The New Federal Procedure and Law Reform

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"The final cause of law is the welfare of society." In these ringing words Justice Cardozo felicitously formulated the aim and purpose of jurisprudence.

That the object of law is to achieve justice, is axiomatic. That the development of law as a science is not an end in itself, but is useful and desirable only in so far as it tends to fulfill the primary purpose for which law exists, is equally obvious. Law is but the handmaiden of society for the attainment of justice. Yet, like so many pious expressions, these truisms are frequently either ignored or are at best rendered but lip service.

In no branch of jurisprudence has this deplorable attitude been more prevalent than in the field of procedure. To a large extent the explanation of this lamentable characteristic is to be found in the history of the growth and development of adjective law. Justice Holmes observed many years ago that the form and machinery of the law "and the degree to which it is able to work out desired results, depend very much upon its past."

In view of this consideration, a historical approach is conducive to an understanding of the significance of any phase of law reform in its proper perspective.

My purpose in this discussion will, therefore, be to endeavor to orient the momentous achievement represented by the recently adopted Federal Rules of Civil Procedure in relation to the history of American jurisprudence, and to attempt to define the major contributions made by them to the development of the law.

While we refer to the new practice by the modest appelation of Federal Rules of Civil Procedure, this group of regulations is much more than just a new code of rules. It constitutes a procedural reform of the first magnitude. It strikes from Federal civil procedure the archaic fetters that have bound it for generations and sets it free to achieve the purpose for which jurisprudence exists, namely to settle controversies between man

and man fairly, expeditiously, inexpensively, and with the least possible regard to form and technicality.

The Act of Congress of June 19, 1934, which conferred upon the Supreme Court the authority to adopt and promulgate rules, and, therefore, made the new procedure possible, marks a vital departure from the past moorings—to which legal procedure clung in this country. While in England procedure of the courts was to a large extent always regulated by the courts themselves, in this country that function was taken over by the legislatures about the middle of the last century. This movement started with the adoption of the so-called Field Code by the New York State Legislature, which attempted meticulously to regulate every step of judicial procedure by legislative enactment. While the code itself marked a milestone along the path of judicial reform, in that it abandoned common law pleading and introduced a simple form of pleading in its stead, with only a single form of action, it nevertheless brought in its wake the reprehensible fashion of legislative regulation of judicial procedure, both in the state courts and in the Federal tribunals. Our English cousins did not fall into this error. While by Act of Parliament they reorganized their judicial system, they left the details of procedure to be determined by rules of court.

Since the Judiciary Act of 1789 the Supreme Court of the United States has had the power to regulate equity and admiralty practice. The Bankruptcy Act of 1898 conferred similar authority in respect to bankruptcy proceedings. As to actions at law, however, the Supreme Court was stripped of this power by the Conformity Act of 1872, which required the Federal Courts to follow the procedure of the courts of the state in which the Federal court happened to be sitting. The Act of June 19, 1934, reposes in the Supreme Court complete control over the entire field of Federal civil procedure, thus restoring to the courts the authority which is traditionally theirs and which as a practical matter should invariably devolve on them. This vital change has a far-reaching significance beyond its effect on Federal procedure. It has given rise to a movement in many of the states to reinvest the courts with control over their own procedure and to confer on them the rule-making power, of which they

were bereft by codes and practice acts. This movement augurs well for the reform of legal procedure in this country.

I referred a few minutes ago to the Conformity Act of 1872, by which the Federal courts in actions at law were required to conform "as near as may be" to the practice of the states in which they were sitting. The result of this system has been the growth of 48 varieties of Federal procedure, for in no two states is civil procedure precisely the same. To consider pleading as an illustration, they vary from common law pleading in its pristine vigor to the simplest and most liberal form sanctioned by codes and practice acts. Between the two poles are found various modified forms of common law pleading and the more exacting types of code practice.

It will be observed that the Conformity Act not only prevented the attainment of uniformity, but it also rendered the Federal courts impotent to improve and reform their own procedure, for it was mandatory on them to follow state practice. There undoubtedly is a historical reason for this condition. Prior to the development of modern means of transportation and communication, the states were much more isolated than they are today. It was a considerable convenience for a lawyer, whose practice took him principally to the state courts, to be able to follow the procedure to which he had been accustomed, on the rare occasion when his client's business led him into a Federal tribunal. Today, when lawyers more than ever before are frequently called away from their offices and can by means of railroad trains and airplanes rapidly betake themselves without much difficulty wherever their clients' needs bring them, these differences in practice would be a serious nuisance. Moreover, Federal judges were at times embarrassed when they were assigned to serve away from their districts and found themselves confronted with a different type of civil procedure. The practice of temporarily detailing Federal judges to serve in districts away from their residence has been growing with the increase in the volume of business in the Federal courts. Even for the practitioner whose business rarely takes him out of his own locality, conformity was, after all, a snare and a delusion. The phrase "as near as may be" contained in the Conformity Act, had serious implications and has entrapped many a lawyer.

The unwary at times thought that after entering the Federal court they were safe in being guided by state practice, only to be informed that in the light of the phrase "as near as may be" the Federal tribunals declined to follow the state courts in some important particular.

From a theoretical standpoint, conformity to state procedure is entirely lacking in justification. The United States is one country. The generation before the Civil War was indeed accustomed to refer to the United States in the plural. Today, that usage is obsolete. The Federal judicial system must needs be a single unified whole. Without a uniform procedure permeating the entire structure, this end cannot be completely attained.

The adoption of a uniform civil procedure prevailing throughout the Federal judicial system—for the first time in the history of the United States—may be regarded as one of the principal fruits of the Act of June 19, 1934.

The outstanding and noteworthy features of the new practice are the abolition of the procedural distinction between law and equity, and the creation of a single form of action, to be known as "civil action," irrespective of whether legal or equitable remedies, or both, are sought by the plaintiff. The differentiation between law and equity, which had its beginnings in Medieval England, is the result of an unconscious historical growth and manifestly has no basis in pure logic. The origin of equity jurisprudence is found in the commendable desire to meet the inadequacy and insufficiency of the common law, which in its early stages was unduly trammeled by artificial distinctions and narrow limitations. The two branches of jurisprudence proceeded along different grooves and developed different types of procedure.

In the 19th century, when public opinion gradually became centered on the defects of administration of justice, it was perceived that no purpose was being served by continuing to maintain the procedural distinction between law and equity. We are, of course, the creatures of the past. It would be folly to attempt to divorce ourselves from history. We must, indeed, build on our foundations. On the other hand, we must do so understandingly, for slavish adherence to the ways of our pre-

decessors may place us in the attitude of the Chinese gentleman depicted in Lamb's Essay on the Roast Pig. You will recall that his barn was accidentally set on fire and that a pig who was imprisoned in it was burned to death. The Chinese gentleman found that burnt pig was a delectable dish. On subsequent occasions whenever he desired to partake of this delicate morsel, he locked a pig in a barn and burned down the barn. For centuries the bench and the bar seemed to think that whenever it was necessary to supplement the inadequacy of legal remedies, the litigant should be remitted to a different court where he would proceed by a different path, in order that he might receive his due. It was not until the middle of the 19th century that it occurred to leaders of the bench and bar that, after all, both types of remedies should be available in the same tribunal, in the same kind of a proceeding. The result was that code pleading, which, as I have remarked heretofore, was inaugurated in New York about 1850, and from there spread to about thirty other states, abrogated the procedural distinction between law and equity and instituted a single form of civil action. The distinction was likewise abolished in England, when the High Court of Judicature was established, in the 1870's. The Federal courts, however, maintained the line of demarcation until 1938. Today, as a result of the new Rules, a single form of action, irrespective of whether legal or equitable remedies are demanded, prevails in the Federal courts.

Excessive formalism is apt to be a concommitant of every system of law in its early stages. This was certainly true of the common law.

A notable contribution made by the new procedure to the movement for judicial reform is found in the abolition of the various forms of actions at law, such as debt, covenant, assumpsit, trespass, trespass on the case, detinue, and replevin. With the abrogation of these distinctions comes also the scrapping of technical pleadings. The pleader simply sets forth a short and plain statement of the claim, in every-day English, showing that he is entitled to relief.

The long chain of technical pleadings, consisting of a declaration, pleas, answer, rejoinder, surrejoinder, rebutter, and surrebutter, is thrown in the discard. The principal effect of this

method of pleading was to postpone the joinder of issue, and therefore, the trial, for an inordinate length of time and greatly to enhance the expenses, which had to be borne by the unfortunate litigants. The new procedure substitutes a complaint and an answer. If the answer contains a counterclaim, a reply is required. A reply may also be ordered, in the discretion of the court, to an affirmative defense, but it is hoped that this privilege will be sparingly exercised. Beyond this point pleadings do not go as between the plaintiff and the defendant. The result will be a much speedier joinder of issue and, therefore, a more expeditious termination of the lawsuit, with an emphasis on the trial on the merits, rather than on fencing by means of exchange of a series of technical papers.

We do, indeed, hear many a lamentation from common law pleaders, who see the knowledge and the skill assiduously acquired by scorning delights and living laborious days, frustrated with a stroke of the pen. In Miltonic cadences they exclaim—"What boots it with uncessant care to . . . strictly meditate the thankless Muse?", the Muse in this instance being the art of common law pleading. Such Jeremiads are, indeed, natural and comprehensible, and yet those who give vent to them, overlook the fact that the primary purpose of the law is not to afford to astute and ingenious lawyers an opportunity to indulge in the fine art of casuistry, but to endeavor to secure justice for the litigant in a simple and expeditious manner.

Lawyers, from the code states, perhaps do not fully realize or appreciate the significance of this aspect of the great reform. Those who have practiced in common law jurisdictions, however—and there are a number of states that still cling to that outmoded procedure—will recognize the tremendous advance, in spite of an occasional attack of nostalgia. I recall hearing a member of the bar, who evidently for the moment forgot his sense of humor, bemoan the fact that under the new Rules it would be as simple to enter the portals of a Federal court as it is to go before a Justice of the Peace. I might well have retorted—" 'Tis a consummation devoutedly to be wished."

Common law pleading is probably in a large part responsible for the contempt and disgust of the lay public toward the technicalities of the law. Shakespeare, among the many thrusts

that he directed against the foibles and shortcomings of mankind, did not overlook legal technicalities. He may perhaps have had common law pleading in mind when he placed these words in the mouth of Jack Cade: "Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man?"

Code pleading is, however, not to be regarded as being entirely innocent from the standpoint of technicalities. Like the hull of a ship that is in need of overhauling in a drydock, it has gradually become encrusted with barnacles that interfere with the celerity of its locomotion. These excrescences consist in part of statutory amendments and in part of restrictive court decisions, all of which have tended to develop just another technical type of pleading and practice. These deficiencies of code pleading are also swept away by the new procedure.

Another notable contribution made by the new Rules is flexibility as to joinder of parties, claims, counterclaims, cross-claims, and the like. The plaintiff is permitted to join in his complaint as many claims as he may have against the defendant, whether they are legal or equitable, and irrespective of whether or not they are independent of each other. Thus, the abstruse learning concerning joinder of causes of actions is entirely obliterated. Alternative, inconsistent, and hypothetical pleadings are permissible. All parties in interest may be joined. Additional parties may be brought in without any restriction, when the desirability of such action is made apparent to the court. The defendant may interpose as a counterclaim any claim that he may have against the plaintiff, irrespective of whether or not it arises out of the same transaction as the plaintiff's claims. The old rule that barred counterclaims *in delictu* if the action was *in contractu* is abrogated. Thus, in one lawsuit the plaintiff and defendant may secure a determination of every possible claim that either of them has against the other.

If there are several defendants, any one of them may assert any claim that he has against any other. Such a claim is known as a cross-claim. By means of a procedure known as "third party practice" the defendant may bring in a party who is liable to him or to the plaintiff for all or a part of the plaintiff's claim.

For example, if the payee of a promissory note sues one of two co-makers, the defendant may invoke the third party practice in order to bring in the second co-maker, who would be liable to the defendant on the theory of contribution. This course results in avoiding the circuity of action inescapable under the old practice, when the defendant had to wait until judgment was rendered against him, and then only after paying the judgment, was he in a position to bring a suit against his co-maker for contribution.

Under the new practice, all such claims can be disposed of in one action. If in any case the issues become so numerous and intricate that it is in the interests of their orderly and expeditious disposition that some of them be tried separately, the court is empowered, in its discretion to make orders to that effect.

There is a fundamental question of law that is open which will have to be settled in respect of third practice—namely, whether as a basis for bringing in a third party defendant, there must be a separate ground of Federal jurisdiction in regard to it, such as diversity of citizenship between the original defendant and the third party defendant, or whether the fact that there was ground for Federal jurisdiction as between the original parties suffices. District Courts have held both ways on this point. Eventually, it will have to be determined by appellate tribunals.

With a view to eliminating sham answers and defenses adduced solely for the purposes of delay, in cases in which upon analysis it appears that there is no material issue of fact in controversy, the parties are no longer required to await a trial. Either party is given an opportunity, by making a motion for a summary judgment, to show by the pleadings, by affidavits, by depositions, or by admissions, or by a combination of any two or more of these methods, that there is no issue of fact to be tried. If this appears to be the case, summary judgment is rendered forthwith, in favor of the prevailing party. Thus, dilatory tactics receive a serious set-back.

The next notable feature of the new procedure, which deserves attention, is found in the fact that the Rules change the basic theory of litigation. An action at law or a suit in equity has been viewed as a contest conducted at arm's length,

according to certain fixed rules. Very frequently the outcome depended upon the skill with which the game was played. The purpose of the new procedure, however, is to ascertain the truth. Each party to a lawsuit is deemed entitled to all the information that bears on the controversy, even if such information is in the possession of an adversary. The element of surprise is greatly reduced. This result is attained by making available to the parties an arsenal of potent weapons, which they may invoke for the purpose of extracting from any other party whatever germane information is in the possession of the latter.

First, any party may orally examine any other party to the action, not only with the object of securing evidence in support of the examining party's case, but also for the purpose of obtaining information in regard to the other party's contentions and searching for leads that may eventuate in finding evidence. Thus, the party may be asked as to the existence of any documents and the like, and the names and addresses of persons having knowledge of relevant facts. Second, any party may serve written interrogatories upon any adverse party, to be answered by the latter under oath. Third, any party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents or of the truth of any relevant facts set forth in the request. Failure to deny them under oath or give a satisfactory reason for failure to do so is tantamount to an admission for the purposes of the trial. Fourth, on motion of any party the court may order any other party to produce for inspection any designated documents, objects, or tangible things containing material evidence. In addition, in any action in which the mental or physical condition of any party is in controversy, the court may direct a medical examination.

An interesting illustration of an adroit utilization of the right to serve requests for admission of the truth of relevant facts is found in a recent case in the Eastern District of New York (*Walsh* v. *Connecticut Mutual Life Insurance Company*), involving an action to recover death benefits under a life insurance policy containing the so-called double indemnity clause in case of accidental death. Suit was brought by the widow of

the insured, who claimed double indemnity on the theory that her husband's death was caused solely by accidental means. This fact was disputed by the insurance company, which asserted that the insured died as the result of injuries received by him in a drunken brawl. The company further contested the validity of the policy on the ground that the insured had been guilty of material misrepresentations in his application for insurance, in that he falsely stated that he had not consulted any physician during seven years preceding the date of the application. The insurance company filed a request for admissions, calling upon the plaintiff to admit a number of short succinct statements of fact contained in a series of paragraphs. Failure to deny such facts under oath or to advance a satisfactory explanation for inability to admit or deny, would have been equivalent to an admission for the purposes of the trial, thus eliminating the necessity of introducing evidence on these issues. The practice invoked by the insurance company was sanctioned by the court. The usefulness and value of such a course of procedure is readily apparent.

The provisions as to depositions and interrogatories can be invoked with equal facility, to similar ends. Much depends on the ingenuity of counsel in employing the various tools afforded them by the new Rules for the purpose of extracting information and assistance from their adversaries, and thereby narrowing down the questions to be actually tried to those concerning which the parties really differ.

It behooves lawyers to familiarize themselves thoroughly with these various remedies and to acquire facility in their use. A frequent and skillful recourse to them will necessarily result in restricting the points of difference, abbreviating trials, and diminishing the element of surprise. Manifestly, the inevitable tendency will be in the direction of a more expeditious, less expensive, and more effective administration of justice.

It will be observed that the basis on which the new system of procedure is founded is that preliminary proceedings should be simplified and shortened as much as possible, and that the trial should be hastened, with the issues narrowed down to the real points in actual controversy. Additional impetus toward the attainment of this aim is given by provisions for so-called

pretrial procedure, which permits the court in its discretion to direct the attorneys for the parties to appear before it for a preliminary conference, with a view to simplifying issues, obtaining admissions, and generally eliminating all superfluous matters from the questions to be tried. A similar practice has been in successful use in the state courts in some of our larger cities, like Boston, Detroit, and Los Angeles. It should be noted that in England every case is subjected to what amounts to a pretrial procedure, although there it is denominated a "summons for directions."

The Federal Court in Massachusetts last fall commenced to call every jury case for pretrial procedure. The result was the settlement of a great many actions and the narrowing down of the issues to be tried in a large number of others. It is hoped that other courts will likewise invoke pretrial procedure.

It is gratifying and refreshing that these vital reforms in judicial procedure were accomplished from within the legal profession. Improvements in the law have not always been achieved in this manner. Lawyers are proverbially conservative. At times there is a tendency on their part to cling to the past unduly. Perhaps the most striking instance of this characteristic that has ever come to my notice is found in an incident narrated by Lord Campbell in his biography of Lord Chancellor Eldon. Lord Campbell relates that on an occasion on which a bill to incorporate a railroad company came before the House of Lords, early in the 19th century, Lord Eldon arose and expressed opposition to the measure, vehemently asserting that "railroads are a dangerous innovation."

In England the movement for the reform of the law received its impetus from the public at large and met with some antagonism, or at best with reluctance, on the part of the bench and bar. I venture to say it is not an exaggeration to state that Charles Dickens by his portrayal in "Bleak House" of the dilatory procedure in chancery, which made that *cause celebre*—*Jarndyce* v. *Jarndyce*—a symbol of law's delays, was a more influential factor in bringing about reform in equity procedure in England than any activities on the part of the legal profession. In a similar way, his diatribes on imprisonment for debt

in "Pickwick Papers" and "Little Dorritt" are entitled to a great deal of the credit for the abolition of that barbaric remedy.

On the other hand, the vast reforms that have been recently attained in Federal judicial procedure were initiated and accomplished entirely and solely by the bench and bar, without any pressure or even assistance from the public at large. This achievement demonstrates that the legal profession in this country is capable of maintaining a progressive leadership in movements for needed reforms in jurisprudence. No system of law can remain static. It must grow, and mould and adjust itself to the needs of the time, in order to meet the responsibilities with which it is charged. It is a proper function of lawyers to be in the forefront of such advances, and it is the duty of every member of the legal profession to equip himself properly to become a part of these great public movements.

Dithyrambic Digest

American Electrotype Co., Inc., v. Monica Kerschbaum and Lorenz Kerschbaum. No. 7293, U. S. C. A. D. C., May 22, 1939.

By CORPUS JUNIUS

Lengthy records the Court do irk
And make unnecessary work,
Expense to those who litigate
And cause the Court to castigate

Lawyers who heedlessly neglect
Essential papers to select,
And to omit, by close revision,
Papers not needful for decision.

For failure to make records terse
The Court the guilty may amerce
(Unless he be the appellee
And the appeal should frivolous be).