# Federal Procedure -- Transfer of Cases Between Law and Equity Sides of Court

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as it does have will appear in the witness' reputation for veracity or his general reputation in the community—a familiar inquiry.

*Conclusion*

The witness box should not be made more forbidding to persons of potential value as witnesses by the fear of a scrutiny of their personal thoughts. The 1931 Legislature should adopt the remedy accepted by the majority of American states by removing religious belief as a test of competency and prohibiting evidence of it to impeach. The Pennsylvania statute is a desirable model: "No witness shall be questioned in any judicial proceeding concerning his religious belief; nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility."[24]

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The case of *Clarksbury Trust Co. v. Commercial Casualty Co.*[1] was an action at law in a Federal District Court for West Virginia to recover on a bond issued by the defendant to cover a deposit of the plaintiff in a Pennsylvania bank. The deposit in question was upon a time certificate and was the only one contemplated in the security transaction; the bond, however, clearly applied only to deposits subject to check. The plaintiff's declaration alleged that this was due to a mutual mistake of law as to the meaning of the coverage clause in the bond. The trial court directed a verdict for the defendant. Held, on appeal, reversed and remanded with directions to transfer the case to the equity side for reformation, with leave to amend the pleadings and to introduce further evidence.

The questions of transfer between the law and equity sides of the Federal Courts arise under the Judicial Code, section 274a,[2] which provides: "That in case any of said courts (courts of the United States) 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

[24] PA. STAT. (West, 1920) §21834.
[1] 40 F. (2d) 626 (C. C. A. 4th, 1930).
[2] 38 STAT. 956 (1915), 28 U. S. C. A., §397 (1928).

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." This provision, together with equity rules 22 and 23,[3] and section 274b Judicial Code[4] which provides that equitable defenses may be interposed in actions at law by answer, plea or replication, greatly facilitates the fusion of law and equity in the Federal Courts.[5]

The Court of Appeals of the Fourth Circuit has directly considered section 274a in eight cases. The court first construed the statute in 1916 shortly after its passage.[6] Judge Pritchard, though not deciding the case solely upon these grounds stated that the statute (section 274a) "relates only to the power of the court in a case where a suit has been improperly brought either on the equity or law side, and authorizes amendments to have the pleading conform to the proper practice." Thus Judge Pritchard narrowly interpreted the statute as applying to actions brought on the proper side of the court but with the wrong type of pleadings. The next case in this circuit[7] did not consider section 274a, but decided under equity rule 22 that the case should not be transferred to law as a cause of action in equity had been set out. Beginning with the case of *Fidelity and Casualty Co. v. Glenn*[8] the court indicates a more liberal attitude. In speaking

[3] Rule 22: "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." Rule 23 provides: "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court." Rule 22 was promulgated to relieve the situation which §274a finally cured, and rule 23 was intended to obviate the old practice of sending feigned issues to the law side of the court for trial by jury. The latter does not restrict the operation of the former.

[4] 38 STAT. 956 (1915), 28 U. S. C. A., §397 (1928).

[5] McCormick, *The Fusion of Law and Equity in United States Courts* (1928) 6 N. C. L. REV. 283; McBaine, *Equitable Defenses to Actions at Law in the Federal Courts* (1929) 17 CALIF. L. REV. 591.

[6] Waldo v. Wilson, 231 Fed. 654 (C. C. A. 4th, 1916), reversed 221 Fed. 505, and *certiorari* denied, 241 U. S. 673, 36 Sup. Ct. 724, 60 L. ed. 1231 (1916).

[7] Gatewood v. New River Consol. Coal & Coke Co., 239 Fed. 65 (C. C. A. 4th, 1916) (Plaintiff improperly sued in equity for breach of contract, but set out that, as agent for defendant company, he was entitled to certain commissions for products sold in his territory. He did not know the quantity of the product sold nor its price. He prayed for a discovery of the facts and for an accounting).

[8] 3 F. (2d) 913 (C. C. A. 4th, 1925) (Action at law against surety on penal bond securing performance of contract. Defendant interposed equitable de-

of section 274b it says: "These statutes are remedial in character, and should be liberally construed, to the end, if possible, of a single, direct, and speedy trial and conclusion of the issues involved in the litigation." The instant case was the first to arise in the Fourth Circuit, after the leading case of *Liberty Oil Co. v. Condon Bank*[9] where Chief Justice Taft construed section 274b, and in a dictum pointed the direction in which the construction of section 274a should go. In the remaining five cases which have arisen in the Fourth Circuit, the court has consistently followed this liberal and progressive tendency. Singularly enough all of the cases have arisen on the law side of the court and the Circuit Court of Appeals has either transferred them to equity as in the principal case;[10] treated the writ of error as an appeal in equity;[11] affirmed judgment because it appeared that the result reached in law was what should have been reached in equity,[12] or sustained the lower court because the complaint stated no ground for relief either at law or in equity.[13]

The usual way to take advantage of the statute is by motion,[14] but motions to amend or to introduce new evidence tending to establish an equitable case have also been construed as within the intent of the statute.[15] Also, the trial judge may, of his own motion, transfer

fense of fraud. Trial court refused to transfer case under authority of §274 b. C. C. A. refused new trial in equity because result would be same as that reached at law).

[9] 260 U. S. 235, 43 Sup. Ct. 118, 67 L. ed. 202 (1922) (The defendant, in an action at law, for money had and received claimed to be merely a stake-holder of the money in question and offered to pay it into court when the other claimants were joined. On appeal the C. C. A. treated the case as an action at law. Reversed by the Supreme Court and remanded to C. C. A. under authority of §274b, for consideration and determination as an appeal in equity. Throughout, the opinion expresses an attitude much more favorable to justice for the litigant than adherent to strict rules of procedure); Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 47 Sup. Ct. 755, 71 L. ed. 1297 (1927).

[10] Hutchings v. Caledonian Ins. Co. of Scotland, 35 F. (2d) 309 (C. C. A. 4th, 1929).

[11] National Surety Co. v. County Board of Education, 15 F. (2d) 993 (C. C. A. 4th, 1926) (Surety on a contractor's bond, after default, attempted to establish at law an equitable lien arising under the contract of suretyship. The pleadings being proper, the C. C. A. decided the case as in equity).

[12] Great American Ins. Co. v. Johnson, *et al.*, 25 F. (2d) 847 (C. C. A. 4th, 1928) (Agent of insurance company erroneously made out policy in corporate name, instead of name of the individual owning the property insured. Property destroyed and individual sues at law and procures judgment. The result was correct, the method wrong); Fidelity and Casualty Co. v. Glenn, *supra* note 8.

[13] Southern Surety Co. v. Plott, 28 F. (2d) 698, 701 (C. C. A. 4th, 1928).

[14] Liberty Oil Co. v. Condon Bank, *supra* note 9; Fidelity and Casualty Co. v. Glenn, *supra* note 8; National Surety Co. v. County Board of Education, supra note 11.

[15] Hutchings v. Caledonian Ins. Co. of Scotland, *supra* note 10.

the case.[16] The circuit courts, however, have split on this question. The Court of Appeals for the First Circuit in the recent case of *American Land Co. v. City of Keene,*[17] sustained the District Court's refusal to transfer the case, "even if it were proper under section 274a," because plaintiff had made no such request to the trial court. The court interpreted the litigant's failure to make a motion for transfer as an election or waiver on his part. "This court will not compel a litigant to transfer its action from equity to law or vice versa against his will." Cases from the Second,[18] Seventh,[19] and Eighth[20] Circuits were relied upon. It would seem that the attitude of the Fourth Circuit is more reasonable. The court in the case of *National Surety Co. v. County Board of Education* declared that on motion of parties, or by the court *ex mero motu* a cause may be transferred from one side of the Federal courts to the other,[21] and in the principal case the court remanded the cause for further proceedings in equity upon argument of counsel that if a cause of action in law had not been stated then one in equity had. The Fourth Circuit, alone, has seen fit to resort in this connection to the act of February 26, 1919 (U. S. C. A. section 391) which enables the circuit court to give complete justice in the particular case by requiring, "that on the hearing of an appeal, to give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." It is submitted that such a construction is more in accord with the remark of Chief Justice Taft: "To be sure, these sections do not create one form of civil action as do the codes of procedure in the states, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward code practice."[22]

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[16] National Surety Co. v. County Board of Education, *supra* note 11; Great American Ins. Co. v. Johnson *et al.*, *supra* note 12.
[17] 41 F. (2d) 484 (C. C. A. 1st, 1930).
[18] Procter & Gamble Co. v. Powelson, 288 Fed. 299 (C. C. A. 2nd, 1923).
[19] Mobile Shipbuilding Co. v. Federal Bridge and Structural Co., 280 Fed. 292 (C. C. A. 7th, 1922).
[20] Fay v. Hill, 249 Fed. 415 (C. C. A. 8th, 1918).
[21] 15 F. (2d) 993 (C. C. A. 4th, 1926).
[22] Liberty Oil Co. v. Condon Bank, *supra* note 9.