the oral testimony in admiralty cases with the greatest attention, and practically to make up his mind on the facts after the argument of counsel, just as a juryman is required to do when a verdict is asked of him upon the submission of the case. The questions of law arising upon these facts he took for more deliberate consideration. All lawyers who had the privilege of practicing before him know how admirably

this method of dealing with litigated questions conduced to the ends of justice, and how satisfactory it was to the bar.

In New Jersey, which is one of the States where a separate court of chancery still exists, the practice of hearing the testimony viva voce in open court has proved satisfactory both to the bench and to the bar. We are distinctly of opinion that a change in this respect would be beneficial in the Federal courts. There is a reason for its adoption there that does not exist in those jurisdictions where there is a separate court of chancery. A Federal judge sits at law, in equity, and in admiralty. He has experience in hearing oral testimony in the trial of cases at law. In those circuits where the admiralty evidence is taken viva voce he also has that experience. The practice has been so successful in these branches of the Federal jurisdictions that your committee think that nothing but the conservatism to which reference has been made will prevent the adoption of the reformed practice in all equity cases. It may perhaps require the appointment of additional judges. If experience should prove this to be the case, we have the satisfaction of knowing that the country is well able to defray the expense which this would entail. Indeed, the entire annual cost of the judicial administration of the United States is less than that of one of the great battleships which we find it so easy to construct.

The objection is also taken that it would be difficult and expensive to procure the attendance of experts before the judge. We are of opinion that experience would show in equity, as it does now in admiralty cases, that the attendance of witnesses would be arranged for mutual convenience, that some depositions would be taken out of court, but that the most important witnesses would be examined in open court and that the judge would derive from their oral examination a much clearer understanding of the real judgment of the expert. We know that expert testimony sometimes obscures when it should elucidate. The judge would shorten the examination and arrive at the truth more certainly than he now can do.

Another committee of this association has had this subject under consideration. One of its members, Mr. Frederick P. Fish, has formulated the method, stated in schedule B, annexed to this report. Some members of this committee approve the proposition, but we have not been able to consider it in full committee. We submit it for the consideration of the association.

In this connection we call attention to the resolution of Mr. Florance. It was said in the debate at Chattanooga by one of the members, "Under the Constitution of the United States the equity practice exists." It seems to your committee that this is a misapprehension.

What the Constitution does say is this (Art. III, sec. 2, subdivision 1):

"The judicial power shall extend to all cases of law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

This section of the Constitution, in our opinion, recognizes the fact that there is an intrinsic difference between the substantive rules and the remedies which prevail at law and those which prevail in equity. It has never, so far as we are aware, been proposed to abolish or destroy this fact. It certainly has not been destroyed in any of the code States. But the Constitution says nothing about the procedure of the courts. It says nothing about preserving the jurisdiction of the court of chancery as a separate jurisdiction. In fact, the original judiciary act of 1790 abolished this distinction entirely. There has never been since the foundation of the Government a separate Federal court of chancery. Every Federal judge, under the existing system, is a chancellor, and also in propria persona a judge at nisi prius, a judge of the admiralty court and of the bankruptcy court. All that is necessary for the pleader in order to express the distinction is to put at the head of his pleading the words "at law" or "in equity," or "in admiralty."

There is no magic in these particular symbols. No one of them is a shibboleth or a fetish. The court is a unit. There can be no possible reason why the judge, who to-day sits in the jury term, to-morrow holds the equity term, and on the third day holds the admiralty term, should not have full power in either division to administer justice upon the merits. If the pleader by mistake has put the words "at law" in his pleading when he should have put the words "in equity" or "in admiralty," it should be the duty of the judge to make the amendment on the spot. It really seems absurd to say that such a mistake must injuriously affect the substantial rights of the adverse party. If the law is a mere game in which the man who is cleverest in the rules of the game will win, then by all means let us retain these tricks of the trade and add to them all those that once existed, but which have inconsiderately been abolished. But if it be, as we believe, the function of a court to do justice between the parties, all requirements which interfere with the administration of justice should be repealed.

The fears expressed that to break down the procedural distinctions in law and equity cases would impair the constitutional grant of judicial power in "cases of law and equity" is a revival of fears entertained in New York and other States at the time of the adoption of the codes. In Leroy *v.* Marshall (8 How. Pr., 373) Justice Barculo said:

"I am not prepared to deny that the authors of the code may have supposed that law and equity could be administered in precisely the same forms; nor that some sections of the code were designed for that purpose. But every judge knows, and every lawyer should know, that, in practice, the thing is impossible.

"Legal and equitable proceedings are essentially different from each other in their origin, nature, and object. * * * Indeed, it would be a matter of astonishment—if we were permitted to wonder at anything in this line—that any man of 'common understanding' should have suffered the idea to enter his head that legal and equitable proceedings could be molded in the same form and be measured by the same rules. Every person who has studied and understands the law as a science knows that there is substance in the distinctions between actions, and that those requirements which superficial observers call 'unmeaning forms and prolix statements' were really wise and indispensable safeguards and protections in administering the most important as well as the most intricate of human sciences."

In New York & New Haven R. R. Co. *v.* Schuyler (17 N. Y., 592) Judge Comstock remarked that the code "with characteristic perspicacity had in fact abrogated equity jurisdiction in many important cases." Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right.

It was for many years the practice in the Federal courts to dismiss a suit which was held to have been brought on the wrong side of the court and compel the plaintiff to resort to another action. But in the recent case of Schurmeyer *v.* Connecticut Mutual (171 Fed., 1) a more liberal practice was adopted. Plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the Circuit Court of Appeals, and the case remanded to the Circuit Court. Judge Amidon in the Circuit Court made an order directing the plaintiff to transform his complaint at law into a bill in equity and directed that the cause be transferred to the equity docket, there to be proceeded with the same as if it had been originally brought as a suit in equity. The Circuit Court of Appeals approved this practice (Ibid., p. 7). The court followed a very able opinion by Judge Shiras in United States Bank *v.* Lyon County (48 Fed., 632).

Your committee has prepared a bill (schedule C), which undertakes to provide a remedy for the evil which has been mentioned. In view of the decision just referred to, it may be that the object of the first section of this bill could be accomplished by a rule of the Supreme Court in equity, which would regulate the practice in all the circuits and conform it to that adopted in the cases just cited.

9. So far as the subject of a general-practice act is concerned, your committee has been entirely unable, within the time which has elapsed since the last meeting of the association, to formulate an act upon this subject. A subcommittee, however, is drafting a preliminary scheme to which your committee, if continued, will be glad to give further and more deliberate consideration.

10. There is one more subject within the scope of the general resolution creating this committee which we have considered, and which we bring to the attention of the association. In the first judiciary act jurisdiction was given to the Supreme Court to review by writ of error a judgment of the highest court of the State in which a party had asserted a claim under the Constitution and laws of the United States, and the decision of the State court had been adverse to this claim. In Cohen *v.* Virginia (6 Wheaton, 414), the Supreme Court held that this grant of power was authorized by that clause of the Constitution to which reference has been had; that such a writ of error was a case arising under the Constitution and laws of the United States, and that it was competent for the Supreme Court to reverse the judgment of the State court. This jurisdiction has been exercised most beneficially and some of the most important decisions of the Supreme Court have been made under the power thus conferred.[1] It is not too much to say that without the powers which the Supreme Court in these cases (in every one of which the decision of the lower court was reversed) maintained for the Federal Government, we should not have been a Nation and would have gone

[1] Dartmouth College *v.* Woodward (4 Wheaton, 518); Gibbons *v.* Ogden (9 Wheaton, 1); McCullough *v.* Maryland (4 Wheaton, 316); The Passenger Tax cases (7 Howard, 288).

to pieces. Indeed, a government without the powers thus asserted would not have been worth preserving. The historic reason for the limitation in the original judiciary act, to wit, that the writ of error should only be permitted where the decision in the State court had been adverse to the claimant, was this: It was thought that the main ground for giving the jurisdiction was that there might be a jealousy of the Federal Government on the part of the State courts. In fact this jealousy did exist in the earlier years of the country's history. Therefore where the decision of the State courts was in favor of the right asserted under the Federal Constitution it was thought there would be no just ground for complaint.

In the present generation we are confronted with a new situation. There are many instances in which the language of portions of the Federal Constitution has been adopted by the constitutions of the several States. In litigated cases rights have been asserted under both constitutions. The rights thus asserted are of exemption from the provisions of laws which in the judgment of the great majority of the people of the States are essential to the public welfare. Take, for example, the subject of compensation for injuries to workmen. The evils which exist under the present system of making compensation for injuries caused by negligence are so great that they have excited universal attention. One of the most serious of them has been condemned by this association in its code of ethics, that is to say, the business which has grown up in large centers, commonly known as ambulance chasing. There are practitioners who keep their scouts on the lookout for accidents, seek employment at once from the injured party, engage to pay the expenses of the litigation upon contingent fees, often amounting to 50 per cent of the recovery. All this business we have condemned, and justly condemned.[1] Yet it is almost a necessary consequence of the failure of the State to make any provision for compensation to be ascertained in a more reasonable manner, and to be determined in advance. At its last term the Court of Appeals of the State of New York held that a workmen's compensation act, which had been adopted by the legislature of that State after very careful consideration and which the court admitted to be beneficial to the public, was in violation of that clause of the fourteenth amendment which has been embodied in the constitution of the State of New York, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law."[2] There is a similar clause in the constitutions of most of the States. Similar acts on the subject of compensation for injuries have been passed in many of the States. One very like the New York statute has been passed in the State of Washington, and the question of its constitutionality is under advisement by the supreme court of that State. It seems to many counsel, learned in the law, quite probable that the decision in Washington will be the reverse of that in New York. We shall then be in the position of having the Constitution of the United States mean one thing in New York and another in Washington.

The reason which originally prevailed for the adoption of this limitation upon the right of review has ceased. The reason having ceased, the law should cease. No such limitation is contained in section 250 of the judicial code relating to the review of decrees of the District of Columbia courts. We therefore recommend that this limitation be repealed, and report a bill, schedule D, for that purpose.

We also submit a report from the subcommittee dealing with the subject of law and equity in the Federal courts. This is marked schedule E.

One member of our committee, Mr. Allen, dissents from that portion of the report relating to schedule D. We submit a copy of his dissenting memorandum marked schedule F.

We recommend for adoption the following resolutions:

"*Resolved*, That the special committee to suggest remedies and formulate proposed laws be continued with the powers heretofore conferred upon it.

"*Resolved*, That it be discharged from further consideration of the subject of District of Columbia appeals.

"*Resolved*, That the American Bar Association approves the provisions of the bill to amend chapter eleven of the judicial code of the United States, reported by said special committee.

"*Resolved*, That the American Bar Association approves the provisions of the bill to extend the right of review in cases arising under the Constitution of the United States, reported by said committee, being an amendment to section 237 of the judicial code.

"*Resolved*, That the American Bar Association approves the amendment to admiralty rule No. 44 reported by said committee.

[1] Canons 27, 28; 33 Reports American Bar Association, 582, 583.
[2] Ives *v.* South Buffalo R. Co., decided May, 1911.

"*Resolved*, That the said committee be instructed to bring the portion of the report relating to equity practice to the attention of the Justices of the Supreme Court of the United States.

"*Resolved*, That the said committee be instructed to take such steps as it shall deem expedient to procure the introduction and passage of said bills at the next session of the Congress of the United States and to recommend the same to the attention of the committees of Congress to which the said bills may be referred.

"All of which is respectfully submitted.

"EVERETT P. WHEELER, *Chairman*.
"ROSCOE POUND.
"CHARLES F. AMIDON.
"JOSEPH HENRY BEALE.
"FRANK IRVINE.
"SAMUEL C. EASTMAN.
"HENRY D. ESTABROOK.
"CHARLES E. LITTLEFIELD.
"EUGENE A. BANCROFT.
"STEPHEN H. ALLEN.
"ARTHUR STEUART.
"JOHN D. LAWSON.
"SAMUEL SCOVILLE, Jr.
"WILLIAM L. JANUARY, *Secretary*.

"BOSTON, *August 29, 1911*."

SCHEDULE A.

[H. R. 31165.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

Passed the House unanimously, February 6, 1911.

SCHEDULE B.

I am satisfied that there can be no real reform in equity procedure and practice in the United States courts until there is a judge in control of each case from the time the pleadings are completed, with a definite feeling of responsibility on the part of the judge that he is to control the procedure. Specifically I believe that the best possible plan would be this:

As soon as the pleadings are completed the case should be assigned to a judge who will practically control it from that moment. He should immediately bring counsel together and find out what the case is about. He should learn specifically what is the nature of the controversy and definitely what are the defenses. He should then determine which of those defenses could properly and fairly be tried in open court. If he found, on this preliminary hearing, that there was testimony to be taken out of the circuit or that certain testimony could not be produced in open court, he should then and there appoint an examiner to take this particular testimony within a fixed time, which of course he could extend if necessary. If any questions arose in the course of this testimony, he should not refuse to pass upon them, but should recognize an obligation to do so.

At this preliminary hearing, having arranged for taking the testimony that must be be taken before an examiner, the judge should set the case down for hearing at a fixed date, at which time the rest of the testimony would be taken orally before him. At the trial there would be the depositions taken before the examiner and a stenographic report of the testimony taken from day to day in open court. In all the great centers testimony taken one day could be printed the next morning.

If at any time during the trial there was a surprise or any ground for so doing, the court would adjourn the hearing for a time, that the parties might have the opportunity to meet the new conditions. The trial in open court would be resumed at the expiration of the period of adjournment.

The rule of Blease *v.* Garlington should be amended so that the trial judge could deal with testimony in equity substantially as he deals with testimony at law. The rights of a party offering testimony which the trial judge rejected could be protected by a statement from counsel offering the testimony as to what it was and what he expected to prove. The appellate court could then determine whether the testimony had been properly or improperly excluded, and if its view was that the testimony had been improperly excluded, the case could be sent back for the single purpose of taking this testimony.

It would be an enormous gain in patent cases if the experts should be forced to testify in the presence of the court. I have no doubt that the length of expert depositions would be reduced 75 per cent and the court would be sure to understand the experts. The court would check the expert whenever he got away from the points of the case and would check the cross-examination when the same was improper.

If cases were prepared in this way, a very large number of them could be decided by the trial judge before he left the bench at the close of the hearing. His opinion would be taken down stenographically and subsequently revised by him if necessary. He would be spared the necessity of reading an enormous record, with the subject matter of which he was not familiar, for the sake of getting at the comparatively few points upon which every case ultimately is determined.

FREDERICK P. FISH.

SCHEDULE C.

AN ACT To amend chapter eleven of the judicial code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the judicial code, entitled "Provisions common to more than one court," shall be amended by adding at the end thereof new sections to be known as sections 274 A and 274 B, to read as follows:

SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require.

SCHEDULE D.

AN ACT To amend section 237 of the judicial code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That Section 237 of the judicial code be, and the same is hereby, amended so as to read as follows:

SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States [*and the decision is against their validity*]; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States [*and the decision is in favor of their validity*]; or where any title, right, privilege, or immunity is claimed under the

Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States [*and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority*], may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

The bracketed words in italics are to be omitted.

SCHEDULE E.

REPORT OF SUBCOMMITTEE UPON THE RESOLUTION OF MR. FLORANCE AND THAT OF MR. SHELTON.

I.—*Law and equity in the Federal courts.*

The first question in any proposed reform in Federal procedure with respect to the absolute separation of legal and equitable proceedings must be one of constitutionality. There are many dicta in the books to the effect that such a separation is required by provisions of the Constitution. It may be well to set forth these dicta.

"It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States in administering the remedy for an existing right. The rule applied to the remedy and not the right. * * * It is the form of remedy for which the Constitution provides." (Taney, C. J., in Meade *v.* Beale, Taney, 339, 361 (1850).)

This dictum of Chief Justice Taney (at circuit) has been cited as meaning that the Constitution provides for a proceeding in chancery for all rights to which such proceedings were appropriate under the old English practice. But, properly apprehended, such is not its meaning. The learned Chief Justice saw, what many have pointed out since, that the distinction was one of remedy; that for certain situations our legal system provides a remedy by a command addressed to and enforced against the person, and that the Constitution expressly provides that the Federal courts shall administer this type of remedy in appropriate cases. It does not provide, nor does the dictum above quoted say that it provides, any procedure by which the type of remedy in question is to be sought or in which it is to be awarded.

A number of subsequent dicta, however, are put more sweepingly:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law." (Taney, C. J., in Bennett *v.* Butterworth, 11 How., 669, 674 (1850).)

Here, again, what is meant is that one whose claim is legal must have a legal remedy; not that this remedy must be sought in any particular form of proceeding. The former was all that the court had to decide.

"In the last-mentioned case [Bennett *v.* Butterworth, *supra*] the Chief Justice, in delivering the opinion of the court, says: 'The Constitution of the United States has recognized the distinction between law and equity, and it *must* be observed in the Federal courts.' In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law they *can not* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either." [Italics in the original.] (Grier, J., in McFaul *v.* Ramsey, 20 How., 523, 525 (1857).)

This protest against the attempt of the Federal district court for Iowa to apply the Iowa code of civil procedure was well taken. Beyond that, the passage is only one of many oracular pronouncements to be found in the books, when the codes of procedure were new, which have been refuted by the event.

"The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought by interposing an equitable defense to defeat this action at law brought by the receiver under the statute. That can not be done because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted." (Harlan, J., in Lantry *v.* Wallace, 182 U. S., 536, 550 (1900).)

"There is a fundamental distinction growing out of the Federal Constitution and legislation between legal and equitable procedure. The seventh amendment to the Constitution provides that in 'suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' And section 16 of the judiciary act of September 24, 1789, reproduced in section 723 of the Revised Statute, enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' These constitutional and statutory provisions control the procedure of the Federal courts." (Bradford, J., in Jones *v.* Mutual Fidelity Co., 123 Fed., 507, 517 (1903).)

Here the matter is put upon its true ground, namely, the seventh amendment and Federal legislation, and it may well be that the preceding extract in reality proceeds upon the same idea.

We have, then, three matters to consider, when legal and equitable procedure in a Federal court are before us: (1) The constitutional recognition of law and equity in the provision conferring jurisdiction upon the courts of the United States; (2) the seventh amendment; (3) Federal legislation providing for distinct procedure at law and in equity. The first of these is the basis of some or even of all but the last of the judicial pronouncements above quoted. Yet if we go back to the fountain head of these statements in the original dictum of Taney, C. J., we see at once that he had in mind the remedy, not the form of procedure, and hence that his remarks afford no ground for assuming that the words "at law and in equity" require a distinct procedure. Rather, those words were meant to give to Federal courts each of the two great classes of remedies of the Anglo-American legal system. Accordingly, many dicta have recognized that a substantial not a formal or procedural distinction is the one recognized. For instance, that is evidently what Curtis, J., had in mind when he spoke of "the equity law recognized by the Constitution and by acts of Congress." (Neves *v.* Scott, 13 How., 268, 272 (1851).)

So, also, in the following:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity not according to the practice of State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles." (Davis, J., in Thompson *v.* Railroad Companies, 6 Wall., 134, 137 (1867).)

There remains one remark of an eminent judge sitting in a circuit court of appeals:

"But in the courts of the United States the distinction between actions at law and suits in equity and between legal and equitable defenses is carefully preserved because it is clearly recognized in the Constitution and laws of the United States." (Van Devanter, J., in Anglo American Land Co. *v.* Lombard (C. C. A.), 132 Fed., 721, 731 (1904).)

It is submitted that this means that the distinction between the remedies and the substance of the defenses is recognized by the Constitution and the distinction between the modes of procedure is established by the statutes.

In the requirement of the seventh amendment, that the right of trial by jury shall be preserved, we find a more serious matter. That this is the true basis of separate procedure at law and in equity has been recognized by many judges:

"The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed $20 the right of trial by jury shall be preserved.' In the Federal courts this right can not be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact." (Field, J., in Scott *v.* Neely, 140 U. S., 106, 109 (1890).)

This evidently does not mean that the learned justice thought such a blending might not be provided for, if it did not impair the right to jury trial of legal issues. No such blending was permissible under the existing practice, and the reason is pointed out, namely, to preserve the right to jury trial. If, therefore, that right can be preserved, such a blending of legal and equitable issues in one cause might be established by proper authority. That this is so the Supreme Court of the United States has

made clear abundantly in passing upon legislation in Territories where statutes had done this very thing:

"The question is whether this act of the Territorial legislature in substance impairs the right of trial by jury. The seventh amendment indeed does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury and that the court shall not assume directly or indirectly to take from the jury or to itself this prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law." (Brewer, J., in Walker *v.* Railroad, 165 U. S., 593, 596 (1896).)

"As in Oklahoma [then a Territory], the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked * * * we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode." (Harlan, J., in Black *v.* Jackson, 177 U. S., 349,364 (1899).)

In that case the suit was in form one for a mandatory injunction. The court held that the seventh amendment did not require that the cause be brought anew as an action of ejectment, but that a jury trial of the legal issue as to possession would suffice.

This construction of the effect of the seventh amendment upon procedure at law and in equity, which must commend itself to everyone's good sense, is borne out moreover by what the court, speaking through Matthews, J., said in Ex parte Boyd (105 U. S. 647, 656, 1881):

"And the remaining question, therefore, becomes not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether by the adoption of that instrument all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it."

It would seem, therefore, that:

(1) The Constitution gives the courts both legal and equitable jurisdiction; that is, the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which can not be taken away, though it may be waived by the party entitled.

(3) If the remedies and the right so secured are not taken away or impaired, the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in Federal procedure.

The second question may well be, How far may rules of court achieve the desired reforms and how far must they be achieved by legislation? As has been seen, the judiciary act of 1789, chapter 20, section 16, recognized the substantive distinction. But section 19 of the same act recognized, or at least assumed, a procedural distinction. Section 21 of that act and section 36 of the act of May 8, 1792 (1 Stat. L., 276), do the same. Since that time the distinction has been assumed in all subsequent legislation. Whether it is required thereby is not so clear. But the Federal courts have said that it is so emphatically so many times that resort to legislation may be the better course. There is good precedent, however, for allowing amendment from law to equity and vice versa, without express legislation, in the decision of Chief Justice Doe, of New Hampshire, in Metcalf *v.* Gilmore (59 N. H., 417, 433). In that cause the court held that the fact that the statute of jeofails allowed amendments at law and that amendments were always allowed in equity, coupled with the union of legal and equitable powers in one court, was enough to justify such amendments. Doe, C. J., said:

"Against an amendment based on the existing unity of jurisdiction it might be asserted that nothing can be done in court without a precedent, and that there is no precedent for such an amendment. But the unity of jurisdiction authorizes such an amendment as could have been made if the unity had been coeval with the common law. In a writ of entry on a mortgage it is found that the mortgage should be reformed. If law and equity had not been disjoined in England (as by the true principle of the common law they could not be) another suit with new process and new notice, for the reformation of the mortgage, would be no more necessary than a new suit to amend a town clerk's record or an officer's return, a reformation of which becomes necessary and is made during the trial. By fair implication the legislative act uniting the disjointed function prescribes whatever new proceedings are requisite for giving due effect to the union."

In some ways the Federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the Federal courts the practice at law by statute conforms to the State practice, which almost everywhere allows amendment from law to equity or vice versa. The practice in equity by statute is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the Federal courts, it would seem that, unless the long line of dicts above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good Federal precedent for such amendment without even a Federal equity rule. (Schurmeyer *v.* Life Ins. Co., 171 Fed., 1.)

Thirdly, we must ask, What reforms in the relation of law and equity in Federal procedure are desirable? It is submitted that three are desirable at once: (1) Power of amendment from law to equity and vice versa, (2) power to allow equitable defenses and equitable replications at law, (3) power to grant ancillary equitable relief in pending legal proceedings without requiring an independent suit with new process.

The first of these raises no questions other than those already discussed. Its desirability would seem beyond argument. It exists not only in the 27 code jurisdictions but also in the more advanced common-law jurisdictions. As has been seen, in New Hampshire it exists by judicial decision as a corollary of the granting of legal and equitable jurisdiction to one set of courts. Noteworthy statutes giving the same power, where legal and equitable procedure are kept distinct, are: Massuchusetts, Revised Laws, chapter 173, section 52; Illinois, Laws of 1907, page 435, section 40. In this respect practice in the Federal courts is far behind that in the State courts.

The second proposed reform involves three items: (*a*) Allowing equitable defenses at law, (*b*) allowing equitable cross demands in legal proceedings, where to make one's defense he must have affirmative equitable relief, such as reformation, cancellation, or specific performance; (*c*) allowing equitable replications at law, as, for instance, where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud. That this is not permitted in the Federal courts see Hill *v.* Northern Pac. R. Co. (C. C. A.) (113 Fed., 914). All of these powers are possessed by the majority of our State courts, and their desirability need not be argued. The sole difficulty lies in the necessity of carefully preserving the constitutional right to jury trial of legal issues. This has not proved a serious obstacle in the 27 code jurisdictions, though the legislative solutions thereof have not always been happy. Three classes of cases have arisen under codes and practice acts: (i) Pure equitable defenses, used defensively only. Here many jurisdictions submit the facts to a jury, as the party who interposes the defense at law may not well complain thereof. But if the court itself passes on the facts on which such a defense is predicated and directs what legal effect shall be given to the facts so determined, according to what a court of equity would have done in a separate suit for that purpose, no constitutional right is impaired. (Marling *v.* Railroad Company, 67 Ia., 331.) (ii) Cross demands for equitable relief of an affirmative nature, which if granted will cut off or dispose of plaintiff's case, but if denied will leave his case yet to be tried on its purely legal issues, or some of them. Here the latter only are triable by jury as of constitutional right. Hence the court may try the claim for equitable relief, and then if any legal issues remain to be tried a jury trial may be had. (Fish *v.* Benson, 71 Cal., 428; Stono *v.* Weiler, 128 N. Y., 655.) (iii) In some cases a legal cross demand has been set up in a suit in equity. Here the party who so sets it up and asks that it be adjudicated in the equity cause has been held to have waived a right to jury trial. Yet the other party may not choose to waive such right. Then the question obviously ought to depend upon whether, as may sometimes be done, this legal issue can be used defensively in equity under the chancery practice. If so, obviously no jury trial may be had; if not, the right must be preserved. (Larkin *v.* Wilson, 28 Kans., 513; Davison *v.* Associates of the Jersey Co., 71 N. Y., 333.) Some of the codes have tried to formulate these rather obvious conclusions, to which the courts have come wherever legislation would allow them, by the use of general phrases, such as "actions for the recovery of money only," "legal issues," "equitable issues," and the like. Such formulas have made much difficulty, since questions have arisen as to how far they may have altered the preexisting rights as to mode of trial. On the whole, no better formula is to be found than that announced by Harlan, J., in Black *v.* Johnson (177 U. S., 349, 364), that a party must have as of right "a trial by jury of all issues which

according to the recognized distinctions between actions at common law and suit in equity are determinable in that mode."

Still another difficulty may be suggested here, namely, the different mode of review in the Federal courts of actions at law and suits in equity, respectively. It may be asked what is to be done where an action at law involving equitable defenses or an equitable replication must be reviewed—shall there be error as to the legal part and appeal as to the equitable part, which would produce great confusion? The question is not a new one. In many of the code States separate forms of review for law and equity were preserved till recently, and hence this very situation arose. The solution adopted was to look to the nature of the main proceeding, in the course of which equitable or legal claims had been interposed. It was stated thus by Maxwell, C. J.: "The rule seems to be that where the action is at law to review the action itself or a final order in any special proceeding therein, the proper practice is by petition in error; but where the action is in equity, the decree itself or any special proceeding in the action * * * may be reviewed on appeal." (Morse *v.* Engle, 26 Nebr., 247.) In like manner in Massachusetts, where certain equitable defenses may be made at law, an action at law in which such a defense is raised is reviewed by exceptions like any other action at law. (Page *v.* Higgins, 150 Mass., 27.)

There remains the matter of injunctions to preserve the status quo pending actions at law. It is a needless expense to require a separate suit with new process and pleadings for this purpose. But no statute is necessary here. The Supreme Court has power by equity rules to prescribe the forms of procedure for exercise of all equitable powers of the court. Surely it may provide that this power of granting an injunction auxiliary to a pending legal proceeding may be exercised upon petition and notice in the legal controversy itself. Indeed, it would seem arguable that it might by rule allow a plea or answer or replication in an action at law to serve the purpose of a bill and so, without legislation, provide for equitable defenses and equitable replications.

II.—*Mr. Shelton's resolution.*

If this resolution is taken literally, no one can have any objection to it. Certainly none of those who advocate reform of procedure or propose or have proposed that a court in deciding a controversy should or should not be permitted to consider anything not legally before it in pleadings, by way of judicial notice, in the form of a presumption, or in the form of legal evidence. What they urge is that when a cause is before the court in the form of legal evidence, the court should be empowered to act upon it and its decision should not be set aside, even if not exactly presented by pleadings, unless some injury has resulted from want of notice of the case or defense to be made. In other words, they urge that pleadings should have but two functions: (1) To furnish notice of the claims, defenses, or cross demands of the parties, (2) to make a record of what has been passed upon so as to furnish a basis for subsequent pleas of res judicata. This matter was fully argued in our report a year ago. We need not repeat the arguments then urged. It is enough to say that if the pleadings give due notice, they subserve every useful purpose of judicial presentation of a cause.

It is suspected, however, that the purpose of the resolution is to impose upon the committee a doctrine, which has been much urged, to the effect that a court ought not to be permitted to deal with a cause in any way unless and until a technical statement of a cause of action, including all the legal elements of case, is before it. It has been asserted somewhat dogmatically, (*a*) that this is a fundamental requirement of the judicial administration of justice, without which there can be no law, (*b*) that it has always obtained in all legal systems, (*c*) that without it constitutional government is impossible, since the courts would operate arbitrarily and despotically. As to the first, it may be enough to say that justice is very well administered to-day in many kinds of cases without anything of the sort—in magistrates' and justices' courts on indorsed writs or informal bills of particulars, in the trial of claims against the estates of deceased persons in many jurisdictions on informal claim bills, in the English courts and in the courts of Canada on informally indorsed writs or informal statements of claim, designed to afford notice. As to the second, it may be remarked that in all three periods of Roman procedure the plaintiff's case was stated in a manner which would be open to demurrer at common law, and that in modern German procedure after citation containing a mere notice the issues are settled by a process of tentative pleading and amendment between court and counsel in which common law demurrers would lie to nearly every pleading. As to the third, in view of the wide powers of interpretation and ascertainment of the law which our common law system confides to the courts, it seems puerile to tie the courts hand and foot with procedural details lest they act arbitrarily. But notice pleading affords no more scope for arbitrary action than a pleading which requires a case to be stated with all its legal elements in common law form. The action of the court on the case made by the proofs is always open to review, and that is the real concern of the law and of society; any deprivation of a fair chance to meet the case so made is also perfectly open to review. Variance ceases to be a matter for technical sparring for advantage and becomes one of substantial rights, namely, Has the party who claims it had a fair opportunity to meet the case against him?

It has been urged that a court can not act until a case is fully and technically made in a pleading before it. Why not? Courts do so act in the cases above enumerated and in others set forth in the report last year with no untoward results. The truth is the requirement of a technically correct pleading to sustain a good case fully proved by legal evidence after a fair hearing is purely historical. It arises from the common law mode of review by writ of error at a time when the parchment judgment roll was the sole mode of setting forth what the tribunal had done. Unless a case was made by the pleadings to sustain the judgment rendered, the reviewing court had no means of knowing upon what the judgment proceeded. To-day, with better modes of review in vogue in almost all jurisdictions and with ample facilities for review of the actual case, to continue to review the pleadings and to require new trial of a good case because of a bad pleading, supposing all requirements of notice have been duly fulfilled, is an anachronism. The committee has no desire to see anything judicially considered that is not juridically presented, but it does desire to see the modes of juridical presentation in many of our jurisdictions much simplified.

ROSCOE POUND,
(For the subcommittee).

SCHEDULE F.

MEMORANDUM OF DISSENT OF MR. ALLEN.

I very heartily approve of all the recommendations of the report except schedule D. The decision rendered by the Court of Appeals of New York in the case you mention certainly presents an instance in which it would be highly desirable to have a review in the Supreme Court of the United States, and a uniform construction of the Constitution of the United States, but I hesitate at any extension of the jurisdiction of that overloaded court. I fear that the amendment proposed would add materially to the number of cases taken to that court, and that in a very large majority of them the inconvenience would outweigh the advantage. Great delay, expense, and inconvenience inevitably result from an appeal to the Supreme Court of the United States, and we ought to be exceedingly careful that we do not open the door wider than necessity requires.

STEPHEN H. ALLEN.

BRIEF FOR AMERICAN BAR ASSOCIATION IN SUPPORT OF BILL RELATING TO PROCEDURE OF UNITED STATES COURTS.

[S. 3750; H. R. 16461.]

This bill was drawn by a committee of the American Bar Association. It has been under consideration by that association for five years. At the meeting at Seattle in August, 1908, it was much discussed and received the almost unanimous support of a large and representative meeting of the association. The bill was presented to the Sixtieth Congress, was discussed fully before the Judiciary Committee, and was amended to meet the criticisms of some members of the committee. In its amended form it passed the House of Representatives unanimously February 6, 1911 (H. R. 31165). It was approved unanimously by the American Bar Association at its last meeting in Boston. The bill represents and was drawn and approved by three professional elements—the bench, the practicing lawyer, and the university.

I. So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in the consideration in an appellate court of a writ of error or appeal, judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below, and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law, that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision below was right, and that if it was erroneous in some detail the error did not affect the result.

Perhaps no better argument can be stated for this proposition than a passage in the opinion of Mr. Justice Martin, of the Court of Appeals of New York. It expresses the great embarrassment that lawyers feel in the trial of important cases. In Lewis *v.* The Long Island Railroad Company (162 N. Y., 50, 67) the judge delivering the opinion of the court says:

"After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered, we are surprised not that a single error was committed, but that there were not many more."

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such procedure needs revision. The State of New York within a few years created a commission to inquire into the causes of the law's delay. Several judges of the supreme court of that State were examined before the commission. Presiding Justice Hirschberg said, in the course of his examination:

"I think that one great difficulty is that our system is distinctively an appellate system, and it is based upon the fundamental idea that a trial and a decision are always wrong; the result of it is that people indulge in litigation because the opportunities are great; they are sure of two appeals, and until the final decision is made they are in no hazard. (Law's Delay Commission Report, p. 269.)

"I have always thought it was a fatal feature of our judiciary system * * * the idea that if a man tries a suit and loses, he can appeal on the assumption that that was wrong, instead of appealing on the assumption that it was right." (Ibid., p. 270.)

Mr. Justice Scott agrees with this view:

"Mr. HAYES. Have you any suggestion to make on appellate procedure?

"Judge SCOTT. You should change that rule of presumption; in the first place I think the appellant should have cast upon him the burden of establishing that there had been error below, and also of showing that that error had been prejudicial. None of us is so wise that he can try a long case without committing some error. In addition to that the appellate division should have the power of awarding judgment." (Ibid., p. 288.)

Mr. Justice (now Senator) O'Gorman says:

"One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

"We have a rule in our State that the commission of an error upon the trial of a cause by a trial justice is presumptively prejudicial to the appellant, and instead of the appellant being required to persuade an appellate court that he has suffered substantial wrong, the moment that he can place his finger on a technical error the burden is at once shifted, and the respondent required to persuade the court that there was no harm following that particular ruling. Now, we all know, and there are very few who seek to vindicate the practice, that very many cases are sent back from the appellate division upon alleged errors which have never affected the merits of the case. (Ibid., pp. 316–317.)

"At the present time nearly every defeated party is willing to take a chance of securing a reversal on appeal. They have every encouragement." (Ibid., p. 319.)

In opposition to all the rules of technicality, which work such injustice and cause such delay, we urge that laid down by Chief Justice Marshall in Church *v.* Hubbart (2 Cranch, 232):

"It is desirable to terminate every cause upon its real merits if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."

The amendment proposed is the equivalent to that already adopted by the Legislature of New York in criminal cases. We quote from the opinion of the court of appeals in People *v.* Strollo (191 N. Y., 42).

At pages 61, 67, the court said:

"Under the statute our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial right of a defendant. Guided by this rule, we feel constrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal. * * *

"These various elements of the question, considered in connection with the functions and powers of this court, bring us face to face with the situation that is apparently paradoxical but actually logical. That is to say, we might have a condition in which we would be compelled, in a civil case, to grant a new trial for a loss of original documentary evidence, although under similar conditions, in a case involving human life and liberty, we may be bound to deny such relief. And why should this seemingly anomalous difference exist? Because this is a court of statutory origin and vested with none but statutory jurisdiction. Thus it happens that in civil cases our powers are limited to the review of errors which are raised and presented by exceptions, while in criminal cases we are not only empowered but commanded to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Proc., sec. 542.) This power of review on criminal appeals is still further broadened in capital cases by the legislative direction that "when the judgment is of death, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below." (Code Crim. Proc., sec. 527.)

Similar legislation to that now proposed has been adopted in Illinois, Kansas, Ohio, and Wisconsin, and by constitutional amendment in California.

In dealing with this important subject, we ask you to put yourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is not this the attitude you always want to occupy? Doubtless, we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. When we look at our profession from the standpoint of the Commonwealth; when we consider that we are not only attorneys for a client, but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system, so that these means of procrastination shall no longer be available.

The objection that is commonly taken to this doctrine, so far as it applies to the review of cases that have been tried before a jury, is that expressed in a letter that we have received from one of the Federal judges, to whom we submitted the proposed bill. He puts it thus:

"If an appellate court either affirms or reverses because of its own opinion as to the merits, it substitutes a trial by judges for a trial by jury."

Our reply to this is that it misconceives the scope of the proposed reform. So far from depriving the verdict of the jury of its value, it tends to establish the verdict. Long experience in the trial of cases before a jury, and conversation with intelligent jurors of our acquaintance, has convinced us that jurors pay much less attention to fine points of evidence or to nice distinctions in the charge than judges generally seem to suppose. In more than half the cases where judgments have been reversed on questions of evidence the ruling in the court below did not affect the verdict in the slightest degree. This being the case, it is unjust that the parties should be put to the expense and delay of a new trial.

Therefore, as practicing lawyers, it is clear to us that the presumption of the appellate court should be that a ruling on the evidence, which it deems erroneous, did not affect the result. It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him upon the merits.

While we can not say that any of the Federal courts has ever sinned as much as some of the State courts, yet we would put upon the statute book a uniform rule for all the circuits, which will embody the rule that prevails in some of them, and which will make it impossible for some of the decisions to be made that the former chairman of this committee, Mr. Lehmann, of St. Louis, adverts to in an address he has recently delivered. We call attention to one, because it seems to us, on the whole, the most flagrant. Yet, under the existing system in some States, it is not only possible, but it has actually occurred. That was an indictment for rape. The proof was clear and the man was convicted, but a writ of error was sued out and the lawyer discovered this defect in the indictment: The constitution of Missouri requires that the indictment should conclude "against the peace and dignity of the State," but in engrossing the indictment the article "the" was omitted before the word "State." The Supreme Court of Missouri held, in State *v.* Campbell (210 Mo., 202), that the omission was fatal, although they said (p. 234): "The testimony as disclosed by the record in this case was amply sufficient to warrant the court in submitting the question to the jury."

They reversed the judgment of conviction. The indictment being held void, of necessity the guilty man would go free unless a new indictment should be found and the case tried again.

There are other cases that might be cited where courts on appeal, particularly in criminal cases, have stretched the rule of error to the furthest limit. It is not in the interest of justice that this should be permitted. The maxim of the common law was that the judge himself is condemned when he acquits the guilty; but we have come in many jurisdictions to the very opposite of that, dependent, we may say, a little upon the character and temper of the judge who happens to sit on the case. Some judges are more technical than others and attach more importance to points like this than others do. That ought not to be the condition of the law. There ought to be a general rule formulated by Congress which shall control in all the circuits of the United States, so as to make these reversals for purely technical defects impossible in any of the Federal courts.

Society has an interest in the punishment of the guilty. Under our system the accused has every chance in the first instance. The judge must charge that he can only be convicted if the jury find him guilty beyond a reasonable doubt. His counsel will probably argue that it is better that ninety-nine guilty men should escape than that one innocent man should be convicted. If, after all that, the jury find the accused guilty, there is a strong presumption of his guilt; and it ought not to be possible for a person in that situation to be allowed to take advantage of such technical errors, which do not affect the merits, and which have nothing to do with the question of his guilt or innocence. We do not always get the most skillful prosecuting attorneys, and under the present rule, as it is often administered, there is required of them almost preternatural skill and foresight in order to guard against questions and objections taken in this way.

II. The second clause of the bill was drawn so as to provide a method by which a verdict on questions of fact may be taken on the trial, reserving questions of law for more deliberate consideration, either by the trial judge, or in the appellate court. It authorizes the court to direct judgment to be entered upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

This amendment gives additional value to the trial by jury. It will prevent the delay, expense, and consequent injustice caused by new trials upon every issue, when the judgment of the appellate court differs from that of the trial court upon some point of law.

To quote from the opinion of the New York Court of Appeals in a recent case:

"It frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony, in order to meet the varying fortunes of the case upon appeal."

This is a direct encouragement of fraud and perjury. (Walters *v.* Syracuse Rapid Transit R. Co., 178 N. Y., 50.)

On the other hand, a just cause may be lost on the second trial because of the death of witnesses, or their departure to parts unknown.[1]

The practice we propose is the common-law practice. It prevails in England to-day, under the judicature act. In that country final judgment is rendered on appeal in 90 per cent of the cases in which the judgment below is reversed; and in only 10 per cent of the reversals is a new trial ordered.

As a matter of fact, the existing procedure in criminal law was framed at a time when it was really needed to protect the criminal, especially from political prosecutions. This is no longer necessary. The criminal is well protected. He must be first indicted by a grand jury of at least 13 men. They say, in finding the true bill, that the man is guilty of the offense. As Sir James Stephen points out in one of his books on criminal law, it is a remarkable thing to say that a man who by 13 of his neighbors has been declared guilty shall start off on his trial with a presumption of innocence. Still he does. The courts tell the jury all the way through, "This man starts and carries through the trial with him this presumption of innocence." Yet at least 13 of his neighbors have already said that he is probably guilty of the crime of which he is accused. The presumption of innocence must be rebutted by sufficient evidence before the jury beyond a reasonable doubt, whereas in a civil case merely a preponderance of the evidence is sufficient. Then, when the prosecutor overcomes all those advantages of the accused, there must be a unanimous verdict. One man can hold up the whole case or compel a mistrial. Again, under the present procedure, if there has been any technical error, even though it does not affect the merits, there must be a new trial. Every rule possible is made to protect the criminal.

[1] A notable instance of the delays under the present system is the Hillmon case (145 U. S., 285; 188 U. S., 208). Second judgment of reversal was 23 years after trial begun. In Springer *v.* Westcott (166 N. Y., 117) there were four appeals. The recovery was $900—for the contents of a trunk.

American courts are far more technical than the English. They have amended their old law. We have adhered to it. They know that the intricacy and technicality of criminal procedure are obsolete, and no longe. fitted for civilization. We pride ourselves on our business capacity and our way of doing things in a common-sense way, and yet we cling to these old technicalities that the Englishman dropped 30 years ago. They pass over little things that we get a new trial for; they decide cases upon the merits more expeditiously and more in consonance with justice than we do.

The American Bar Association, speaking for the bar of every State, urges upon Congress to reform these abuses and redeem the promise of Magna Charta that justice shall be denied or delayed to no man, and that the administration of justice shall not be so cumbrous, dilatory, and consequently expensive that it shall be obtainable only by the rich.

In the President's message, sent to Congress December 21, 1911, we find the following recommendation (p. 16):

"The American Bar Association has recommended to Congress several bills expediting procedure, one of which has already passed the House unanimously, February 6, 1911. This directs that no judgment should be set aside or reversed or new trial granted, unless it appears to the court, after an examination of the entire cause, that the error complained of has injuriously affected the substantial rights of the parties, and also provides for the submission of issues of fact to a jury, reserving questions of law for subsequent argument and decision. I hope this bill will pass the Senate and become law, for it will simplify the procedure at law."

The President's experience as a lawyer and a judge gives especial weight to this recommendation. We submit that it should receive careful consideration.

We conclude with a quotation from the great Italian statesman, Cavour, which seems to us timely:

"I am not an alarmist; nevertheless, without being one, I think we can see at least the possibility, if not the probability, of stormy times. Well, gentlemen, if you wish to take precautions against these stormy times, do you know the best way? It is to push reforms in quiet times, to reform abuses when these are not forced upon you by the extremists."

EVERETT P. WHEELER, *New York.*
RUSSELL WHITMAN, *Illinois.*
R. E. L. SANER, *Texas.*
(For American Bar Asscciation.)

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CHAP. 231.—An Act To codify, revise, and amend the laws relating to the judiciary.

March 3, 1911.
[S. 7031.]

[Public, No. 475.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows:

Judicial Code.

TITLE.

Title.

THE JUDICIARY.

The Judiciary.

CHAPTER ONE.

Chapter 1.

DISTRICT COURTS—ORGANIZATION.

District courts, organization.

Sec.
1. District courts established; appointment and residence of judges.
2. Salaries of district judges.
3. Clerks.
4. Deputy clerks.
5. Criers and bailiffs.
6. Records; where kept.
7. Effect of altering terms.
8. Trials not discontinued by new term.
9. Court always open as courts of admiralty and equity.
10. Monthly adjournments for trial of criminal causes.
11. Special terms.
12. Adjournment in case of nonattendance of judge.
13. Designation of another judge in case of disability of judge.
14. Designation of another judge in case of an accumulation of business.
15. When designation to be made by Chief Justice.
16. New appointment and revocation.
17. Designation of district judge in aid of another judge.
18. When circuit judge may be designated to hold district court.
19. Duty of district and circuit judge in such cases.
20. When district judge is interested or related to parties.
21. When affidavit of personal bias or prejudice of judge is filed.
22. Continuance in case of vacancy in office.
23. Districts having more than one judge; division of business.

SEC. 1. In each of the districts described in chapter five, there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: *Provided*, That whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district: *Provided further*, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: *Provided further*, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

District courts.
R. S., sec. 551, p. 93.
Judge for each district.
Additional for designated States.
Vol. 34, p. 1253; Vol. 33, p. 995; *Ante*, p. 201. Vol. 32, p. 795; Vol. 34, p. 297; Vol. 33, p. 987; Vol. 31, p. 726; Vol. 34, p. 828; *Ante*, p. 202. Vol. 35, p. 656; Vol. 33, p. 155; Vol. 35, p. 656; Vol. 35, p. 688; Vol. 32, p. 803; Vol. 34, p. 202; Vol. 35, p. 685.
Provisos.
Maryland senior judge.
Ante, p. 201.
Service in two districts.
R. S., sec. 552, p. 93.
Alabama.
Vol. 24, p. 213.
Residence required.

SEC. 2. Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments.

Pay of judges.
Vol. 32, p. 825.

SEC. 3. A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

Clerks.
R. S., sec. 555, p. 93.

SEC. 4. Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be

Deputy clerks.
Appointment and tenure.
R. S., sec. 558, p. 94.

Appeals from court of appeals.

An appeal may be taken to the Supreme Court of the United States from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said Supreme Court, in the following cases and no other:

Amount in controversy, etc.

First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

Affecting construction of bankruptcy laws.

Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

Cases certified from other courts.

Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Precedence of criminal cases from a State court.
R. S., sec. 710, p. 134.

SEC. 253. Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

Printing cost.
Vol. 19, p. 344.

SEC. 254. There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States.

Admission of women to practice.
Vol. 20, p. 292.

SEC. 255. Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the court of appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

Chapter 11.

CHAPTER ELEVEN.

Provisions common to more than one court.

PROVISIONS COMMON TO MORE THAN ONE COURT.

Sec.
256. Cases in which jurisdiction of United States courts shall be exclusive of State courts.
257. Oath of United States judges.
258. Judges prohibited from practicing law.
259. Traveling expenses, etc., of circuit justices and circuit and district judges.
260. Salary of judges after resignation.
261. Writs of ne exeat.
262. Power to issue writs.
263. Temporary restraining orders.
264. Injunctions; in what cases judge may grant.
265. Injunctions to stay proceedings in State courts.
266. Injunctions based upon alleged unconstitutionality of State statutes; when and by whom may be granted.
267. When suits in equity may be maintained.
268. Power to administer oaths and punish contempts.
269. New trials.
270. Power to hold to security for the peace and good behavior.
271. Power to enforce awards of foreign consuls, etc., in certain cases.
272. Parties may manage their causes personally or by counsel.
273. Certain officers forbidden to act as attorneys.
274. Penalty for violating preceding section.

Exclusive jurisdiction of United States courts.
R. S., sec. 711, p. 134.

SEC. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States. Crimes under Federal laws.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States. Forfeitures and penalties.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. Admiralty and maritime causes.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize. Seizures and prize cases.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States. Patent rights and copyrights.

Sixth. Of all matters and proceedings in bankruptcy. Bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens. Where a State is a party.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls. Diplomatic and consular cases.

SEC. 257. The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ——— ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God." Form of judicial oath. R. S., sec. 712, p. 135.

SEC. 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor. Judges prohibited to practice law. R. S., sec. 713, p. 135.

SEC. 259. The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the Commerce Court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence. Expense allowance to judges away from official residence. Official residences.

SEC. 260. When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation. Retired judges. Vol. 35, p. 619.

Writs of ne exeat. R. S., sec. 717, p. 136. Restriction.

SEC. 261. Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Power to issue writs. R. S., sec. 716, p. 136.

SEC. 262. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Temporary restraining orders. R. S., sec. 718, p. 136.

SEC. 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

Injunctions. R. S., sec. 719, p. 136.

SEC. 264. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it can not be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

Issue by Supreme Court justices.

By circuit judge in absence of district judge.

No injunction to State court except in bankruptcy.

SEC. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Injunctions based on unconstitutionality of State laws. *Ante*, p. 557.

SEC. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district

Hearing before three judges.

Applications.

Provisos. Qualification of judges. Notice to State officials, etc.

Temporary restraining order to prevent irreparable damage.

judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Precedence to hearings.

Direct appeal to Supreme Court.

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Restriction on equity suits.
R. S., sec. 723, p. 137.

SEC. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Powers to administer oaths, and punish contempts.
R. S., sec. 725, p. 137.
Proviso.
Limitation as to contempts.

SEC. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

New trials.
R. S., sec. 726, p. 138.

SEC. 270. The judges of the Supreme Court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.

Power to hold to security of peace and good behavior.
R. S., sec. 727, p. 138.

SEC. 271. The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent: And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however*, That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such

Enforcing orders, etc., of foreign consuls.
R. S., sec. 728, p. 138.

Issue of process.

Proviso.
Payment of expenses.

Marshals to assist.

imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

Pleadings by parties, etc. R.S., sec. 747, p. 141.

SEC. 272. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

Court officials barred from practice in district, etc. R.S., sec. 748, p. 141.

SEC. 273. No clerk, or assistant or deputy clerk, of any Territorial, district, or circuit court of appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer.

Punishment for violation. R.S., sec. 749, p. 141.

SEC. 274. Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

Chapter 12.

CHAPTER TWELVE.

Juries.

JURIES.

Sec.
275. Qualifications and exemptions of jurors.
276. Jurors, how drawn.
277. Jurors, how to be apportioned in the district.
278. Race or color not to exclude.
279. Venire, how issued and served.
280. Talesmen for petit juries.
281. Special juries.
282. Number of grand jurors.
283. Foreman of grand jury.
284. Grand juries, when summoned.
285. Discharge of grand juries.
286. Jurors not to serve more than once a year.
287. Challenges.
288. Persons disqualified for service on jury in prosecutions for polygamy, etc.

Qualifications and exemption of jurors. R.S. sec. 800, p. 150. Vol. 21, p. 43.

SEC. 275. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Drawings. Vol. 21, p. 43.

SEC. 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Commissioner. Qualifications, etc.

Apportionment of jurors. R.S., sec. 802, p. 150.

SEC. 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

United States [Laws, etc. (U.S. Code)]

x re former section 399

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VOLUME THREE

TITLE 27—INTOXICATING LIQUORS

TO

TITLE 42—THE PUBLIC HEALTH AND WELFARE

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proof of service, with the clerk of the court in which the judgment to be reviewed was entered. The mode of obtaining a supersedeas is pointed out in paragraph 2 of Rule 36.

DERIVATION

Derived from 1928 revised rule 46, as amended by Order May 31, 1932.

Rule 47. Appeals Under the Act of August 24, 1937.

Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under Section 2 of the Act [28 U. S. C. § 349a] the service required by paragraph 2 of Rule 12 shall be made on all parties to the suit other than the party or parties taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed.

DERIVATION

Derived from 1928 revised rule 46½, as added January 10, 1938.

Rule 48. Joint or Several Appeals or Petitions for Writs of Certiorari; Summons and Severance Abolished.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

DERIVATION

New rule.

Rule 49. No Session on Saturday.

The court will not hear arguments or hold open sessions on Saturday.

DERIVATION

Derived from 1928 revised rule 47, which was from 1925 revised rule 43.

Rule 50. Adjournment of Term.

The court will at every term announce, at least three weeks in advance, the day on which it will adjourn, and will not take up any case for argument, or receive any case upon briefs, within two weeks before the adjournment, unless otherwise ordered for special cause shown.

DERIVATION

Derived from 1928 revised rule 48, which was from 1925 revised rule 44.

Rule 51. Abrogation of Prior Rules.

These rules shall become effective February 27, 1939, and be printed as an appendix to 306 U. S., 59 S. Ct. The rules promulgated June 5, 1928, appearing in 275 U. S., Appendix, 50 S. Ct. and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

DERIVATION

Derived from 1928 revised rule 49, which was from 1925 revised rule 45.

Chapter 10.—PROVISIONS COMMON TO MORE THAN ONE COURT

Sec.
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372. Oath of United States judges.
373. Practice of law by United States judges.
374. Traveling expenses of circuit justices and circuit and district judges.
374a. Salaries of stenographers and law clerks to district or circuit judges.
374b. Salaries of secretaries or law clerks to district or circuit judges.
375. Salary of United States judges after resignation or retirement; recall to perform judicial duties; procedure where judge is mentally or physically disabled; effect on seniority.
375a. Supreme Court Justices; retirement; rights and privileges; appointment of successor.
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378. Injunctions; when granted.
379. Same; stay in State courts.
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380a. Same; constitutionality of Federal statute; application for hearing; appeal to Supreme Court.
381. Same; preliminary injunctions and temporary restraining orders.
382. Same; security on issuance of.
383. Same; requisites of order; binding effect.
384. Suits in equity, when not sustainable.
385. Administration of oaths; contempts.
386. Contempts; when constituting also criminal offense.
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388. Same; review of conviction.
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391. New trials; harmless error.
392. Security for the peace and good behavior.
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394. Appearance personally or by counsel.
395. Officers forbidden to act as attorneys.
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397. Amendments to pleadings.
398. Equitable defenses and equitable relief in actions at law.
399. Amendments to show diverse citizenship.
400. Declaratory judgments authorized; procedure.
401. Intervention by United States; constitutionality of Federal statute.
402. Residence requirements for retired judges.

§ 371. (Judicial Code, section 256.) Exclusive jurisdiction of United States courts.

The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common

§ 397. (Judicial Code, section 274a.) Amendments to pleadings.

CODIFICATION

Section, act Mar. 3, 1911, ch. 231, § 274a, as added by act Mar. 3, 1915, ch. 90, 38 Stat. 956, related to amendments to pleadings to obviate objection that suit was brought on wrong side of court. Rule 2 of the Rules of Civil Procedure abolished the distinctions between law and equity. See note by Advisory Committee under said Rule 2, set out following section 723c of this title.

§ 398. (Judicial Code, section 274b.) Equitable defenses and equitable relief in actions at law.

CODIFICATION

Section was from section 274b of act Mar. 3, 1911, ch. 231, as added by act Mar. 3, 1915, ch. 90, 38 Stat. 956. Rule 2 of the Federal Rules of Civil Procedure, set out following section 723c of this title, abolished the distinctions between actions at law and bills in equity and provided there should be one form of action to be known as a civil action. See notes of Advisory Committee under said Rule.

§ 399. (Judicial Code, section 274c.) Amendments to show diverse citizenship.

Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (Mar. 3, 1911, ch. 231, § 274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956.)

FEDERAL RULES OF CIVIL PROCEDURE

Amended and supplemental pleadings, see Rules 12, 15, following section 723c of this title.

Continuation of section by Rules, see note by Advisory Committee under Rule 13.

§ 400. (Judicial Code, section 274d.) Declaratory judgments authorized; procedure.

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, ch. 231, § 274d, as added June 14, 1934, ch. 512, 48 Stat. 955, amended Aug. 30, 1935, ch. 829, § 405, 49 Stat. 1027.)

FEDERAL RULES OF CIVIL PROCEDURE

Declaratory judgments, see Rule 57, following section 723c of this title.

Form of complaint, see Form 13, appendix of forms following section 723c of this title.

Special verdicts and interrogatories, see Rule 49, following section 723c of this title.

§ 401. Intervention by United States; constitutionality of Federal statute.

Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act. (Aug. 24, 1937, ch. 754, § 1, 50 Stat. 751.)

COURTS OF THE UNITED STATES

Act Aug. 24, 1937, § 5, cited to text, defined the term "court of the United States" as meaning the courts of record of Alaska, Hawaii, and Puerto Rico, the United States Customs Court, the United States Court of Customs and Patent Appeals, the Court of Claims, any district court of the United States, any circuit court of appeals, and the Supreme Court of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

Effect of Rule 24 on this section, see note by Advisory Committee under said Rule 24.

Intervention, see Rule 24, following section 723c of this title.

§ 402. Residence requirements for retired judges.

No provision of law requiring any judge of any court of the United States to reside in any district or circuit shall be held or considered to apply to any such judge after he shall have retired. (Feb. 11, 1938, ch. 23, 52 Stat. 28.)

Chapter 11.—JURIES

Sec.
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412. Same; manner of drawing.
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413. Same; apportioned in district.
414. Repealed.
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416. Jurors; venire; service and return.
417. Talesmen for petit juries.
417a. Alternate jurors.
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419. Grand jurors; number when less than required number.
420. Same; foreman.