January 1927

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Recommended Citation
Edward F. Treadwell, Some Pitfalls in Federal Practice, 15 Calif. L. Rev. 113 (1927).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38WZ3V

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Some Pitfalls in Federal Practice

Preliminary

The constant and repeated failure of the profession to observe certain rules of practice in cases in the federal courts, resulting in failure to have cases decided upon their merits, has become so prevalent as to justify more than passing remark. Most attorneys are educated in the law with particular reference to the laws of the states, and they are particularly instructed in practice in the state courts. Many practitioners never practice in the federal courts, and many more seldom do so. After practicing for two years in the state courts, they are automatically admitted to the federal courts, with no special inquiry as to their qualifications, particularly with reference to the more or less intricate system of practice prevailing in those courts. It is not the purpose of this article to present any treatise on federal practice, but it is thought that a few rules have become such constant sources of error, that by calling attention to them in this way these errors may be avoided and the young lawyers in particular may be incited to delve even further into the possible pitfalls that await them in a journey through the procedure of the Federal Courts.

I.

Waiver of Jury

Under the state practice the waiver of a trial by jury may be accomplished either formally or informally, and the result on the case is not affected by the manner in which the waiver is accomplished. A practitioner familiar with that practice may naturally think the same liberality prevails in the federal courts. The federal statute permits a jury to be waived only by stipulation in writing filed with the clerk. If the case is tried without a jury, and without a waiver in that manner, the case on appeal is deemed to have been tried by the judge as an arbitrator, and no errors can be reviewed, except such as appear in the pleadings and judgment. Errors oc-

curring at the trial and embodied in a bill of exceptions cannot be considered on appeal.²

Moreover, in order that the case may be reviewed, the record on appeal must affirmatively show that the waiver was accomplished in the statutory manner; and even a recital in the judgment that a jury was duly waived is not sufficient.³

II.

REQUEST FOR FINDINGS

If a case is tried by the court without a jury, it is not sufficient that the record contains no finding on a particular issue, but in order to take advantage of this fact on writ of error, the court must have been requested to make a finding thereon.⁴


A similar rule applies in a case tried by jury. If it is desired to have the question whether the evidence is sufficient to support the verdict passed upon on writ of error, a request must be made at the conclusion of the case for a peremptory instruction to the jury.\(^5\)

\(^{5}\) See Sandeen v. Tschider (C. C. A. 8th Circ. 1913) 205 Fed. 252, 4th headnote: “Introduction of evidence in his own behalf by the defendant after denial of his motion to dismiss is a waiver of the error, if any, in the ruling of his motion.” Also, on this point, see Mechanics Ins. Co. v. Hoover Co. (C. C. A. 8th Circ. 1910) 182 Fed. 590. See also, Allen v. Cartan & Jeffery Co. (C. C. A. 8th Circ. 1925) 7 F. (2d) 21, for a discussion of the act of Feb. 26, 1919, in which the conclusion is reached that the rule as to motion and exception remain unchanged by this act. See also, Howe v. Parker (C. C. A. 8th Circ. 1917) 10 Fed. 738, 746, wherein this same rule as to motion and exception is applied to trials before the Secretary of the Interior or any quasi-judicial body. See also, St. Louis Packing Co. v. Houston (C. C. A. 8th Circ. 1917) 242 Fed. 337, on the same point.

In the following cases failure to ask for a peremptory instruction to the jury at the conclusion of the case prevented any review in the appellate court:
III.

EXCEPTIONS TO INSTRUCTIONS

Under the state practice instructions to the jury are deemed excepted to; but such is not the rule in the federal courts. On the contrary the instructions not only must be excepted to, but those exceptions must be noted in the presence of the jury. This requirement can not be waived by counsel or even by the court. 6

IV.

ANSWER UNDER OATH IN EQUITY SUIT

Another rule in federal practice of which practitioners run afoul is that if the bill is verified, or if unverified and an answer under oath is not waived, and the answer is verified and is made on

personal knowledge, the answer can only be overcome by the testimony of two witnesses, or one witness and circumstances equivalent to one witness. To avoid this result the bill should be unverified and an answer under oath should be waived. This rule has an ancient origin and seems to be unaffected by the new equity rules.7

CONCLUSION

If these instances were extended further this article might become a treatise on federal practice, which is not intended. All that is desired is to call attention to these highly technical requirements, which are so often the cause of our undoing, in the hope that those reading this comment and learning of these rules for the first time may be tempted to further explore this important subject.

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7 Demarest v. Winchester Repeating Arms Co. (Dist. Ct. Conn. 1919) 257 Fed. 162; Watts v. Crabb (C. C. A. 9th Circ. 1919) 257 Fed. 717, 169 C. C. A. 5; Wilcox v. El Banco (C. C. A. 1st Circ. 1918) 255 Fed. 442, 166 C. C. A. 518. This question has not been passed upon by the United States Supreme Court. In view of the fact that the equity rules provide that the complaint "should" be verified where preliminary relief is desired, it is difficult to see how this rule can longer prevail.