

1941

Substance and Procedure

Albert Kocourek

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Albert Kocourek, *Substance and Procedure*, 10 Fordham L. Rev. 157 (1941).

Available at: <https://ir.lawnet.fordham.edu/flr/vol10/iss2/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

FORDHAM LAW REVIEW

VOLUME X

MAY, 1941

NUMBER 2

SUBSTANCE AND PROCEDURE

ALBERT KOCOUREK†

I

Introduction

THE terms "substantive" and "adjective" seem to have been invented by Bentham.¹ Austin criticized the distinction² saying "it cannot be made the basis of a just division."³ This criticism, it would seem, is

† Emeritus Professor of Law, Northwestern University, School of Law.

1. The following are excerpts from Bentham:

"By procedure, is meant the course taken for the execution of the laws. . . . Laws prescribing the course of procedure have on a former occasion been characterized by the term *adjective* laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *substantive* laws. For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it. . . ." 2 BENTHAM, WORKS (Bowring's ed. 1843) 5-6.

"Here, then, comes the line of distinction—the distinction between that part of the proposed system of procedure, which may be given without the previous exhibition of any part of the system of substantive law, and that part which cannot. . . ." 2 BENTHAM, *id.* at 15 *et. seq.*

"The adjective branch of law, or law of procedure, and therein the law of evidence, has everywhere for its object, at least ought to have, the giving effect throughout to the several regulations and arrangements of which the substantive branch or main body of the law is composed." 6 BENTHAM, *id.* at 7. Attention may be here directed to an interesting and important observation, later emphasized by Pollock, Salmond, Gray, and others, bearing on the nature of law, that the disposable force giving effect to legal rights, is "expressed by one common abstract denomination, . . . viz., *the judge*." 6 BENTHAM, *id.* at 7.

"Of the two main branches of the body of the law, the substantive and the adjective, it is to the adjective alone that the subject of evidence belongs." 7 BENTHAM, *id.* at 318. ". . . the aggregate of that which in any country has the force of law, it will be found divisible, . . . into two portions . . . viz. . . . that in which the rule of action is laid down simply and absolutely, . . . in the next place, that in which a description is given of the course to be taken. . . ." 9 BENTHAM, *id.* at 8.

2. 2 AUSTIN, LECTURES ON JURISPRUDENCE (4th ed. 1873) 611.

3. Austin points out that the French terms are "le fonds du droit" (substantive law) and "la forme" (adjective law); the German terms are *material* law (substantive law) and

based chiefly not on the meanings given by Bentham⁴ to the terms "substantive" and "adjective" but rather on Austin's objection to the terms used for the distinction sought to be made.⁵ For the rest, we believe Austin was mistaken or did not clearly understand the basis of the distinction.

Holland in his treatise on Jurisprudence popularized the terms "substantive" and "adjective" and they have become generally accepted by writers of professional texts. Holland, however, made no effort to analyze the ideas which lie back of these terms and the wide acceptance of this terminology no doubt is due to the simplicity of his description of what the terms denote. The law, says Holland,

"... defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law', or Procedure."⁶

Consideration of the problem involved led to an interesting difference of view, as we have seen, between Bentham and Austin, the two most eminent analytical jurists of any age. A like opposition later developed between Holland and Salmond, the two most eminent analytical jurists of the last generation. Salmond begins by saying:

"It is no easy task to state with precision the exact nature of the distinction

formal law (adjective law). 2 AUSTIN, *ibid.* See also POSENER, RECHTSLEXIKON, s. v. MATERIELLES RECHT UND FORMELLES RECHT; 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS (9th ed. 1906) § 124.

4. Austin says: "Under the department of the law which relates to secondary rights and duties I include Procedure, civil and criminal. For it is manifest that much of procedure consists of rights and duties, and that all of it relates to the manner in which secondary rights and duties are exercised or enforced. . . . In the *Traites de Legislation* Bentham severs from *droit substantif* or *the law*, *droit adjectif* or the law of procedure. This as it appears to me involves a double logical error. For in *droit substantif* he includes *droit civil* (as opposed to *droit penal*) and *droit penal*; including under *droit penal*, the law relating to civil injuries and to crimes with their punishments, together with the rights and duties growing out of those delicts and of those punishments. . . . For all rights of action arising out of civil injuries are purely instrumental or adjective; as well as the whole of criminal law and the whole law relating to punishments. And 2dly, if he calls the law of procedure *droit adjectif*, he ought to extend that term to the law relating to the rights and duties arising from civil injuries and from crimes and punishments. The division itself, therefore, is illogical, and his limitation of adjective law to the law of procedure only, involves a second logical error." 2 AUSTIN, *op. cit. supra* note 2, at 791 *et seq.*

5. Later, in this discussion, we shall suggest use of the terms Telic and Instrumental for Substantive and Adjective, as applied to rights, and state the reasons for the substitution.

6. HOLLAND, THE ELEMENTS OF JURISPRUDENCE (13th ed. 1924) 90; see also 148, 168, 365, 368, 380, 388, 394.

between substantive law and the law of procedure, and it will conduce to clearness if we first consider a plausible but erroneous explanation."⁷

Salmond does not mention Holland by name but there is little doubt that his remarks refer to that contemporary.

Salmond objects that a distinction between *jus* and *remedium* is inadmissible. There are procedural rights (e.g. the right to introduce competent evidence) on one hand. On the other hand, remedies may be substantive (e.g. the rules of measure of damages).⁸

Salmond next gives his definition as follows:

"The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions. . . . All the residue is substantive law. . . ."

He continues:

"Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which these ends are to be attained."⁹

Again, Salmond makes the interesting observation that "procedural law is concerned with affairs inside the courts of justice" while "substantive law deals with matters in the world outside."

It is further remarked by Salmond that in legal theory the distinction attempted can be sharply drawn, but he adds that there are many procedural rules which in their operation are "substantially equivalent" to rules of substantive law. He mentions three classes: (1) exclusive evidential rules (e.g., statute of frauds); (2) conclusive evidential facts (e.g., conclusive presumptions); (3) limitation of actions.

Bentham's statements on the distinction are highly generalized and offer no definite criteria for the solution of various difficult problems. Austin, in effect, after an acute discussion of the question, criticizing Bentham's terminology, abandons the distinction entirely. Holland goes back to Bentham. His basic definitions are superficial, and even inaccurate as Salmond has made clear.¹⁰ However, the Bentham-Holland arrange-

7. SALMOND, JURISPRUDENCE (9th ed. 1937) § 172.

8. At this point, Salmond says that the "rules determining the classes of agreements which will be specifically enforced are as clearly substantive as are those determining the agreements which will be enforced at all." SALMOND, *op. cit. supra* note 7, at § 172. This problem will be considered later.

9. *Id.* at § 172. *Cf.* note 8 *supra*. Does not this statement present a contradiction?

10. It may be pointed out as explanatory of this fact, that Holland had no notion of the complexity of jural relations and seems not to have recognized the existence of any right other than the claim-duty relation.

ment has an utility of great importance and convenience for an arrangement of the law.¹¹ "Adjective" law deals with all the facts, rights, and conditions which *first arise in, or refer to*, litigation. "Substantive" law includes all the rest.¹²

According to this arrangement, a judgment would fall under "adjective" law; so, likewise, would be classified a conclusive presumption of fact, or the parol evidence rule. We believe an arrangement of the law on this basis presents a clear-cut distinction, sound both in logic and practice. However, it must be pointed out that the terms "substantive" and "adjective" are used in litigation in a sense somewhat different from the usage for the purpose of arrangement or classification of the law. Bentham, Holland, and Terry were concerned primarily with classification. Austin, too, was concerned with classification but what seemed to him an inappropriate use of the terms "substantive" and "adjective" led him to abandon them entirely. Salmond, also, having in mind the problems that arise in litigation, and, at the same time, seeking a classification, sought a solution in rules of exception, where certain "procedural" rules were treated as "substantive". We believe the difficulty here arises from failure to observe that the terms may be used to represent two distinct but yet related categories. The terms "substantive" and "adjective" can never be reconciled unless and until these categories are sharply separated. We believe that all the difficulty and confusion that now exist, in conflict of laws, is due to two features: (a) the inappropriateness of the terminology, and (b) the attempt to harmonize the function of legal arrangement with a group of problems arising only in litigation and having no immediate connection with the problem of classification of the law as a whole.

Theories. The problem under consideration has developed various theories of solution. First, there is the orthodox view that "substance" and "procedure" can be clearly and sharply separated (Bentham). Next,

11. Terry also follows the Bentham-Holland arrangement. Terry includes under "Adjective Law", procedure, pleading, and evidence. TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 636. Holland's arrangement includes (i) jurisdiction (in the conflicts sense); (ii) jurisdiction (domestic sense); (iii) the action, including summons, pleadings, trial (including evidence); (iv) judgment; (v) appeal; (vi) execution. HOLLAND, *ELEMENTS OF JURISPRUDENCE* (13th ed. 1924) 358-365.

12. A rather obvious and sometimes controverted question is presented here. The school of jurists who may be labeled as "phenomenalists" would deny that there are any "rights" involved either before or after litigation. See LUNAU, *ILLUSIONS ET REALITES DANS LA POLITIQUE INTERNATIONALE DE PAIX* (1939) 81 *et seq.* In Roman tort law there was no right prior to the tort act. In the Roman law of Obligations there did not seem to be any recognition, at least for purposes of classification, of a breach of contract. *Cf.* MOYLE, *THE INSTITUTES OF JUSTINIAN* (4th ed. 1906) 130. There is still another view that there are only procedural rights.

there is the view that this separation "is sharply drawn in theory" but that in practical operation many procedural rules are "wholly or substantially equivalent to rules of substantive law" (Salmond).¹³ Next, there is the view, that there is no distinction between "substance" and "procedure" (Chamberlayne).¹⁴ Another view (at once the most recent and one already widely accepted) is that of Professor Walter Wheeler Cook.¹⁵ Cook's position is based on relativity and function. Professor Cook does not, it seems, deny that there is a distinction between "substance" and "procedure" but he asserts that many problems fall into a "twilight" zone.

The Chamberlayne and Cook Theories Considered. Chamberlayne said,

" . . . the distinction between substantive and procedural law is one not only of but little consequence; . . . it is one which is principally based . . . on a mere difference in form of statement."¹⁶

Cook says:

"Not so, unless I qualify my statement by adding 'for the purpose in hand.' For other purposes it may become vital and important, . . ."¹⁷

Chamberlayne says:

"So far as it is law at all, it is the litigant's right to insist upon it, *i.e.*, it is a part of his right. In other words, it is substantive law."¹⁸

In these words, Chamberlayne annihilates all procedural law. In logical effect "substantive" law also is obliterated. There remain only law and rights. Chamberlayne now introduces an entirely new category. "The true distinction," says Chamberlayne, is, "between the rules of law, substantive or procedural . . . and the principles of rational judicial administration."¹⁹ Chamberlayne's radical assumption that all law is

13. SALMOND, JURISPRUDENCE (9th ed. 1937) § 172.

14. "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself."

1 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) § 171.

15. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

16. 1 CHAMBERLAYNE, *op. cit. supra* note 14, at 216.

17. Cook, *supra* note 15, at 337.

18. 1 CHAMBERLAYNE, *op. cit. supra* note 14, at 217.

19. 1 CHAMBERLAYNE, *op. cit. supra* note 14, at 217 *et seq.* The value of this distinction lies in that it points out an important element in the process of litigation which can hardly be treated by legal rule [see WIGMORE, PRINCIPLES OF JUDICIAL PROOF (3d ed. 1937)], but it can not be employed as a substitute for the conventional terms "substance" and "pro-

substantive,²⁰ has a certain amount of plausibility but only in a preliminary way. A right without the protection of a legal sanction which can be put into motion is not a legal right.²¹ But once it is found that a "remedy" is available, the preliminary question is answered and it would seem to be clear that there is a distinction between the right of redress and the procedural steps available to obtain it. The right to have damages certainly is of a different nature than the right to summon the defendant.

Professor Cook's essay is much more than a discussion of "substance" and "procedure." It is a practical application of problems in semantics and legal logic. It is based on a distrust, if not quite an abandonment of concepts and categories.²² For Cook, concepts are not discovered but created. They have no timeless validity but are merely operational postulates to facilitate attainment of practical ends.²³ He shows his aversion to categories by referring to "substance" and "procedure" as an "alleged distinction."²⁴ We have seen that Chamberlayne dissolves any distinction between "substance" and "procedure." Cook arrives at a trichotomy. There are: (i) "substance," (ii) "procedure," and (iii) a penumbra, a "twilight zone," a "no-man's land," which may be "substance" or "procedure" conditioned on the end to be attained.²⁵ This trichotomy is based on a statement by the eminent American scientist, Lewis,²⁶ and a favorite generalization of Holmes that most distinctions are differences of degree.²⁷

cedure." The distinction touches a different subject-matter.

20. This solution suggests the possibility of a theory that all law and all rights are purely procedural. Cf. THON, *RECHTSNORM UND SUBJEKTIVES RECHT* (1878). See note 12 *supra*.

21. The procedural remedy may be in various ways suspended or it may be subject to procedural opposition (*e.g.*, suits by aliens in war time; contract not presently evidenced by a writing; claims barred by limitation). In all these cases the right exists but it is presently unenforceable.

22. Professor Cook's views here are probably a part of a general scheme of scientific method in which the ideas of operationalism (Bridgman) and function (Dewey) seem to be the chief elements.

23. ". . . concepts are tools which we use to aid us in determining what ought to be done. . . ." Cook, *supra* note 15, at 340.

24. *Id.* at 336.

25. *Id.* at 350-351.

26. LEWIS, *THE ANATOMY OF SCIENCE* (1926) 178. It may be observed that Lewis at this point is discussing the non-mathematical sciences.

27. HOLMES, *COLLECTED LEGAL PAPERS* (1921) 232. LEWIS, *op. cit. supra* note 26 asks: "Indeed, are all distinctions in kind reducible to distinctions in degree? These questions are hard to answer." On these important and interesting questions the present writer ventures to suggest the following:

Concepts in a strict and accurate sense relate only to forms, abstract entities. They do

While the origin of Professor Cook's trichotomy is clear enough, its logical basis is not easy to understand. If there is a "twilight zone" which indifferently may be "substance" or "procedure," it would seem to follow that there is no distinction between "substance" and "procedure." On the contrary, if there is no "twilight zone" then "substance" and "procedure" are distinct ideas. We believe Cook's theory needs reconsideration, and, probably, reformulation, in its logical construction, but, for the rest, there can be no doubt of the considerable value in other respects of his point of view.²⁸ We leave the matter with the declaration of belief that the ideas, "substance" and "procedure," either in their definition or in their social application do not rest on a relationship of degree of something.

The Terminology. The terms "substance" (or "substantive" or "material") and "adjective" (or formal) are unsatisfactory. These terms are metaphors, drawn, as Austin has remarked, from grammar or logic.²⁹ Austin himself suggests a meaning for "substantive" rights as "those which exist *in* and *per se*."³⁰ Another similar form is "self-regarding

not relate to so-called "objective things." There are for example, no differences of degree between odd numbers and even numbers. Abstractly 2+2 always equal four, but concretely 2+2 might add up to five, three, or some other number. The probability of concrete addition of 2 and 2 resulting in four would be only one chance in many millions. The problem remains whether such ideas as "substance" and "procedure" are amenable to sufficient abstraction to attain the conceptual level. We believe an affirmative answer is the right one. It will, of course, be instantly urged that in passing from the lower level of concreteness to the higher level of abstractness, the difference attained is merely one of degree. Attenuation of the concrete residues is progressively attainable in degrees but when all concrete residues are eliminated, the result is a difference in kind, as is often seen in pure mathematics when dealing with limits. Moreover a difference in kind may be reached without an intermediate step of purification.

Professor Cook says: "Apparently all concepts which we use in our attempts to classify objects, events, or situations turn out to be surrounded by a 'twilight zone'. . . ." Cook, *supra* note 15, at 334. The present writer makes no objections to this statement as it stands, since concepts do not fall into the class of objects, events, or situations. Unfortunately, Professor Cook would seem not to accept our interpretation of the nature of concepts. He says, ". . . so long as we assume that the distinction between 'substance' and 'procedure' has a more or less 'real' or 'objective' existence, . . ." Cook, *supra* note 15, at 347.

28. Cook's essay seems to us the best written on this topic. Its special value lies in the abundance of concrete problems which the distinguished author has put together and the shrewd insight into the legal policy in the background of the rules. See also, Green *To What Extent May Courts Under the Rule Making Power Prescribe Rules of Evidence?* (1940) 26 A. B. A. J. 482.

29. 2 AUSTIN, *op. cit. supra* note 2, at 611.

30. 2 AUSTIN, *id.* at 789.

rights."³¹ The latter form, however, can not be used here since it stands in contrast with "other-regarding rights."³²

Since the terms "substance"³³ and "adjective"³⁴ (apart from arrangement of the law)³⁵ are not used with a uniform meaning and especially since they are faulty in application from the standpoint of etymology, we venture in this part of our discussion to displace both terms by others as follows: for "substantive" we shall say "telic"; for "adjective" we shall say "instrumental." One advantage of this minor proposal is that we can make a fresh start, fixing the meaning of the new terms as we wish, free from the influence of traditional ambiguity and misapplication. "Telic" rights are those abstract rights³⁶ whose realization is effected by the concrete application, directly or indirectly, of "instrumental" rights.³⁷

Classes of Applications. The problem under consideration, whether there is any sharp conceptual distinction between "telic" and "instru-

31. KOCUREK, AN INTRODUCTION TO THE SCIENCE OF LAW (1930) 312 (e.g., corporal integrity).

32. E.g., pledge. Cf. *Principal and Accessory Claims*, KOCUREK, *op. cit. supra* note 31, at 307.

33. The term "substance" (*sub+stare*) in logic means a subject of predication. It may also mean "essence" or "being." There are various other meanings. See BRADLEY, APPEARANCE AND REALITY (9th imp. 1940) ii. It is clear that standing alone the term "substance" does not unambiguously point out its *designatum*. From the historical standpoint it may be urged that the procedural operations which bring a right to concrete realization are the "substance" of the right. Thus, Holmes: "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." HOLMES, COMMON LAW (1881) 253.

34. The term "adjective" (*ad+jicere*) suggests addition, or adjunction (dependence or secondary). See, BRADLEY, *op. cit. supra* note 33, on the view that "substantive" law has the appearance in the infancy of the courts of "being gradually secreted in the interstices of procedure" (Maine), the modern meaning amounts in effect to a reversal of ideas.

35. To avoid misapprehension we restate our position. We suggest no change of terminology as to the terms "substantive" and "adjective" as applied to an arrangement of the laws. For this purpose, these terms by long usage beginning with Bentham have acquired a meaning special to the law. We do, however, suggest a change of terminology for these or other terms when used to designate *rights*.

36. What we mean here by an "abstract" right is what Holmes calls an "hypostasis of a prophecy." HOLMES, COLLECTED LEGAL PAPERS (1921) 310, 313. The prophecy of the abstract "telic" right is brought to concrete realization or is tested by "instrumental" rights.

37. According to Lorenzen, ". . . 'substance' includes all rules determining the legal relations which the courts will declare when all the facts have been made known to them, whereas 'procedure' relates to the process or machinery by which the facts are made known to the courts." Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 325; 3 BEALE, CONFLICT OF LAWS (1935) 1599 *et seq.*

mental" rights, is generally assumed to be involved in three classes of cases:

1. *In So-called Conflict of Laws.*³⁸ A may have a given telic right and given instrumental rights³⁹ in state X. A's telic right may be litigated in state Y. Speaking broadly, A's telic right will be enforced in state Y but in the process of concrete enforcement, state Y will apply its own "adjective" (instrumental) law and accord to A only those instrumental rights which are available to its own subjects.

It is the prevailing theory in Conflict of Laws that when enforcement is sought in Y but where the investitive facts arose elsewhere (*e.g.*, in state X) that the right was uniquely created where the facts arose and not elsewhere.⁴⁰ This doctrine probably derives from ideas of public international law with which the theories of conflict of laws in earlier centuries were closely connected. This is not a necessary view and the rule itself probably is an historical accident. It would result in simplification of theory if the view were accepted that investitive facts create as many coincident rights as there are states which give them recognition.⁴¹ Under the existing theory, in a given jurisdiction, the instrumental rights of all litigants are the same, but the telic rights differ. These differences are measured chiefly by considerations of morality, comity, and convenience.⁴²

2. *In Constitutional Law.* If the problem can be said to be presented in constitutional law it will arise chiefly in the following ways: (i) under retrospective laws⁴³ (including *ex post facto* laws);⁴⁴ (ii) under laws im-

38. To replace this misnomer, the author on another occasion suggested the expression, "The Law of Foreign Reference." Kocourek, Book Review (1940) 35 ILL. L. REV. 234, 236.

39. It should be observed that instrumental rights are themselves abstract prior to concrete application. The plaintiff may have an instrumental right against the clerk of court to have issued to him a summons. This right is itself abstract. If, when application is made, the clerk performs his duty, performance is incidental to realization of the plaintiff's telic right. If, on the other hand, the clerk violates his duty, this breach of duty gives rise, as between the plaintiff and the clerk, to a telic right.

40. Where the locus of the facts is a country not under control of a state (*e.g.*, Spitzbergen in the last century) a new problem will arise especially in contract cases. See Stammler, *Das Recht im Staatslosen Gebiete*, Festschrift für Karl Binding (1911) 331.

41. KOCOUREK, *JURAL RELATIONS* (2d ed. 1928) §§ 13-16, p. 234 *et seq.* Many years ago Professor Cook had already taken this position on the nature of rights in conflict of laws. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, 473-477; Cook, *Recognition of "Massachusetts Rights" By New York Courts* (1918) 28 YALE L. J. 67.

42. Professor Cook emphasizes convenience as the dominant test: "How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?" Cook, *supra* note 15, at 344.

43. *Ohio & M. Ry. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259 (1875); *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159 (1867).

44. *Calder v. Bull*, 3 Dall. 386, 390 (U. S. 1798).

pairing the obligation of contracts;⁴⁵ (iii) under the Due Process clause;⁴⁶ (iv) under the Full Faith and Credit clause;⁴⁷ (v) under the Equal Protection clause.⁴⁸

3. *Under the Federal System.* This includes (a) the application of federal law in the state courts; (b) the application of state law in the federal courts.⁴⁹

It has been suggested that the meaning of "substance" and "procedure" differs or may differ in the three classes above enumerated according to the "purpose in hand." The position taken here is that telic rights are such by nature and conception, and that their character does not change by reason of purpose of application. This is likewise true of instrumental rights. The *rules*, however, of application of these concepts may and do differ as modified by purpose.⁵⁰ If the application differs from the general rule (*e.g.*, that instrumental rights are fashioned by the forum), that is no warrant for the view that the concept of instrumental rights is imaginary or that the nature of the rule is determined by the use made of the concept.⁵¹ These distinctions can only be accurately understood *ex natura rerum* in a logical harmonization of all possible applications and all conceivable ends.⁵² The practical methodological problem here is this: Is it better to start with concepts which attempt to envisage the

45. *Gunn v. Barry*, 82 U. S. 610 (1872).

46. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934).

47. *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178 (1936).

48. *Paramino Lumber Co. v. Marshall*, 309 U. S. 370 (1940).

49. This class recently has achieved special importance following the abrogation of the rule of *Swift v. Tyson*, 41 U. S. 1 (1842).

50. Thus, the rule of burden of proof, almost by universal consent is a rule of "adjective" law. Yet, because of the practical utility of having a uniform body of land law in each of the federated states, the local rule should prevail over a possibly inconsistent federal rule. See *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208 (1940). On the contrary, where a federal statute is involved, for the need of uniformity in application, it is sound policy that the rule on burden of proof should give way to the federal rule. See *Barney v. New York Central Railroad Co.*, 222 N. Y. 195, 118 N. E. 625 (1918).

51. According to the federal view the rule is one of "substance." According to the New York view, the rule is "procedural." The better policy is that there should be uniformity. Federal authority is superior to state authority in this collision of ideas. The result throws absolutely no light on the question. If the views had been reversed there would still be no light. If concrete application and choice of ends are to be determinative for the problem then the distinction must disappear since these applications and choices will often be found in conflict.

52. As to the classes above enumerated in which the problem arises, the cases are legion. These cases are collected chiefly in works on Conflict of Laws, Constitutional Law, Federal Procedure, and Evidence. The applications are often highly conflicting and we must here of necessity limit our consideration of the problem to its theoretical outlines.

whole subject-matter of possible applications or shall we direct our attention solely to the ends in each instance to be served without reference to, or consciousness, in the process of application, of a conceptual structure of ideas?⁵³

Jural Survey of the Problem. The nature of the problem can best be understood by setting out a jural chain of the ideas involved, in an historical sequence. For this purpose, we shall set out the consecutive steps, (a) of a contract situation, and (b) of a tort, in the following table:

A. I	II	III	IV	
Creative	Contract	Breach	(a) Remedy	
Facts	Relation		(b) Power of suit	
B. Creative	Primary	Breach	(a) Remedy	
Facts	Right		(b) Power of suit	
A. V	VI	VII	VIII	IX
Process	Pleadings	Trial	Judgment	Execution
B. Process	Pleadings	Trial	Judgment	Execution

It will be observed that there is no substantial difference in these series. The first four steps are dealt with by Substantive Law; the last five steps are dealt with by Adjective Law. Step No. II is a telic right. When that right is violated it is succeeded by IV(a) which also is a telic right. Later

53. This is one way of stating the controversy between "conceptualists" and so-called "realists." To use a figure of speech, the "conceptualist" looks upon a machine as an integrated combination of power, levers and connecting rods, and wheels. The "realist" (anti-conceptualist) eliminates the levers and connecting rods. The "realist" has the simpler machine. It has no intellectual complications, but it suffers the risk that the wheels often will not go at all or will go in the wrong direction. Acceptance of the first alternative does not imply that the conceptual structure is attainable without great effort or that what is available is not highly imperfect. "Realism", on the other hand, untroubled by painful toil of achieving a workable harmony and a systematic unity of ideas, knows what it wants but in general does not know why. As a philosophy, realism in law is voluntaristic and pluralistic, and tends toward a legal entropy of ideas.

Professor Cook's article is the leading one on the subject of this paper and to avoid misapprehension the writer wishes to make clear that the comment just made is directed against some of the radical forms of "realism". Professor Cook, as we understand him, does not repudiate logic, deductive reasoning, or even concepts or categories. For him concepts serve only an heuristic purpose. Professor Cook has, however, stressed the "purpose in hand" idea as the dominant one in the problem before us. He has also, as we have seen, advocated a "twilight zone" doctrine. Both of these ideas we believe, have the unhappy effect of bringing him for the problem under consideration, in effect, into a camp not easily distinguishable from radical "realism."

in the chain we find a Judgment (VIII); this also is a telic right, although it falls into the field of adjective law.

Step No. II (in both cases) is often called a primary (or antecedent) right.⁵⁴ Step No. IV(a) is often called a secondary (or remedial or sanctioning) right. Some writers call Step No. IV(b) a tertiary (or remedial) right.⁵⁵ Steps IV(a) and IV(b) arise at the same moment, immediately following a breach of duty. Power of suit[IV(b)] is clearly a right⁵⁶ but it is not a telic right. It is not a self-regarding right but exists solely for the specific enforcement of IV(a). If IV(b) can not be predicated, then IV(a) can not be predicated.

In a jural inventory of the elements involved, we find the following kinds: (i) facts (human acts and natural events); (ii) jural events; (iii) jural conditions; (iv) jural relations.⁵⁷ In the above table some of these elements are disclosed (*e.g.*, A-I—human acts of “offer and acceptance”; B-I natural events—birth and survival; steps II, IV(a), IV(b), VIII—jural relations). Jural events and jural conditions are not expressly disclosed in the above table. Thus, that an offer followed by an “acceptance” results in the jural relation called “contract” is due to a jural event, the imprimatur of the law. Jural conditions in this connection have a special importance in procedure. The object of introducing evidence is to produce persuasion in the trial of the fact. This persuasion is a jural condition.

We are now prepared to observe that elements other than rights enter into the problem before us. We have just seen how the jural element of procedural persuasion is one of the central ideas which demonstrate the actual, as opposed to the hypothetical, existence of an asserted right. The important conclusion at this point is that the problem is not confined to rights (jural relations) but includes jural facts, jural events, and jural conditions arising in litigation.⁵⁸

54. *Cf.* HOLLAND, JURISPRUDENCE (13th ed. 1924) 147.

55. See GOODRICH, CONFLICT OF LAWS (2d ed. 1938) 188.

56. We use the term “right” here in a generic sense; it includes the following varieties: (i) claim-duty; (ii) immunity-disability; (iii) privilege-inability; (iv) power-liability. Groups (i) and (ii), and (iii) and (iv), respectively, are substantially equivalent. In some of the restatements of the American Law Institute the term “right” is confined to group (i).

57. It would hardly be convenient to attempt a detailed explanation of these elements. For a discussion of these matters see KOCOUREK, INTRODUCTION TO THE SCIENCE OF LAW (1930) 235-330.

58. Many jural categories are comprehensive (*e.g.*, public and private, positive and negative, self-regarding and other regarding, frangible and infrangible, *etc.*). Some jural categories are not comprehensive of the element of idea separated into classes (*e.g.*, personal and proprietary, principal and accessory). The dichotomy here employed of “telic” and

A final question is: How shall we denominate the jural facts that give rise to jural relations, especially in the field of Substantive law? The complex of facts which create a right are not telic; they are simply creative of an idea of a telic nature. It will be shown that these facts are of equal importance for our problem with the rights which they create. The facts are the jural cause, and rights are the jural effect. We see no reason to doubt that these jural facts should also be denominated as telic. There are, therefore, telic facts, telic conditions, and telic rights standing against instrumental facts, conditions and rights.

Nature of the Problem. The above survey of the elements which enter into the problem now enables us to point out precisely what the problem involves. We have attempted to show that there is a sharp distinction between what is "telic" and what is "instrumental."⁵⁹

In the process of litigation, a minimum of all the strictly relevant elements (I-IV) must be reproduced in the pleadings (in abstract form) and in the evidence (in detail). Where only one jurisdiction is involved and no change in the substantive or adjective law is presented, the problem of what is telic or instrumental does not arise. This is the normal case. Here the telic facts and rights are in complete accord with the instrumental facts and rights. The scope of telic rights is determined by the instrumental rights which are available to protect them.

But even where only one jurisdiction is involved there may occur a change in the existing law⁶⁰ which raises the question whether the change is telic or is simply instrumental. The assumption underlying the governing rules is that changes affecting instrumental rights do not substantially affect telic rights. The assumption serves as a direction finder

"instrumental" does not embrace all the kinds of rights. Thus a right specifically enforceable can not be violated (*i.e.*, it can be specifically enforced). Therefore, juristically, it is necessary to hypostatize another right which is frangible. The principal right is telic (*i.e.*, self-regarding); the accessory right is neither telic (in essence though it is so treated procedurally) nor instrumental.

59. It may be interesting to observe that telic rights deal with the claim-duty relation, while instrumental rights deal with the power-liability relation. Telic rights outside of litigation are sometimes supported by accessory instrumental rights of the power-liability type (*e.g.*, power of recaption, power of distraint, power of sale, lien assertion, etc.). Here it is to be noted also that instrumental rights are not limited as is, we believe, commonly supposed, to public law (*i.e.*, state-supervised litigation). In state-supervised litigation, the accessory power of self-help disappears. For it is substituted the claim-duty relation available against the officers of public justice (*i.e.*, clerks, sheriffs, judges).

60. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, "contravenes the constitutional provision applicable alike to the United States and the several states." *Calder v. Bull*, 3 Dall. 386, 390 (U. S. 1798).

and in general is in accord with the fact, but even a change in the rules of evidence as applied to an existing telic right may affect the telic right so adversely that it may be constitutionally objectionable. In such cases the question is not whether the change in the law affects the telic or the instrumental right. The basis of decision here is a different idea—the idea of fairness and legal tradition.⁶¹

What has been remarked concerning the single jurisdiction applies in principle also so far concerns the federal system. If a federal statute is involved, federal decisions rule the question of what is telic and what is instrumental.⁶² Here it may be noted that instrumental facts and rights fall into two groups: (a) those which are rigid as fixed by the constitution or as fixed by statute (either directly or indirectly, *e.g.*, organization of courts including jurisdiction, process, the pleading system, effect of judgments, execution), and (b) those which are flexible, being fashioned by the courts for general operation or by the trial judge in the concrete case (*e.g.*, number of witnesses, limitation of argument, burden of proof, burden of going forward, *etc.*).⁶³ Under the federal system, it seems desirable where federal rights are involved in state litigation, that flexible state applications give way in favor of a uniform federal rule and application.

Contrariwise, where state rules are applied in the federal courts, it seems desirable that the litigant should be put in the same position so far as convenient, with respect to procedural matters as if the litigation occurred in the state court.⁶⁴ It is well known that prior to the case of

61. It would seem, therefore, that problems involving a single jurisdiction do not essentially present the problem of the distinction of telic and instrumental rights, even when they appear so to do. For example, where a statutory time limitation is abbreviated, the real question is not whether the power of suit is telic or instrumental but whether the power can be abbreviated. See *Bell v. Morrison*, 1 Pet. 351 (U. S. 1828). Vested property rights may not be abridged but a statute of limitations is not a vested property right.

62. See *Central Vermont Ry. Co. v. White*, 238 U. S. 507 (1915); *Barnet v. N. Y. C. & H. R. R.*, 222 N. Y. 195, 118 N. E. 625 (1918).

63. Much can be said in elaboration of this idea, and no doubt, also, much against its validity.

64. It will follow, of course, that inconsistent applications will be found in the federal courts due to underlying differences of decision in the various states. Thus, in *Francis v. Humphrey*, 25 F. Supp. 1 (E. D. Ill. 1938), the Illinois rule requiring the plaintiff to plead absence of contributory negligence, was applied, while in *MacDonald v. Central Vermont Ry Co.*, 31 F. Supp. 298 (D. C. Conn. 1940), it was held that contributory negligence is an affirmative defense to be pleaded if the state law treats it as procedural.

It may be pointed out that state rules governing the requirements of pleading, allegation and burden of proof, even when they are denominated in judicial application as being rules of "substance" or "procedure" do not essentially raise the question of the validity of the distinction or the correctness of the application.

Erie Railroad Co. v. Tompkins,⁶⁵ one of the reasons for seeking out the federal court often was the advantage provided in that forum in the instrumental rules as well as in the telic rules.

To sum up, neither of these two classes, where the classification of telic and instrumental is employed, has any essential relation to the problem of what the distinction actually is. Arbitrary terms could be employed in these cases without affecting the result. (There is an important exception arising from the adoption of the new Rules of Civil Procedure for District Courts. This exception will be discussed later in this paper.)

It seems to be otherwise, however, in Conflict of Laws. Here, we believe, is the only instance (with the exception just noticed), where the distinction has any essential importance.⁶⁶ Now, why is that so? The reason, shortly stated is that from the beginning of Conflict of Laws as a separate and recognizable field of law, the rule has prevailed in all parts of the world, which employ the "territorial" as against the "personal" theory of law, that rules of procedure are for the forum.⁶⁷

Reference to Foreign Legal Rules—A Digression. The "territorial" theory was not a complete change in or abandonment of the "personal" theory of law. It resulted only in a simplification of the rules.⁶⁸ Instead of the complicated rules involved in a "personal" application of law, the accent was put not on the parties involved in a jural relation but on the jural relation itself.⁶⁹ Briefly stated, the jural relation in litigation was regarded as having a special connection with a given state domain because the originative facts arose there, or, because, in certain cases, the duty was to be performed there, or, in other cases, because the *res* was situated

65. 304 U. S. 64 (1938).

66. Even here, Professor Cook probably would take the position, that the distinction does not essentially appear. The argument could or would probably run more or less as follows: The courts reach certain results based on ideas of legal policy. They or others may attempt to create concepts and classifications to explain the results, but the true reality resides in the objective facts, and in the intellectual creation of concepts and classifications. Our position on this ancient philosophical problem, in a word, is that concepts and classifications are discovered and not made.

67. GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 187.

68. The familiar statement of Bishop Agobard of Lyon points out the difficulties of application of law based on a "personal" reference: "*Nam plerumque contingit ut simil eant aut sedeant quinque homines, et nullus eorum legem cum altero habeat. . .*" See VINOGRADOFF, *ROMAN LAW IN MEDIAEVAL EUROPE* (1909) 16 *et seq.*

69. See von Bar, *Internationales Privat, Straf, and Verwaltungsrecht*, 2 ENZYK, *DER RECHTSWISSENSCHAFT* (Holtzendorff-Kohler, 1914) 226-280, especially page 235 *et seq.* Roman law did not achieve a system of Private international law. See Husserl, *The Foreign Fact Element in Conflict of Laws* (1940) 26 *VA. L. REV.* 243 *et seq.*, 453 *et seq.*, especially page 263.

in that domain, or, again in other cases, because one or both of the parties was domiciled in or was a subject of that territory. Under the mediæval view a man carried his law with him wherever he went. Under the modern view a man still carries with him his domicile (in Anglo-American law) or his nationality (in European law). But for questions not arising out of domicile or nationality, the applicable law (in general) is determined by the place where the originative facts occurred or where the *res* is situated.

The points we wish to make in this connection are: (i) that the "territorial" connection was unnecessary;⁷⁰ (ii) that there is some evidence of its abandonment in special cases,⁷¹ and (iii) that the law of foreign reference could be and would be significantly simplified if such foreign references were limited to instances where such reference is unavoidable or based on sound policy.⁷²

Return to the Nature of the Problem. We have sought to show that the problem of "substance" and "procedure" in strictness can arise only in that field of existing law which is based on a reference to foreign law. We have also sought to point out, by way of digression, that that field in sound theory should be cut down to narrow limits. We have also attempted to show that the classic view that there is a sharp distinction between "substance" and "procedure" is correct, and, as a logical

70. We have attempted to show elsewhere that the attribution to a legal relation of the quality of physical position is a fiction. KOCOUREK, *op. cit. supra* note 41, at 236 *et seq.*

71. Cook, *'Contracts' and the Conflict of Laws: 'Intention' of the Parties* (1938) 32 ILL. L. REV. 899.

Suppose two men, domiciled respectively in *X* and *Y*, ascend together in an airplane at New York for a trip to Los Angeles. They discuss and make a machinery contract. The machinery is to be made in states *R*, *S*, *T*, and deliveries are to be made in states *U*, *V*, *W*. A check for \$100,000 is delivered, *etc.* The unreality of a territorial connection is here beyond doubt. The parties may, perhaps, select the *lex fori*, but our suggestion is that if the parties do not designate the forum, questions which arise should be decided as questions of domestic law regardless of foreign reference, leaving it open to the aggrieved litigant to select any forum that he chooses which has "jurisdiction."

72. "Investitive facts generate as many legal relations as there are states which give them independent recognition." KOCOUREK, *op. cit. supra* note 41, at 236. On this basis the domestic law of the forum on grounds of policy and convenience would resort to a foreign reference in such matters as those involving land, succession, and domestic status, as the rules now provide, but the law of contract and of tort would cease to be a subject-matter of foreign reference. The law of *renvoi* also would completely disappear. It may be answered—"good! but that is not the law as it stands." Our answer is that if the law as it stands is based on a pure fiction and a false theory of the nature of rights, then the law as it stands should be changed. Whether, in fact, it will be changed is a matter of indifference to legal science.

corollary, that there is no "twilight zone" which because of external reference to purpose changes the conceptual nature of the distinction.

If this conclusion, asserted with so much confidence, is true, then why has the problem so often arisen with such highly contradictory results in the reasoning of courts and especially of legal theorists?

An attempt will be made in what follows to explain the various reasons for this situation, but the general nature of the problem may perhaps be understood by putting a physical illustration: A symphony orchestra is playing a work which is transmitted by radio. In the present state of radio art the work will not be exactly reproduced. Certain ranges of tone will not be heard and there will be distortions of the tones transmitted. The broadcasting equipment and the receiver are the analogue of "procedure"; the symphony as originally played is the analogue of "substance." That is the situation in our problem. The telic rights created in state *X* are not reproduced in the instrumental application in state *Y*, unless it is assumed that there are actually no differences and especially that the instrumental rights are precisely the same. We believe we have now isolated the cause of the difficulty.

Suppose that in state *X* one witness suffices to establish a creative fact (*i.e.*, a telic fact). Suppose by the rule of the forum (*Y*) the civil law rule prevails, requiring two witnesses for *plena probatio*.⁷³ This is a rule of evidence; it is also, it seems to us, clearly enough, an instrumental rule. If only one witness is available, it is plain that the plaintiff's telic right is fatally obstructed. Examples of this sort can easily be multiplied. Does such a failure in instrumental transmission of an essential element of the telic right raise a reasonable doubt as to the validity of the distinction? We think not. The case put does not differ in principle from that in domestic law where the sole witness of a fact dies. These are among the many accidents of litigation.⁷⁴

73. "*Unius responsi testis omnino non audiatur.*" 3 BLACKSTONE, COMMENTARIES (13th ed. 1800) 370.

74. For domestic law to avoid some of these procedural accidents there are made available the deposition *de bene esse*, the *dedimus potestatem*, interrogatories, *etc.* The same procedures, in the proper case, are available in litigation involving foreign reference but where the procedure of the forum is not adjuvant but frustrative there is no legitimate way out except by treaty among the states to deal with these problems. Much of the conflict in the case-law probably is due to the wish to give relief based on the fiction that many of these procedural obstructions are, usually contrary to the fact, "substantive" in nature. As for the fiction, it is here no more entitled to scientific respect than elsewhere. It is manifestly a falsehood parading in the habiliments of benevolence but it is none the less a moral affront to the law.

For those who deny any distinction between "substance" and "procedure" we put the following case: A large piano is to be placed in a room. There is no window or door or

With the foregoing explanation of the distinction between "substance" and "procedure," we rest our theoretical consideration of the problem. There remains, however, a testing of the distinction in concrete applications. For that purpose we now proceed to consider a variety of problems where the validity of the distinction is crucially presented.

II

*The Statute of Frauds.*⁷⁵ This celebrated statute has the effect of confronting us with a variety of problems of unusual difficulty.⁷⁶ These difficulties are due to two features: (i) lack of legislative clarity resulting in ambiguity and even contradiction;⁷⁷ (ii) lack of theoretical consistency in the decisions.⁷⁸

There is no doubt of the object of the statute. It was entitled "An Act for Prevention of Frauds and Perjuries." The doubt arises as to how prevention was to be effected. Does prevention operate as a rule of evidence, as some formulations of the relevant statutory language seem to indicate?⁷⁹ Or do the words indicate that a non-conforming transaction is wanting entirely in legal effect?⁸⁰ Or does the statute mean that the non-conforming transaction is valid unless procedurally opposed?⁸¹ There are affirmative answers for each of these alternatives.⁸²

Obviously we are not concerned here with the detail of what has been

other opening which will admit the piano. Let us call the piano "substance" and let us call the openings "procedure." The test of any right, so the argument runs, is whether you can enforce it. Since the piano can not be introduced into the room, therefore it doesn't exist. The argument is sound as applied to a single jurisdiction, but it is unsound as applied to plural jurisdictions where alone the problem actually arises. The piano remains a piano whether it can be introduced or not. Other features and applications of this illustration are obvious.

75. See Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933.

76. TERRY, *THE COMMON LAW* (1906) 218 *et seq.*

77. Following are some of the variations which bear on the problem: "be in" writing; "be made in" writing; be "manifested and proved" by writing; "no action shall be brought;" "shall [not] be allowed to be good;" "is not valid;" "is void;" "shall not be binding;" "shall not be liable;" "shall be utterly void and of no effect." A review of American forms of the statute will disclose numerous other variations. For an annotated compilation of all American statutes, see SMITH, *THE LAW OF FRAUDS* (1907).

78. We refer, of course, to single jurisdictions. The conflict between jurisdictions on these questions is notorious. See GOODRICH, *op. cit. supra* note 55, at 205-208.

79. TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 159, 245.

80. *E.g.* SALMOND, *JURISPRUDENCE* (3d ed. 1910) 445.

81. This is the prevailing view.

82. Lorenzen, *supra* note 75.

adjudged on these preliminary questions. Still it is necessary to take a position on them so far as they bear on the problem. If the transaction is interpreted as being wholly void, then the rule that makes it void falls under "substantive" law. "Substance" includes both the positive and negative aspects of the rule. The rule determines here, under this interpretation, the question whether oral facts create or do not create a legal right.⁸³ We have not encountered any support in this generation for this view in the case-law and we believe it can not be supported either in principle or authority.⁸⁴ If the statute deals either with a rule of evidence or with a procedural defense, it seems clear that the question is one that falls into the procedural field.

The choice as between evidence and procedural defense is itself an interesting minor problem. We have already shown above that the entire telic situation⁸⁵ is reproduced in the litigation series. It is a rule of our law that the statute must be pleaded. The question therefore is raised in the pleading stage and not in the evidence stage.⁸⁶ Oral evidence, under the statute, may be admitted if there is no objection when the evidence is offered, but the power to object rests on a prior procedural defense raised by the plea. For these reasons, it seems clear that the question is not primarily one of evidence.⁸⁷

We believe it can hardly be doubted that the problem of the Statute of Frauds so far as it concerns our domestic law is one of procedure and not of substance. So far as concerns rights of foreign incidence, where alone the problem actually is involved there is a division of authority in the

83. Perhaps it needs to be said that a "no-right" is not a matter of "substance" or of "procedure" either. The problem whether a right comes into existence is one of "substance" under the interpretation discussed and is not "procedural."

84. The Statute of Frauds contained twenty-five sections. All of these sections except sections four and twenty-three have been repealed in England. We refer here to section four. For a full discussion of the whole matter (limited to section four) see WILLIAMS, *THE STATUTE OF FRAUDS* (1932) xxv, 194-211, 275-279.

85. See the diagram above (Stages I-IV).

86. Where the defence may be raised by the plea of general issue (which was the procedure at common law prior to the Judicature Acts) or by a demurrer in equity, it seems that the question is not one of pleading but becomes one of evidence. Cf. WILLIAMS, *op. cit. supra* note 84, at 275 *et seq.*

87. There is a curious rule that an oral contract (which creates only an imperfect right) can be perfected only by a writing prior to an action based on it; or where a party later joined relies on it, must be perfected prior to such joinder. See, WILLIAMS, *op. cit. supra* note 24, at 78, 210 *et seq.* It has been suggested, that this rule indicates that the Statute of Frauds involves "substance." If it does, it is a contradiction of all other rules bearing on the question, at least in Anglo-American law. We believe, however, the rule is simply one of administrative convenience and has no other than a purely procedural explanation.

courts and among theoretical writers. We must, however, continue to insist that the question has only one answer and that if, as we think, the Statute of Frauds involves procedure and not substance, that fact is in no way altered if and when the usual rule, that matters of procedure are for the forum, is modified.⁸⁸

As to rights of foreign incidence it has been the prevailing rule in England and America that the Statute of Frauds involves questions of procedure and not of substance. The leading case of *Leroux v. Brown*⁸⁹ ruled (under section four) that an oral contract made in France and valid under French law could not be enforced over objection, in England. The rule of the civil law countries is otherwise either because they have no Statute of Frauds or because the statute or the application is different.⁹⁰ The Statute of Frauds in stating that "no action shall be brought" *etc.* did not distinguish between domestic and "foreign rights." The court might well have restricted the statute to a domestic reference.⁹¹ Nevertheless the question still remained one of procedure whatever the application.⁹² We do not therefore attempt to take any position here on

88. GOODRICH, *op. cit. supra* note 55, at 205 says: "It would seem that the preferable view is to regard it as a matter of substance. . . ."

89. 12 C. B. 801, 138 Eng. Reprints 1119 (1852).

90. See Lorenzen, *supra* note 75, at 332. Professor Lorenzen points out that continental experts distinguish between "mode" of proof (substance) and "administration" of proof (procedure). *Id.* at 329.

91. Professor Goodrich made this point. GOODRICH, *op. cit. supra* note 55, at 207.

92. We find it difficult to understand how any reasonable doubt can be raised on this conclusion; nor do we understand the line of reasoning sometimes used in criticism of *Leroux v. Brown*, 12 C. B. 801, 138 Eng. Reprints 1119 (1852). Thus Professor Lorenzen says: "Ideas of right and remedy are inseparable." (True but they are not the same ideas.) He says again: "Even if it were conceded . . . that the statute of frauds falls fairly within the definition of a procedural rule, it would not follow that it may not be 'substantive' as well." Lorenzen, *supra* note 75, at 326. (We do not understand this sentence). Again, ". . . a statute affecting the entire existence of a legal remedy . . . is a rule determining rights and duties." *Id.* at 327 (Query, suppose by the law of *X* a spouse may be a witness but not by the law of the forum?) In conflict of laws ". . . all matters of procedure are submitted to the law of the forum." *Id.* at 327. (This rule either in sound policy or in actual practice may go too far, but in any case the author's thesis is not helped.) "It is impossible to set up a special machinery for 'foreign causes' of action. . . ." *Id.* at 328. (Why impossible? By treaty? By administrative arrangements? By legislation? In any case, irrelevant.) "The label . . . matters little. It may be clearly 'substantive' or both 'substantive' and 'procedural' or possibly even exclusively 'procedural'. . . ." *Id.* at 332. (It seems clear, however, that Professor Lorenzen wishes to keep the rule that, as he puts it, "all" matters of procedure are for the forum, and bend the application of the Statute of Frauds to a substantive operation. We respectfully suggest it would be easier and better to modify the rule than to mutilate the conceptual and real distinction between substance and procedure).

whether *Leroux v. Brown* was or was not correctly decided. We say only the question raised and decided was one involving procedure.⁹³

*The Statute of Limitations.*⁹⁴ A distinction must be made between the limitation of actions and the prescription of rights. Thus, if *A*'s chattel is converted by *B*, *A*'s power of action may be barred by lapse of time. If that is the only effect, the statute is one of limitation of actions.⁹⁵ If, however, the effect is not only to defeat the action but also to destroy *A*'s rights as owner of the chattel, the statute is one of prescription of rights.⁹⁶ In our law, in general, statutes of limitation are procedural while statutes of prescription are matters of substance.⁹⁷ The results reached by the courts on the general problem are in accord with sound theory, so far as these results are based on the distinction of substance and procedure.⁹⁸

93. We do not doubt that it is legislatively possible that a statute of frauds might be enacted which would make certain oral promises and undertakings "void" and not merely "ineffective," "unenforceable," or "invalid." That is the case for deeds, wills, promissory notes, and certain other transactions. See TERRY, *THE COMMON LAW* (1906) 218. Why much legislation declaring certain transactions to be "void" has failed in judicial application would be in itself an important and interesting chapter in the law. Such legislation if declared and if applied by the courts would present a rule of substance but section four is not such a statute. Under it oral transactions are not "no-rights" but are "imperfect" rights.

94. WOOD, *LIMITATION OF ACTIONS IN LAW AND IN EQUITY* (4th ed. 1916); GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 201-205; LORENZEN, *The Statute of Limitations and the Conflict of Laws* (1919) 28 *YALE L. J.* 492; TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 301-305, 321; SALMOND, *JURISPRUDENCE* (3d ed. 1910) 414-418.

95. *Miller v. Dell* [1891] 1 *Q. B.* 468, 7 *T. L. R.* 155 (C. A.) (*dictum*).

96. See *Chapin v. Freeland*, 142 *Mass.* 383, 8 *N. E.* 128 (1886); *Townsend v. Jemison*, 9 *How.* 407 (U. S. 1850).

97. In the case of choses in action in nearly all American states, the statute is one of limitation of actions. It is of course possible to enact statutes of prescription for choses in action which would destroy the "right." This raises an interesting analytical problem. In the case of the conversion of a chattel, B II (diagram *supra* page 167) is the right affected by prescription? For the purposes of assumpsit, IV (a) (diagram *supra* page 167) is the relation affected (since II no longer exists because of the breach) but for the purpose of prescription, II is the relation which is prescribed. On that basis the results are equivalent.

98. Whether sound policy justifies the results apart from the theoretical distinction is another matter. The fact that various states have enacted rules requiring the forum to apply the rule of the foreign state, if the parties have been residents of the foreign state during the time limited, is persuasive on the question of policy. Judge Goodrich seems to suggest that in such case the statute necessarily is substantive in its operation. GOODRICH, *op. cit. supra* note 55, at 202. We can not agree. If the statute is one of limitation in the foreign state it is not made substantive by adoption at the forum. The distinction between substance and procedure is fixed not only by its fundamental nature but also verified by an overwhelming mass of judicial practice which seeks to bring this idea to practical manifestation. The better solution, we respectfully submit is to consider such a case as a departure from the general rule. We do not undertake to consider whether such a departure is in accord with sound policy.

Difficulties arise when new elements are injected. Suppose by the law of *X*, action on a sealed instrument is limited to ten years and that by the law of the forum (*Y*) seals have been abolished and that the limitation is five years. Can the action be maintained in *Y* after five years? The form of the action (covenant in *X* and assumpsit in *Y*) is for the forum,⁹⁹ it is procedural.¹⁰⁰ Since the forum provides no remedy other than assumpsit, the limitation applicable to assumpsit must be employed unless the statute itself makes an exception for such a case.¹⁰¹

*Conclusive Presumptions.*¹⁰² Presumptions are rebuttable or conclusive. Thus, at common law, a bond or receipt under seal imported consideration. This was a rule of law in the form of a rule of evidence. On the other hand, absence for seven years without explanation of the absence, raised a presumption of death which could be rebutted. This also is a rule of law. "In a shipwreck, in the absence of other facts, the probability that a strong man who was a good swimmer outlived his companion, a feeble invalid, unable to swim," is contrasted with the other cases by Thayer as resting on its probative quality and not based on a rule of law.¹⁰³ ". . . through rules of presumption, vast sections of our law have accumulated," says Thayer.¹⁰⁴ It seems that Thayer would regard all pre-

99. *Cf.* *LeRoy v. Beard*, 8 How. 451 (U. S. 1850) (deed sealed with scrawl in Wisconsin where breach of covenant was suable in covenant; assumpsit in New York where a wafer was necessary to constitute a sealed instrument, held, action proper).

100. Professor Lorenzen who thinks that the Statute of Limitations is a matter of substance probably would agree with this answer on the ground that the Statute of Limitations touches an interest of the state where the law of the situs and the law of the forum differs. Lorenzen, *supra* note 94, at 498. If, however, the situation were reversed (*e.g.* *X* has a five-year statute and *Y* a ten-year statute, Professor Lorenzen, it seems, would say the action should be barred. We do not agree. We believe the Statute of Limitations is a matter of procedure in both cases. Whether "sound international practice" would require a different result is not our problem.

101. Difficulties of another sort arise out of the rule that the statute does not run when the debtor is beyond the jurisdiction. This rule applies to foreigners as well as to residents. As to the foreign debtor, the statute does not begin to run until he reaches the forum. *Strithorst v. Graeme*, 3 Wils. 145, 95 Eng. Reprints 980 (K. B. 1770); *Williams v. Jones*, 13 East 439, 104 Eng. Reprints 441 (1811); *Lafond v. Ruddock*, 13 C. B. 813, 138 Eng. Reprints 1422 (1853). In *Graves v. Weeks*, 19 Vt. 178 (1847), the defendant, a New York citizen temporarily in Vermont, was sued by a New York citizen on a debt barred by the law of New York. The plaintiff recovered. The result furnishes an argument for a change in the rule. That change has come about by statute in many states.

102. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 313-352; TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 51; TERRY, *THE COMMON LAW* (1906) 136, 139; SALMOND, *JURISPRUDENCE* (3d ed. 1910) 451 *et seq.*

103. THAYER, *op. cit.* *supra* note 102, at 340.

104. *Id.* at 327.

sumptions not resting on probative quality alone as matters of substantive law, whether the presumptions are conclusive or rebuttable. The Anglo-American law of foreign rights regards conclusive presumptions as "substance" and rebuttable presumptions as "procedure."¹⁰⁵

A third view is possible, *viz.*, that all presumptions are procedural. The argument is this: persuasion is a procedural condition, and even where the presumption is irrebuttable the object is probative and not definitive of the right. This argument presents a question of interpretation of the legal nature of presumptions and especially of irrebuttable presumptions. We are disposed to believe that the prevailing American distinction is to be preferred as against the other two views.¹⁰⁶

*The Parol Evidence Rule.*¹⁰⁷ The problem here is connected with the question which arises under the Statute of Frauds and also under conclusive presumptions. The answer here should be the same. On the preliminary questions, the courts divide, and inconsistency may be found even in the same jurisdiction.¹⁰⁸ If parol evidence has no legal relevancy, then it is like any irrelevant evidence—it has no legal effect for any purpose—and a judgment based on such evidence is erroneous and voidable, assuming of course that the proper procedural objection has been entered on the record. If, however, parol evidence may support a judgment in the absence of procedural objection, it is not irrelevant or ineffective. In one case it is a matter of substance based on the conclusive presumption of irrelevance. In the other case, it is a matter of procedure. In the latter case the rule is not vitiated; it embodies a rebuttable presumption which requires affirmative procedural action for application. Under this view "the parties may by agreement express or implied, accept oral testimony instead of the presumption ordinarily arising from written evidence. They have a right to make a rule of evidence for their own case."¹⁰⁹

105. GOODRICH, *op. cit. supra* note 55, at 197 *et seq.*

106. The tendency in legal development has clearly favored a declining role for the conclusive presumption. See SALMOND, *op. cit. supra* note 102, at 451 *et seq.*

107. THAYER, *op. cit. supra* note 102, at 390-483; 9 WIGMORE, EVIDENCE (3d ed. 1940) 3.

108. Brady v. Nally, 151 N. Y. 258, 45 N. E. 547 (1896) (an entire contract to furnish labor and materials for a gross sum may be modified and a claim for installment payments based on partial performance be established by oral testimony, if not challenged before the close of the trial). Union Bank v. Case, 84 N. Y. Supp. 550 (App. Term 1903) (parol evidence admitted without objection is in the record for all purposes—the rule is one of evidence). Stanton v. Granger, 125 App. Div. 174, 109 N. Y. Supp. 134 (2d Dep't 1908), *aff'd* 193 N. Y. 656, 87 N. E. 1127 (1908) (contract under seal, question raised by demurrer—parol evidence rule is more than a rule of evidence—it is a matter of substance). See 1 WIGMORE, EVIDENCE (3d ed. 1940) § 18; 9 WIGMORE, *id.* § 2592.

109. Brady v. Nally, 151 N. Y. 258, 264, 45 N. E. 547, 549 (1896).

Professor Thayer took the position that the parol evidence rule is not a matter of evidence¹¹⁰ and he seems to regard it as a matter of substance.¹¹¹ We believe Thayer is right in the first position—that the parol evidence rule does not belong to the law of evidence.¹¹²

Remedies. This term unfortunately is not always used in the same meaning. It may embrace at least three different ideas: (i) it may be limited to the meaning already suggested [diagram, IV(a)]; (ii) it may include that meaning plus a power of suit [IV(b)]; (iii) it may embrace (solely) all the concrete processes (and their underlying powers) employed for redress of violated rights (*i.e.*, all adjective law).

In this discussion we shall adhere to the meaning already chosen above [*i.e.*, that indicated by diagram IV(a)]. In a word, we shall understand by the term "remedy" all the abstract right-duty relations which follow upon a violation of rights. We do not include under "remedy" either (a) the power of suit or (b) the concrete steps (and their underlying power relations) which normally follow the commencement of suit.

In the field of foreign rights, it is the prevailing theory that the foreign right has an exclusive foreign origin but that the violation of this foreign right may be the basis of a suit elsewhere (the forum) subject to the rule that matters of procedure are determined by the law of the forum while matters of substance are administered by the forum as if it were, *pro hac vice*, a foreign tribunal. This is a very curious theory—it makes the forum a domestic and a foreign tribunal in the same litigation—but there is little doubt that this theory is actually dominant not only in the courts but also in the views of the majority of experts.

We have suggested above that a more simple theory was and is possible; *i.e.*, to look upon rights as created in as many states as give it recognition. No comment or explanation is necessary to show that the law of foreign rights together with that singular logical complication, the *renvoi* rule, would be reduced to small proportions. Courts would not be called upon to function in the same litigation as domestic courts for one purpose and as foreign tribunals for another purpose. It may also be pointed out that the distinction of "substance" and "procedure" would seldom have arisen as a special legal problem except for the theory of foreign rights which now prevails.

110. THAYER, *op. cit. supra* note 102, at 390; 9 WIGMORE, EVIDENCE (3d ed. 1940) 3: ". . . the rule is in no sense a rule of Evidence, but a rule of substantive law."

111. THAYER, *op. cit. supra* note 102, at 391; 1 WIGMORE, EVIDENCE (3d ed. 1940) § 5; 9 WIGMORE, *id.* §§ 2400, 2425.

112. It does not necessarily follow that the rule must in consequence be substantive. Adjective law embraces not only pleading and evidence but also practice.

The difficulties of application of the distinction are more acute at the point here under discussion than elsewhere. Questions concerning the nature of the rules dealing with the Statute of Frauds, the Statute of Limitations, burden of proof, presumptions, the parol evidence rule, and, especially, process, pleading, evidence, practice, damages, exemptions, *etc.*, are relatively simple as compared with the problem now under consideration.

Under the theory which prevails, the remedies offered in *X* may not be available in *Y* (the forum). Thus the plaintiff may be entitled in *X* to integral restitution of a certain kind of chattel. Several situations are possible in *Y*. The forum, (a) may not recognize any form of specific enforcement for any chattel; (b) it may not recognize the remedy of specific enforcement in any case; (c) it may not recognize specific enforcement for the chattel in question. The right to have integral redress is clearly a substantive right in *X*, but if the forum does not in any way provide the procedural relief to enforce the right, the nature of the right is in no manner altered. It is still a telic right in *X*, but it does not exist in *Y*. If, however, the forum affords relief by way of specific enforcement in any case (*e.g.*, other chattels, land exclusively), the forum as a matter of sound policy should recognize the right since recognition does not involve creation of new procedural machinery.

The question arises here, under the prevailing theory, how much of remedy and how much of power of suit must exist in *X* to warrant recognition in *Y*? We have already suggested that an asserted right must have at least a minimum of recognition both in the form of remedy [IV(a)] and in power of action [IV(b)] in *X* before it will be recognized in *Y*. If, improbably, the forum does not recognize any remedy [IV(a)] or any procedural redress (V), then the right simply does not exist in *Y*.

While the situation where the forum does not recognize any form of remedy in its domestic law or any form of procedural redress for the foreign right, is hardly likely to occur, yet there are instances where as to foreign rights the forum (a) does not afford a domestic remedy in a similar case and (b) either extends or restricts the procedural relief as against the procedural relief available at the situs (*X*).

An example of the first case (a) is this: Suppose the law of *X* recognizes, and the law of *Y* does not recognize a right of privacy. The forum (*Y*) will afford relief. Contrariwise, if *X* does not recognize a right of privacy and *Y* does, the forum (*Y*) will not give relief.

Suppose again that *A* (creditor) and *B* (debtor) are residents and citizens of *X*, that the debt was contracted in *X*, and that by the law of *X*, *B* is not liable to arrest. Suppose by the law of *Y*, (the forum) a debtor

may be arrested. The forum will apply its own domestic law because arrest is exercise of a procedural power.¹¹³

Another interesting variation of the problem is put by Judge Goodrich. "Suppose a promissory note, negotiable in form, is executed and delivered to the payee and indorsed to a holder in due course in a state where such holder takes free from any set-off the maker might have against the payee. The holder sues the maker in another state, where such matters may be pleaded in set-off."¹¹⁴

The general rules governing the power of set-off are procedural but the example put goes beyond a mere matter of procedure and touches a matter of substance. The set-off rule of the forum creates a new substantive rule which creates an incumbrance on a promissory note. The power of set-off runs with the note. It will readily be admitted on the contrary that where in state *X* a set-off is recognized as available in all cases, in and outside of litigation, but where *Y* (the forum) excludes procedural set-off, that the question is one of procedure. Where procedural relief either is not available or is expressly prohibited, substantive rights may fail since in case of conflict, the procedural rule will prevail.

The courts have gone far to uphold without modification the existing practices, policies, and rituals of the forum. Thus, in a leading case,¹¹⁵ it was held that where a tort was committed in a foreign country which made provision, in event of recovery, for an alterable installment judgment, that the American forum would not entertain the suit. This harsh result is due first to an erroneous theory of foreign rights and next to an overemphasis of the forum's ritual.

We need not multiply instances.

The distinction which we have sought to investigate has taken on an unnecessary importance. It is an historical accident. It has a place only in the law of foreign rights.¹¹⁶ If the underlying theory of that field of law had not come into existence it does not seem probable that the distinction would ever have been noted as a legal problem apart from the problem of legal classification.¹¹⁷ The underlying theory which gave it birth was a monster but the progeny of this monster has multiplied with

113. *De la Vega v. Vianna*, 1 B. & Ad. 284, 109 Eng. Reprints 792 (1830).

114. Judge Goodrich believes this question is one of substance. *GOODRICH, op. cit. supra* note 55, at 192, referring to *RESTATEMENT, CONFLICT OF LAWS* § 593 comment a.

115. *Slater v. Mexican Nat. R. R. Co.*, 194 U. S. 120 (1904).

116. We have used this expression as a verbal convenience. It can be shown that no state ever applies a foreign right. The right in these cases is always a domestic right with a foreign reference.

117. We must insist, however, that even if the distinction had never found an application, it would still exist.

the most astonishing fecundity. We know of no instance of development of a legal idea which is comparable in its effects.

Much as we may regret the existence of this unnecessary problem, yet, we can not withhold our respect of the mental power that has entered into its application and development, or our admiration of the general logical consistency of the rules and doctrines that have been employed in the judicial application of the distinction.

The case of *Jacobus v. Colgate*¹¹⁸ presents an interesting variation of the problem of "remedy." It also involves a pervasive feature which has a wide range of application. A statute was enacted in New York permitting the bringing of action for damage to land in other states. An action was brought in New York for a land tort committed in Kansas prior to the statute. One of the questions much discussed was whether the statute operated retrospectively. The rule was invoked that retrospective operation is permissible as to matters of procedure but not as to matters of substance. The majority thought the case involved a matter of substance. The minority thought it was a matter of procedure. The holding we think can be supported on the view that no statute has a retrospective operation unless it clearly so provides. This rule applies as well to matters of procedure as to matters of substance. If, however, retrospection touches a matter of substance, then, of course, a question of constitutional law may be involved.

The majority took the position that until the statute was enacted, there was no remedial right [IV(a)] which would be recognized in New York for a foreign land tort. The minority took the position that a remedial right did exist in New York but that no direct action could be maintained over the objection of the defendant; in other words, that a judgment based on a foreign land tort was not voidable in New York in the absence of procedural objection. This feature of the court's discussion arises often in various settings, and it raises a fundamental question.

Is this kind of situation comparable to (let us say) one where a rule of substantive law requires consideration? In a suit on an alleged contract where there is no showing of consideration, it seems where the defendant has been duly summoned and the court has jurisdiction, that a judgment is not voidable where the defense of want of consideration has not been raised by the defendant. Suppose, again, the plaintiff sues in *assumpsit* and fails to present any evidence whatever supporting his declaration. Let us suppose further the defendant has been summoned, that he files

118. 217 N. Y. 235, 111 N. E. 837 (1916).

a plea of general issue, offers no evidence on his own account, makes no objection to the plaintiff's evidence and that there is no exception noted or motion for new trial or arrest of judgment, and that a judgment follows. Would that judgment be voidable? Probably not. We are speaking here of common law procedure and not of equity. What bearing, if any, has this kind of situation on our problem?

We are disposed to believe that these procedural situations throw no light on the question. In a no-defense case (*i.e.*, where no defense is made) there is no difference observable in the results between a no-right and a right good unless there is a procedural objection. Thus, the case where *A* sues on an alleged contract which has never existed and gets a judgment, is not in any manner different in the result from the case where *A* sues on a claim barred by limitation where no plea is filed or objection made. The results are the same, but the cases are different. One is a no-right; the other is an imperfect right. But how may this difference be shown procedurally? We venture to suggest that under common law pleading the crucial test could be made by a motion for a directed verdict, by motion for a new trial, and, lastly, by motion in arrest of judgment.

On the view, therefore, that there is an actual and demonstrable difference between a no-right and an imperfect right, the answer to the question here under consideration depends on what the New York court would do under each hypothesis. On a record disclosing a no-right, the court would arrest the judgment. On an imperfect right (no procedural objection having been raised) the court would enter a judgment for the plaintiff.¹¹⁹

Another way of putting it, is to say that substantive rules in our law can only be changed by contract based on consideration, but that procedural rules may be waived without consideration and by unilateral positive act (express procedural waiver) or by unilateral negative act (*e.g.*, failure to make procedural objection, *i.e.*, absence of plea, absence of objection to introduction of evidence, absence of motion to strike).¹²⁰

On this basis of reasoning we see no escape from the conclusion that the question involved a matter of procedure and not one of substance. Similar reasoning is applicable to the question of the Statute of Frauds, the Statute of Limitations, the parol evidence rule, rebuttable presumptions and other like instances.

One more problem, of recent origin, may conclude our survey. Just

119. *Sentenis v. Ladew*, 140 N. Y. 463, 465, 35 N. E. 650, 651 (1893).

120. In equity, where the decree must be supported by a satisfactory certificate of evidence or findings in the decree, a question of substance could be raised after decree and on appeal.

prior to the abrogation of *Swift v. Tyson*¹²¹ in *Erie Railroad Co. v. Tompkins*,¹²² the Supreme Court promulgated the Rules of Civil Procedure for District Courts.¹²³ The enabling act of Congress provided that "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."¹²⁴ One of the rules¹²⁵ provided for a physical and mental examination in actions where the physical or mental condition of a party is in controversy.

In the absence of a valid rule requiring a litigant to submit to physical examination, an order requiring it would be violative of various constitutional immunities.¹²⁶ No power to make such an order exists at common law.¹²⁷ Under the above federal rules, the interesting question is presented (or seems to be presented) whether a plaintiff suing in a federal court where the local law does not authorize an order to undergo a physical examination, can be coerced to submit under the federal rules.¹²⁸

The right of privacy to be immune from physical contacts is clearly and unmistakably a substantive right.¹²⁹ Even where this right may be overridden by a procedural rule, it still remains a substantive right.¹³⁰

Conclusions

1. The pairs of terms, Substantive Law and Adjective Law, and Substance and Procedure, are not equivalent. The first pair of terms is useful in a classification of the law. The second pair of terms is limited to a determination of the rights of the parties, in litigation.

121. 41 U. S. 1 (1842).

122. 304 U. S. 64 (1938).

123. 302 U. S. 783 (1937).

124. 28 U. S. C. A. § 723 (b), 48 STAT. 1064.

125. FED. RULES CIV. PROC. 35 (a), 28 U. S. C. A. following § 723 (c).

126. U. S. CONST. Articles IV, V, XIII. These contentions were relied on by the plaintiff-appellant in *Countee v. United States*, 112 F. (2d) 447 (C. C. A. 7th, 1940).

127. *Union Pacific R. R. Co. v. Botsford*, 141 U. S. 250 (1891); *Camden & Suburban R. R. Co. v. Stetson*, 177 U. S. 172 (1900).

128. In *Sibbach v. Wilson Co.*, 108 F. (2d) 415 (C. C. A. 7th, 1939), *cert. granted*, 309 U. S. 650 (1940), the court gave an affirmative answer. See also *Countee v. United States*, 112 F. (2d) 447 (C. C. A. 7th, 1940).

129. In *Sibbach v. Wilson Co.*, *supra* note 128, the court intimated that the right is procedural because of the rule. This can not be. The substantive right may be denied its usual compass in procedure but the right remains the same. Analytically, this is another instance of conflict of rights as illustrated in the law of encumbrances of land and elsewhere.

130. Whether FED. RULES CIV. PROC. 35 (a) can be supported in the case put is not within the scope of our inquiry, but it may be suggested that if the Federal Rule is allowed to prevail over the local rule, the object of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938), is thwarted. The litigant has a different position in the Federal court than in the local court with respect to his substantive rights.

2. The terms used are not etymologically satisfactory in either pair of terms. The suggestion is offered that for substance and procedure there be employed the terms *telic* (*i.e.*, the "what" or object) and *instrumental* (the means or method).

3. The term "instrumental" is not limited to rights (jural relations) but includes jural facts, jural events, and jural conditions arising in litigation.

4. The question of the distinction of what is "telic" and what is "instrumental" does not essentially arise in the law of a single jurisdiction, in constitutional law, or under the federal system. It arises only where two distinct and constitutionally unrelated systems of law are involved and where a reference is made by one to the law of the other in litigation.

5. The modern theory of unique territorial origin of rights was a simplification of the earlier personal theory of rights. It is suggested that both theories which are alike in substance may be replaced by a theory of territorial recognition of rights. Such a theory would greatly simplify the difficult field of so-called conflict of laws and incidentally would remove the problem under discussion as a practical issue.

6. There is a clear logical distinction between "substance" and "procedure." There is no "twilight" zone which involves the distinction or affects its conceptual clarity. There are however applications which raise questions of policy. The latter problems have a different logical nature. The logical nature of the distinction is not dependent on application. Mental apprehension of this category no doubt was furthered by practical experience in the administration of justice, and historically it may have emerged as a generalization of practical experience, but in the background of human experience and cerebration, like other valid logical categories, it remains a subsistent wholly independent of experience or application.

7. English and American courts have, in the main, applied the distinction with remarkable logical consistency.