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UNIFORM LAW PROCEDURE IN FEDERAL COURTS

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A great drive is being made for the passage of a bill for investing the Supreme Court with power to prescribe rules of procedure for law actions in the Federal Courts. A committee of the American Bar Association, or perhaps rather a small number of a committee, has been active in propaganda work for the proposed legislation. Great names have been invoked, and meetings of the Bar Association and lawyers have been passing resolutions in favor of the bill, but the very unanimity with which some of these resolutions have been passed confirms a natural belief that the action was taken upon the initiative of a few active persons, and without proper consideration. Such resolutions can not be accepted as truly representative. For one, I have endeavored to follow this subject somewhat, and I do not know, and have not heard advanced, a single sound reason for this bill. Its sponsors say that it will promote uniformity, simplicity, speedier decisions, and decisions upon the merits. As to whether it will promote speed and decisions upon the merits depends, of course, upon the second, that is, whether it will promote simplicity. Any consideration of the subject may, therefore, be confined to the two arguments of uniformity and simplicity.

Why should uniformity in the various District Courts of the United States be held up as *per se* a desideratum? We

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should be shown in what way uniformity will promote justice. Unless it is to promote justice, then it is useless. The sponsors of the bill, however, speak of uniformity as if it were some excellence in itself, something transcendental and absolute; or at least as an undoubted blessing, as health, happiness or virtue. No reason is given why uniformity, if attained, would be of advantage to any litigant, though it might be to some lawyers. For instance, a firm in a great city may represent a railroad, or an industrial company doing business in many states. If the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main part of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors. Uniformity, therefore, increases the influence and importance of the great city firm, having at its head, perhaps, some business man masquerading as a lawyer, with his partners of first and second magnitude, law clerks, process servers, runners, etc.; would correspondingly reduce local practice, local ability and local pride and drive the practice of law further on the downward road from a profession to a business. The hired man from the city supplants the local lawyer who, indeed, may be "fogy" and wear baggy breeches, but who, withal, is an independent thinker, has leisure for reflection, is devoted to principles, and who more than once has been found the mainstay of constitutional liberty. Uniformity would further augment the importance of large aggregations of men and depress the individual. Its tendency is toward centralization and the further destruction of local character and influence.

It is hard, however, to see how the new rules, as proposed by their sponsors, would bring about uniformity. They disclaim entirely the ordinary practice code which endeavors to cover the subject in detail, and say that the rules would be reduced "to the last word in simplicity * * * * * ." Then, if the rules are not to make provision for the various contingencies of litigation, but are to be exceedingly simple, questions would be continually arising before the District Judge for which there was no rule.

We can not ignore the fact that questions, and numerous, will arise. Suppose that in the trial of an action a question does arise as to whether sufficient notice has been given for the taking of depositions, whether the time were suf-

ficient, whether they are properly certified, whether the notices were sufficiently explicit, and no rule is found covering these points? How will the District Judge decide? By what will he be guided? The answer is not doubtful. He will turn to the system in which he has been trained and with which he is already familiar, to-wit, the State practice. During his years of practice and his contact with other lawyers, a certain rule more or less well settled has been followed. His mind will turn at once to that guide; and to assert differently is to suppose that a man will reason otherwise than with his own mind, and out of his own knowledge and experience. But the District Judge, having in mind that a new system has been established, and that he is presiding in an independent court, will follow the State practice, not slavishly, but reasonably and equitably —that is, "as near as may be." At the end of, say a generation, the practice would probably have reached about the same conformity with State practice as is now observed. The natural evolution would bring us back, after much unnecessary toil, to the principle of the Act of 1789. The friends of the proposed legislation argue from the wholly false analogies of the equity rules and English practice. The equity rules have been applied with fair uniformity. But why? Because a detailed uniform equity procedure had already been developed in England and in the Federal Courts of this country, and whenever a question arises under new rules we turn back to the old practice for a guide. The new rules, therefore, have not developed any uniform procedure but have fallen back upon a practice that was already uniform. In the same way, the various District Courts, in the application of simple practice rules, would fall back upon the old practice which they had learned, to-wit, the State practice, and we would have again as many differing procedures as there are states in the Union. The argument drawn from the English practice is equally fallacious. England again is a small and compact country, living under one law, and in the application of its rules every lawyer and every judge had the same guide in antecedent practice, and not as in the Union—forty-eight. I have not yet heard that England has attempted to establish uniform procedure for Kent and New South Wales, which

would hardly be more absurd than for Rhode Island and New Mexico.

As to simplicity, this is as President Wilson well said, rather a matter of emphasis. The attempt to obtain entire simplicity and lack of technicality through rules is a will-o'-the-wisp. All sorts of questions will, and do, arise in the course of litigation, and we can not avoid them by pretending that they do not exist. Many of these questions, perhaps, are not important, but some are important. Even so, in hotly contested litigation the unimportant ones will be pressed, and certainly the important ones are effective in a very practical way upon the substantive right. It is futile to pretend otherwise. If a group of mariners tired of studying their complicated charts should decide to throw them away and adopt more simple maps, they would not thereby do away with the air and water currents through which they must pass, or the icebergs or the reefs in their course. Legislatures have, from time immemorial, enacted statutes that causes should be decided according to the very substance of the right without regard to technical defects. At frequent intervals for almost a thousand years English speaking countries have passed such statutes, and some of our worthy brethren of the American Bar Association are still busy upon them. The regularity in the reenactment of this statute already upon the books is an apt illustration of the work of reformers heedless of history. This is not to elevate practice before, or even to anything approximating equality with the substantive right of the cause. Practice is a mere tool, but in any system of government, having anything like a guaranty of private rights and a judiciary of integrity and consistency, there must be a way to bring causes to the attention of the court; to adduce proof; to hear argument; to conclude the cause; to give the proper judgment; to take the proper steps for enforcing it; to seize the property which, perhaps, really belongs to the debtor and not to somebody else, yet at the same time not permit him to hide what he really owns; to grant certain exemptions for the relief or self respect of himself and family and yet not permit these to be abused. Jack Cade (or can it possibly be Jack Code?) thought all of this was very easy and that lawyers were merely perverse,

but any lawyer knows that it is difficult and often necessarily intricate and complicated. We can not ignore the importance of a settled and fair procedure. For instance, suppose a defendant has a most righteous defense but an essential witness fails to arrive but expects to appear within a few days, how long should the court wait? The length of time it waits is a matter of procedure, and yet to him, at least, it means life or death. Manifestly, we would say that the court should wait, but not too long, for, if continuances could be indefinitely granted for such reason, the plaintiff who had just cause might, by the operation of the rule, be deprived of an opportunity ever to recover upon his cause. In this, and numerous other cases, the application of rules must always be of considerable importance. The public men of the States of the Union have been struggling with these problems for many years. It would be a bold man who would say that they were not many of them able, conscientious and well informed, indeed, many of them geniuses and learned sages. They had before them the same evils, the same great problem of enforcing substantive rights and of adopting reasonable rules for the ascertainment of truth. Why should we, of the present, be so impressed with our superior wisdom that we must regard their labors as futile, throw their works into the discard and begin all over again? It is easy to adopt slogans, to utter wise platitudes and to enlarge upon the failures of others, but the wise and experienced statesman usually endeavors to retain and improve upon the work of others, while the impractical Utopian decides to evolve a wholly new system out of his head. Stability, even in procedure, is highly desirable. It is a maxim that nothing is worse than variable and uncertain law.

The present scheme seems to be typically American in its faith in machinery. A great deal has been said about the excellency of the administration of justice in England, and it has been assumed that if we adopt something like their rules of procedure we will enjoy the same excellence. Why so? Do their rules of procedure constitute all? Such an argument belies the position of its sponsors. English justice comes, not out of its rules of procedure, but out of the English character and the English judicial system. The

English are homogeneous people with a generally diffused sense of fairness and long training in self-government. These are the things that make for justice. How feeble to ignore all these and to speak as if a book of procedure were the be all and the end all of the supreme and final test of government, to-wit, the administration of right between man and man. The Judge in England, as I am told, is my Lord on the Bench. He is selected from the leaders of the bar; he is given an adequate salary and a long tenure. Consequently a small police court shyster has not much standing before him. Only able men make progress in such courts, and lawyers upon both sides being skilled and well trained do not consume days in immaterial wrangling, in pertinacious puny objections, but come to the merits of the cause. A characteristic story is told of an English Vice-Chancellor. The barrister was arguing before him that the old law said a man should not beat his wife with a rod thicker than the thumb, and that he impliedly had the right to beat her with one of that thickness. The report said that the Vice-Chancellor did not answer the argument. He merely smiled. That is the spirit with which all petty points of law as well as of procedure should be treated. We can never be rid of technicalities by devising new systems, and thus giving to each state in the Union another system to be learned and argued about. Much important work has recently been done in reducing procedure to its proper place, but this has been accomplished by placing the emphasis upon substance and in regarding rules of procedure as instrumentalities for reaching the right. And what has been done has resulted, not so much from new rules and new systems as from the changed attitude of judges. The majority report of the Judiciary Committee of the Senate, in speaking of Section 914 of the Revised Statutes, says "With the passage of this statute began the confusion which, increasing as the years have gone by, now makes the practice of law in the District Courts of the United States the most difficult and uncertain of the whole civilized world." It is submitted that there is no warranty for this statement. The trial and decision of a case in any particular District Court depends largely, as it should, upon the judge. If he is a competent lawyer and has had adequate experience, the chances are that

merely technical objections will be treated without much ceremony. The Judge, it is true, listens respectfully, but he usually finds a way to obviate the objection. Almost any active lawyer knows one or more, perhaps a number, of the District Courts where this is true. On the other hand, where the incumbent was, before appointment, an untrained pettifogger, engaged largely in justice of the peace or police court cases, justice is well nigh impossible with him, no matter what system of procedure is in vogue. To such a man, every rule found in a law book is equally law, equally crystallized, equally fixed and rigid. He does not know what the present law is and does not know what has become obsolete. Far fetched objections of every kind are argued at length, taken under advisement, and as soon as disposed of another similar objection is made, so that it is almost impossible to reach a trial. Such a court is a very paradise for bad causes and bad defenses. But it is due to the ignorance of the Judge and not to the system of the procedure unless, indeed, the procedure be that of the detailed codes, and that, as experience has shown, is difficult even for a good Judge.

Some of the friends of the bill indulge in assertions which can hardly be treated seriously. Thus we are told that the rules to be framed by the Supreme Court will be the "last word in simplicity." The bill, itself, nowhere says that the rules shall be simple. Its language is that "the Supreme Court of the United States shall have the power to prescribe by general rules for the District Courts of the United States and for the courts of the District of Columbia the forms of process, writs, pleadings and motions, and the practice and procedure in actions at law." Here we have it laid down that the court shall prescribe rules, not only for process, writs, pleadings and motions, but also for practice and procedure. These are very extensive words. There is no requirement that the rules shall be simple. The truth is that simplicity is an afterthought brought forward as an argument in support of the bill. If the intention had been that the rules be simple, it was very easy to insert the word. It may be argued that it was the purpose of the American Bar Association, of the Committees of Congress and of the friends of the bill that the rules should be simple, but the

courts usually look to the terms of an act to see what the Legislative body means. And while committee reports may be looked at to solve ambiguities, it will hardly be argued that there is an ambiguity here. The court is given power to prescribe general rules, and by this is doubtless meant rules more or less complete and adequate to the exigencies of litigation. Who is authorized to say what the Supreme Court will do? The court is already greatly overburdened, and the task in any form is too great for its leisure, if it had special fitness. Much of the time of the Judges is consumed in strictly applying its own rules of procedure to keep litigants out of the court. This may, indeed, be necessary because of its heavy duties; nevertheless, so it is. The Supreme Court of the United States, while it has at many times been composed of very able lawyers, has very wisely handled many great problems and is not subject to much of the criticism made against it, is, nevertheless, very conservative. Its own practice, although much tinkered with and reformed, has become almost a special art. Anyone at all familiar with its practice knows that it is very difficult for a litigant to get into court, and if he gets in he frequently finds himself out again upon a point of practice which seemed strict to his counsel. Nevertheless, we are told that this body is to produce a model of perfect ease and simplicity. The Majority Report of the Judiciary Committee of the Senate avers that the new centaur "shall embrace all the merits and none of the vices of 'common law' and 'code' pleading, and that it is neither." Truly the millenium is at hand; awaiting only the advent of this *magnum opus innominatum et incognitum.*

It is submitted that the proposed legislation is only one of the various reforms with which this country has long been plagued, which proposes to scrap the result of experience and to begin—all over again; to unsettle and to begin again the costly process of resettlement.