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During the past hundred years vast strides have been made in advancing various branches of substantive law in order to adjust personal and property rights and liabilities to the needs and conditions of the times and to the changes in the social and economic structure of society A few examples will illustrate this statement. Thus the legal rights of married women have been formulated by Married Women s Acts in a manner to accord with the modern point of view Compensation for injuries sustained by employees in the course of their employment is no longer dependent on the employer s negligence, but is almost universally governed by a system of insurance under the Workmen s Compensation Acts.[1] The law of torts has been extended to create new types of causes of action, such as, for example, a right to recover for the invasion of privacy, which has been recognized in a number of States. In the field of contracts in many jurisdictions a third party beneficiary of an agreement may sue for breach of contract. These examples may be multiplied *ad infinitum.*

A substantive right, however, becomes at times but an empty shell unless there is an efficacious means for enforcing and vindicating it. Consequently, an efficient, expeditious, and inexpensive type of judicial procedure, free of technicalities, is indispensable in order to effectuate the rights and enforce the liabilities prescribed by substantive law Ever since the middle of the 19th Century, efforts have been made to clear away the morass found in common law pleading and in old equity practice, which, in effect, made compliance with rules of procedure an end in it-

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[1] Strangely enough, a striking exception is to be found in respect to employes of interstate common carriers, who still are relegated by the Federal Employers Liability Act to actions at law for damages based on negligence.

self. The science of pleading was indeed a beautiful and artistic application of logic. Many a theoretical mind reveled in its precision. Unfortunately, however, the poor litigant was completely forgotten in the process of determining whether his counsel properly prepared the pleadings.

In the 1870's England led the way by entirely jettisoning the systems of common law and equity pleading and completely revolutionizing judicial procedure in the civil courts. In the United States, the Federal judiciary carried the torch of reform. In 1934, as a culmination of a campaign carried on for a quarter of a century, the Congress passed an enabling Act which granted to the Supreme Court the power to prescribe uniform rules of practice and procedure for the United States District Courts. The Supreme Court promptly exercised the authority conferred upon it. It appointed an Advisory Committee of outstanding members of the bar, who labored for several years in preparing a draft of rules of civil procedure for the United States district courts. The rules were adopted and promulgated by the Supreme Court and became effective on September 1, 1938. This far-reaching step resulted in what is probably the simplest type of civil procedure in any Anglo-American jurisdiction.

Several States promptly followed the lead of the Federal courts. Arizona, Colorado, and New Mexico almost immediately accepted the Federal procedure *in toto*. Subsequently, a few other States, such as for example, Iowa and Delaware, followed practically the same course. Within the past few years, New Jersey, under the enlightened leadership of Chief Justice Arthur T Vanderbilt, substantially adopted Federal civil procedure. In passing it may be said that Chief Justice Vanderbilt has been instrumental in transforming the judicial system of New Jersey into one of the most progressive in the entire country A few other States, such as Texas, Missouri, and Maryland adopted some of the features of Federal procedure without assimilating it in its entirety By and large, however, most of the States have been lagging behind the Federal government and have not improved or simplified their procedure to the extent to which this has been accomplished in the Federal courts. The Commonwealth of Kentucky is to be congratulated on undertaking at this time a project of reforming its judicial procedure.

It is but natural since the Federal courts have had about twelve years experience with the new procedure, that the States should inquire as to the extent to which this reform has been successful before undertaking to adopt it. Perhaps the best workshop and the most effective laboratory in which to study the new Federal procedure in operation is the District of Columbia, because the District of Columbia is a Federal area and its courts occupy a unique position. The United States District Court for the District of Columbia is one of eighty-six United States district courts in the continental United States. In the District of Columbia, however, there are no tribunals of original jurisdiction corresponding to State courts elsewhere.[2] The result is that in addition to trying cases under its Federal jurisdiction, the United States District Court for the District of Columbia also handles all civil actions that elsewhere come before State courts of original jurisdiction. All civil suits that outside of the District of Columbia would be tried in a local court of original jurisdiction are disposed of in the District Court in the nation's capital. Divorce cases, probate proceedings, administration of estates, actions for damages, and all other matters of local jurisdiction are disposed of in the United States District Court. It necessarily follows, therefore, that the extent to which the new Federal procedure has been effective and successful in the District of Columbia should be of particular interest to the States. If it has proven its value there, the argument that is sometimes advanced to the effect that procedure suitable to the Federal courts is not necessarily fitting for State tribunals, would be completely refuted. The bench and bar of the District of Columbia have found the new procedure highly desirable in simplifying and expediting litigation, without any sacrifice of the rights of the parties. They are practically unanimous in approving it.

Rule 1 of the Federal Rules of Civil Procedure contains the following admonition. "They (i.e., the Rules) shall be construed to secure the just, speedy, and inexpensive determination of every action." This statement is no mere exhortation or an expression

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In the District of Columbia there is a local Municipal Court, which has limited jurisdiction, i.e., criminal jurisdiction over misdemeanors and civil jurisdiction over actions involving not over $3,000. All civil actions involving an amount over $3,000 and all felonies are tried in the United States District Court.

of a pious wish. Fortunately, Federal courts as a whole have followed the spirit of this injunction and have interpreted and applied the Rules with the flexibility and liberality that their framers intended. The Rules are not to be regarded as rigid regulations to be followed literally, but are to be applied flexibly in a manner that would effectuate their spirit and achieve their purpose, rather than comply with their exact letter. The result has been that throughout the Federal judicial system technical pleadings have been abolished and the so-called "sporting theory of justice" has been reduced to a minimum. Preliminary motions have been substantially minimized and a determination on the merits of the litigation has been expeditiously attained. It should be of interest to the States for the reasons stated above that these results have been achieved in the District of Columbia quite as fully as in other Federal jurisdictions.

It may be helpful to summarize and review the principal features of the present Federal civil procedure. The keystone of the arch is vesting in the judiciary the right to regulate its own procedure. One of the principal hindrances to procedural reform during the past century or more, has been the insistence on the part of legislative bodies of the exercise of their power to regulate procedure in the courts. This anomaly is a comparatively modern development, for the earlier types of procedure were evolved by the courts themselves. The restoration to the courts of the power to regulate their own practice is indispensable to a permanent liberalization of judicial procedure. What has been picturesquely denominated as legislative tinkering has been a constant bane in the field of adjective law One of the reasons why the Field Code in New York did not attain all of the results hoped for by its optimistic supporters, is to be found in the fact that it left the control of procedure in the hands of the legislature. The New York Code of Civil Procedure became an ironclad detailed compilation of procedural rules changed from time to time by sporadic Acts of the Legislature. The courts were helpless to improve their own practice.

The farsighted leaders of the movement to reform Federal procedure saw the necessity of vesting in the judiciary the right to regulate judicial procedure. Surely the courts should be trusted to do so. If they are to be responsible for the administration of

justice, they must be accorded the means to carry out this task. A campaign lasting about twenty-five years was required to convince the Congress of the desirability of vesting the necessary authority in the judicial branch of the government. Finally, under the leadership of Attorney General Cummings the enactment of the enabling Act was secured in 1934, conferring on the highest court in the Federal judicial system the power to regulate Federal procedure throughout the Federal trial courts. Most of those who are familiar with the history of Federal procedure are strongly of the opinion that permanent reform of procedure cannot be achieved without first vesting the rule-making power in the judiciary itself, generally in the highest court of any judicial system. With this authority the highest court is in a position not only to prescribe a simple procedural system, but also to make changes and improvements in it when they become necessary as a result of experience. Legislative bodies whose attention must of necessity be devoted to other matters are not in a position to do so effectively

A number of States have already conferred upon their highest courts the power to regulate judicial procedure. It can properly be said without fear of successful contradiction that in most States, if not all, in which this has been done the outcome has been salutary It is hoped that Kentucky, which is now interesting itself in procedural reform, will give favorable consideration to this principle. Candor requires the writer to say that there are many States that are lagging behind in this movement and that are still reluctant to trust their judiciary to the extent of permitting it to regulate its own procedure. Thus, the great State of New York, which a century ago was the leader in the field of reform of judicial procedure, today has dropped into the rear ranks and has so far declined to confer the rule-making power on the courts. The control of its procedure is still in the hands of the legislature.

The next outstanding feature of the present Federal civil procedure is the abolition of the distinction between law and equity To be sure the system of code pleading, which was introduced in New York about a century ago and which rapidly spread to many other States, especially those in the middle west and far west, professed to abrogate all distinctions between law

and equity In some of the States, however, this was done largely only in respect to differences of forms of pleadings. There was still a distinction between actions at law and suits in equity, although the forms of pleading for both became the same. If a plaintiff erroneously sued in equity, when he should have sued at law or vice versa, his pleading was still subject to dismissal. Under the present Federal procedure, the merger of law and equity is complete. It is immaterial whether the party prays for legal or equitable relief, or whether he attempts to state a claim for relief in equity or at law A complaint may no longer be dismissed on the ground that a party seeking equitable relief, has an adequate remedy at law A party is awarded whatever type of relief he shows by his proof at the trial to be entitled to.

The introduction of a simple, single form of civil action necessarily involves not only a coalescing of law and equity, but also an abolition of various types of actions at law Procedural differences between actions in contract and actions in tort no longer exist: Such conceptions as *assumpsit,* trover, detinue, have only historical interest so far as Federal procedure is concerned. A vast library of useless learning has been cast into oblivion. True the old-fashioned pleader, who had the admiration of an artist for his accomplishments, at times sighs with a feeling of nostalgia for the "good old days" On the other hand, the administration of justice is advanced and the rights of the litigants, who after all are to be considered more than their counsel, are determined more expeditiously and less expensively

All technical forms of pleading were abolished. All that a pleading need do is to set forth in plain, simple English a short statement of the claim, coupled with a short and clear statement of the grounds on which the court's jurisdiction depends. In fact, it is told of an opponent of the new procedure that he gave as a reason for objecting to this reform that any high school graduate would be able to draw a pleading under the new Rules. He did not realize that he was paying a high tribute to an important accomplishment in the field of adjective law

The number of pleadings is reduced to a minimum. Ordinarily the only pleadings are a complaint and an answer. If the defendant interposes a counterclaim, the plaintiff must file a reply thereto. There are no further pleadings as between the

plaintiff and the defendant. The court may indeed order the filing of a reply to an answer, – something that is seldom asked for and still more rarely granted.

The tiresome interchange of pleadings that existed at common law, ending with arrival at an issue after a consumption of unnecessary time and the incurring of useless expense, is at an end. Even the requirement of a reply to an affirmative defense, which exists in some jurisdictions under code pleading, is no part of Federal procedure. Demurrers are abolished. The sufficiency of a claim or defense may be tested by a motion, but if on any possible theory the pleader may be entitled to relief, such a motion is denied.

An important feature of the present Federal procedure is the encouragement of bringing into a single law suit all possible claims as between the contending parties. For this reason all claims that the plaintiff has against the defendant may be joined in a single complaint, irrespective of whether they sound in contract or in tort, or are based on legal or equitable grounds, or on both, or are consistent with each other. The different claims need not arise out of the same transaction, but may be entirely disconnected from each other. By the same token, a defendant may plead as a counterclaim any claim that he may have against the plaintiff, irrespective of whether it arises out of the transaction or occurrence that forms the subject matter of the plaintiff's claim, and irrespective of whether it arises in contract or in tort, or is based on a legal or equitable right. For example, in an action for damages for libel, the defendant may counterclaim for goods sold and delivered.

An outstanding feature of the reformed procedure is found in liberal provisions for broad discovery The group of rules relating to this subject are of such importance as to justify some discussion. They transformed the basic philosophy of litigation. The doctrine previously prevailing was that each party to a law suit was entitled to retain to himself whatever knowledge he had of the pertinent facts and whatever evidence was in his possession, and to require his opponent to produce the necessary proof in support of his claim or defense. It has been graphically denominated on occasion as "the sporting theory of justice" Under the present Federal procedure, the fundamental principle is kept

in mind that the purpose of litigation is to ascertain the truth and to administer justice. To attain this objective all parties may be required to disclose, prior to trial, whatever pertinent information and relevant evidence may be in their possession, subject only to the rule of privilege. This doctrine bars a party from suppressing or failing to disclose information in his possession that is germane to the issues. The element of surprise is reduced to a minimum. Discovery is permissible not only for the purpose of securing evidence, but also for the purpose of ascertaining what evidence is in existence and where it may be obtained, as well as names of possible witnesses. Unlike the limitation in some of the States, discovery is permitted in respect to all of the issues of the case, and is not limited to those as to which the party seeking discovery has the burden of proof. In order to achieve these objectives several distinct remedies are provided: depositions, which ordinarily may be taken on notice without an order of the court, interrogatories; production and inspection of documentary and other real evidence; requests for admissions; and physical and mental examinations. Suitable weapons are accorded as against a recalcitrant or unwilling party or witness. The utmost liberality of discovery prevails. Nevertheless, since it is amenable to abuse, the court is clothed with ample authority to prevent harassment or vexation by appropriate orders. Broad and liberal discovery may properly be said to be one of the outstanding achievements of the present procedure.

Another important innovation in Federal civil procedure introduced by the Rules, is known as third-party practice. This remedy is not entirely novel, for it had existed for many years in the English courts, as well as in admiralty in this country More recently, it had been introduced in a few of the code States. Its purpose is to avoid circuity of action insofar as is possible and to permit the adjustment of all rights and liabilities, directly or indirectly, arising out of the same claim in a single law suit. By this procedure a defendant may bring in as a third-party defendant any person who is secondarily liable over to him in the event that the plaintiff recovers as against the original defendant. Thus, the defendant may bring in as a third-party defendant a person who may be secondarily liable over to him for the entire amount of the plaintiff's claim, as an indemnitor, guarantor, or surety, or who

may be liable for a part of the claim by way of contribution.[3]

We now reach a topic which has received wide publicity and a great deal of discussion, namely, pretrial. Its introduction into the Federal courts was one of the notable accomplishments of present Federal procedure. Pretrial procedure is in its essence nothing more than a conference between the court and counsel for both parties, at which the issues are simplified, matters concerning which there is no substantial controversy are eliminated, and stipulations are entered into, – all for the purpose of simplifying and shortening the trial. At first blush it would seem that this course is so obvious as not to require a rule. One might well argue that it does not rise to the dignity of an innovation or a reform. Yet it is one of the outstanding achievements of the present Federal procedure. As we all know, some of the greatest inventions in all fields appear so simple and obvious after they have been made that one wonders why no one had thought of them before. Nevertheless, this circumstance does not detract from the merits of the invention. These considerations are applicable to pretrial.

For many years a procedure has prevailed in the English courts known by the somewhat mystifying appellation of "summons for directions" It required parties to a law suit to appear before a master promptly after the litigation was commenced, in order to settle the pleadings and frame the issues. This practice may be deemed a precursor of pretrial procedure, although in England it is invoked at the beginning of litigation instead of shortly preceding the trial, as is the usual course in the United States. In this country it was introduced more or less by accident, as is often true of inventions in other fields. In the late 1920's, the judges of the local State court in Detroit, found themselves confronted by a staggering and overwhelming load of cases several years in arrears. In an effort to break the log jam and do something to expedite the clogged docket, the court started a call of all equity cases on the calendar with a view to an informal discussion as to each, in order to ascertain whether the case could be

[3] The original third-party rule (Rule 14) permitted a defendant to bring in as a third-party not only any person who was secondarily liable to him, but also any party who was liable directly to the plaintiff on the same claim as that on which the suit was brought. The latter provision proved unworkable and was eliminated by an amendment which became effective on March 19, 1948.

disposed of without a trial, or, in any event, with a view to narrowing the issues and abbreviating the trial. This procedure proved immediately successful and became a permanent feature in the State courts in Detroit. Soon the State courts in Boston inaugurated it, after observing the success that this procedure attained in Detroit. It gradually came to be known as pretrial practice.

The draftsmen of the Federal Rules had the results of the Detroit and Boston experiments before them, and adopted a rule for pretrial procedure. In view of its novelty the procedure was not made mandatory, but was left to the discretion of each district. The Federal rule authorizes the court to direct the attorneys in any case to appear before it for a conference in order to consider the simplification of the issues, the necessity or desirability of amendments to the pleadings, the possibility of obtaining admissions of fact and of documents, which might avoid unnecessary proof, the limitation of the number of expert witnesses, the advisability of a preliminary reference of issues to a master for findings, and such other matters as might aid in the disposition of the action.

Some of the Federal courts, among them Massachusetts, Oregon, and the District of Columbia, promptly took advantage of this Rule. Perhaps the greatest use of pretrial procedure has been made in the United States District Court for the District of Columbia, which is a very busy tribunal with an exceedingly heavy docket, the court being continuously in session except for a summer recess during which it operates on a curtailed schedule.

The experience of the United States District Court for the District of Columbia may be of particular interest to the bench and bar of the States, because, as previously indicated, this tribunal in addition to the usual cases arising under its Federal jurisdiction, also tries all cases that elsewhere would come before State courts of general jurisdiction. In the District of Columbia a rule was adopted and has been continuously in operation, requiring all cases, both jury cases and non-jury cases, to be pretried. Every case, shortly before it is reached for trial, first appears on the pretrial assignment and pretrial becomes a necessary routine. An exception is made only for matrimonial litigation and for actions against the Commissioner of Patents to require him to issue a patent. Whatever members of the bar may

have thought of pretrial before it was inaugurated, the general concensus of the bar of the District of Columbia today heartily favors pretrial. Unlike a trial, a pretrial conference requires the active participation of the judge. Without it a pretrial can hardly accomplish the objective for which it is conducted.

The procedure followed in the District of Columbia is for counsel for each party to state his contentions. The judge participates by asking questions of counsel to help in clarifying the issues, as well as eliminating matters that may be controverted by the pleadings but are not actually in dispute. The judge then and there commences to dictate a pretrial order to a typist, first setting forth the issues to be tried, resulting from the discussion just referred to. He then proceeds to obtain stipulations and admissions of facts and of documents. Frequently such stipulations are suggested by counsel. Additional stipulations are often proposed by the judge, who, at the conclusion of this part of the discussion, dictates into the pretrial order all of the stipulations that have been reached. Frequently as a result of the simplification of the issues and the stipulations, the trial becomes very much shortened. The parties then proceed to discuss further matters, such as limitation of the number of expert witnesses, additional discovery, amendments to the pleadings, and other similar topics. All of the agreements reached are dictated into the pretrial order by the judge. In the District of Columbia, at the conclusion of the formal pretrial, an informal discussion generally follows for the purpose of exploring the possibility of settlement. Members of the bar are used to having the judge participate in this discussion and encourage the judge to help bring them together. Not infrequently settlements are reached at the pretrial conference. More often, the discussion leads to settlement subsequently to the pretrial. Useful as settlements resulting from pretrials are, they must of course be regarded as a by-product, for the real purpose of pretrial is the simplification of issues and the shortening of trials.[4]

Pretrial has been rapidly gaining ground throughout the Federal judicial system. Unfortunately again the States, although first devising pretrial practice, have been lagging behind in the

[4] A recent book on "Pretrial" by Harry D. Nims, is an exhaustive study of the subject and should be required reading for everyone interested in the subject,

procession and have not adopted it to the same extent as the Federal courts. This is a matter that should be carefully studied by those interested in the State courts, for it can be made exceedingly useful to litigants, who are the primary concern of the courts. It can render justice less expensive and more expeditious. Especially is this true in crowded metropolitan centers where arrears in dockets, especially in State courts, are the rule rather than the exception.

In addition to the simplification of procedure, problems of administration must be adequately solved, in order that trials and disposition of cases may proceed smoothly, effectively, and expeditiously The operation of a multiple-judge court with a heavy docket involves many administrative considerations as is true of the conduct of an executive department of the Government, or of a big corporation. Judicial administration is still in its infancy Its importance has not been realized until recently It has had its greatest development in the Federal judicial system and in the State of New Jersey There must be a head to each judicial system, generally the Chief Judge or Chief Justice of the highest court, with authority to make temporary designations of judges to serve outside of their home districts when the needs of the dockets and other considerations so require. Within each multiple-judge court there must be an organized system for handling the docket. Some means, such as that provided by the reporting system in the Federal courts, must exist to encourage judges not to keep matters under advisement for a longer time than is reasonably necessary A few of the States have made partial progress toward the consummation of these ends. Most of them, however, have done very little in that direction.

In every multiple-judge court there must be a unified administration of the dockets. What is sometimes called "the master calendar" system, consisting of a unified calendar from which cases, when reached, are assigned to individual judges for trial as they become disengaged, is indispensable. Such a system exists in many metropolitan centers, both in the Federal and State courts. This alone, however, is not sufficient. A single judge must be clothed with the power of close supervision and administration of the master calendar system. Illustrations may be found in the United States District Court for the District of Columbia and the

United States District Court for the Southern District of New York. In each of these courts there is an official known in one instance as the Assignment Commissioner, and in the other as the Calendar Commissioner, who devotes his entire time to the operation of the system. He acts under close supervision of the Chief Judge, who in one instance is known as the Assignment Judge, and in the other instance as the Calendar Judge. All applications for continuances are heard by the Assignment or Calendar Judge, as the case may be, who exercises full control over the calendar and who when necessary shifts judges from one type of cases to another in order to make as much inroad on the dockets as possible. Both Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia and Chief Judge John C. Knox of the United States District Court for the Southern District of New York are outstanding judicial administrators and have done much for the cause of judicial administration. Recently, the United States District Court for the Northern District of California, under the inspiration of Judge Louis E. Goodman, has also successfully adopted the master calendar system. Firm and effective judicial administration is essential for the successful handling of court dockets.

The administration of justice exists not for the benefit of the bench or the bar, but for the welfare of the public. The interests of litigants are paramount. Too often this obvious fact has been overlooked in the past. The general public should be interested in improving the administration of justice. Justice must be rendered expeditious and inexpensive. The attainment of these objectives presents a challenge to the States. They must pick up the gauntlet and follow the leadership of the Federal courts and of a few of the progressive States. These reforms cannot be attained by supine acquiescence. No progressive measure in any field is ever adopted except under the leadership and through the dint of hard work of individuals. The history of judicial reform, both in England and in the United States, demonstrates that it is invariably some one or some few individuals whose initiative and energy lead to the consummation of the desired result. Such men, as Lord Brougham and Lord Selborne in England; and David Dudley Field, Homer Cummings, and Arthur T. Vanderbilt in this country, and a few others who might be named, are to be

credited with these accomplishments. It is hoped that the outstanding leaders of the bar in each State will take up the struggle. Under their leadership and with the support of the bench and bar generally, as well as of the public, the administration of justice can rise to greater heights.