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Procedural Reform

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except within thirty days immediately preceding an election. This he may do (1) by appearing at the clerk's office in person or (2) by filling out the necessary blank before a notary public or the county clerk in the county where he happens to be and having it sent to his home county.

After he has registered he may get a certificate of registration from his county clerk. This will entitle him to vote anywhere in the state on state and national questions.

If, being away from home, he wishes to vote on local questions in his home town, he may write to his county clerk within thirty days before election for an application blank for absent voters. After making application he will be sent a ballot which he may fill out and return by mail.

The important thing is that he register in his home county. If he does that he may vote anywhere in the state on state and national questions or he may vote in his home town by mail on all questions.

—C. E. S.

PROCEDURAL REFORM

Dissatisfaction with the current law of procedure is one of the chronic complaints of the legal profession. If there appears no reason for any supposed failure of the law the critic turns (apparently from force of habit) to the procedural side and fixes the blame there. We are continually concerned about reforming procedure. It is submitted that that outlook is quite superficial, and that our problems in that field cannot be entirely solved by so simple an expedient as changing the law of procedure.

We hear the suggestions made that the system itself is ready for the discard; that it can best be reformed by doing away with the Code of Procedure; that the fault lies with the law schools, who persist in turning out students with a very inadequate knowledge of the practical matters pertaining to the trial of law suits. The rule-making power for courts is pressed upon us continually as the first step in reform. While the rule-making power may be indispensable as the first step, it is submitted that there are other fundamental aspects to the problem.

In answer to the complaint concerning the law school end of it, it is submitted that the principles of pleading and practice on the whole are as well taught as are the other branches of legal learning, and that it is impossible to teach a young man the "art" of trying a law suit. It is wasted time to attempt to teach him the business end of the profession, or to endeavor to instruct him in the matters of drawing legal papers. There can be no substitute for experience. If one is to be fitted out as an altogether competent lawyer his education period must be extended to include several years of apprenticeship. It is probably true that the law schools could devote more time to the law of procedure, but only at a sacrifice of emphasis on important phases of substantive law. But after all, does the situation call for more emphasis on the courses in Pleading and Practice? I think not.

It is quite generally agreed that one of the primary purposes of pleading is to present an issue of fact or law (or both) to a court for judicial determination. Insofar as the present system fails to do that with accuracy or efficiency it is folly to emphasize it and the remedy must be elsewhere. It is in fact full of failures.

The codes of civil procedure are drawn and administered with a view to preventing the ultimate determination of any law suit upon the pleadings if there is a trial on the supposed merits of the case. The primary purpose is to protect a litigant against any harsh rule which would prevent him from presenting to the court any facts or any law which might ultimately prove to be involved in the controversy.

The cold fact is that about the only section of the code which it is really essential for a lawyer to know is the section on amendments. If one files an insufficient pleading unless the other party demurs most defects are waived. If a demurrer is filed and sustained the pleading can be amended as of course. If the defects are serious and the pleadings fail to state a cause of action or defense, or proceed upon a wrong theory, the opposing party must raise the question on the evidence or at the close of the case, and in either event the pleadings can be amended to permit the proof, or to conform to the proof. Although those amendments are sometimes discretionary with the court, as a practical matter the courts almost without exception permit them even under the most trying circumstances. The only pitfall is the unusual case where the amended pleading states a new cause of action so that the statute of limitations becomes a successful defense.

The only obstacle in the way of a final determination of a law suit according to all of the law and facts applicable is the wilful refusal of an attorney to swallow his pride or learning, or both, and to plead the facts which the court deems essential. The fact is that the law of pleadings has lost most of its efficacy. It has become a dull tool indeed, and consequently most lawyers have abandoned it as a means to its legitimate end, that is, of carving out an issue to be tried.

And, after all, a very poor attorney can become quite proficient in the law of pleading and practice and to little, if any, good effect. The entire code is comparatively short, and although a man may have but little knowledge of substantive law he can easily and quickly master the various sections of the Code of Civil Procedure. (His knowledge, of course, would be quite superficial.) When he has learned that certain pleadings must be verified; that complaints in attachment and garnishment and in replevin require an affidavit as to certain matters; that the question of the lack or failure of consideration, must be raised by special answer; that a denial of the execution (which includes the delivery) of an instrument sued upon or a denial of the jurisdiction of the court must be raised by verified answer; that jurisdiction of the person, and defects in the process must be raised by plea in abatement; that in some states the question of the maturity of the obligation sued upon must be raised by plea in abatement; that in general any affirmative relief due a defendant may, and must, be presented in the same suit,—when he has learned those few rules, along with the rule on amendments, he has learned most of the rules of pleading which have any practical significance. It is an entirely safe assertion that the average trial lawyer's learning in procedure surpasses his knowledge of substantive law. If one is a poor lawyer as far as the latter is concerned it ought not to be wholly unexpected if he turns out to be not so bright in the former.

A good lawyer is, of course, seldom trapped on a question of procedure. He is usually convinced of the futility of tying the other side down on the pleadings, or ultimately of successfully presenting any question for appellate

determination on them. If he really wants to know what the law suit is all about he takes the conditional examination of the adverse party and thus gets the opposition's position under oath, and he does not rely upon pleadings which can be amended almost at will.

It is very apparent that the code system falls far short of serving its real purpose in those cases where a party does not want to disclose his real position, or where the attorney is too lazy or ignorant to plead well. (And that does not take into account the numerous cases where one can plead well and say nothing.) Can these evils be entirely eliminated by amending the code?

The real difficulty is not that if rightly used the code would not serve its purpose, or that the code is hard to master. A poor attorney cannot plead well, not so much because he is deficient in the law of procedure, but because fundamentally he is deficient in the substantive law applicable to his case, or is too indolent to do well what he can more easily do poorly. A good attorney does not plead well, or abuses the code devices for delay, because his professional ethics are below standard. A reform of the Code of Civil Procedure, or more emphasis on the Law of Procedure by the law schools will obviously not remedy any of those situations.

Is it not plain that a lawyer who does not know whether his cause of action is really one in contract or tort will sue quite indiscriminately in either or both? Would he not, if he did not know the fundamental principles of estoppel, most certainly fail to file a good answer on that theory?

Observation of the trial work of good lawyers will disclose that very few cases where high class attorneys are employed on both sides involve any questions of pleading or practice. If they are there they are substantial and worth consideration. A good lawyer has no trouble in stating a good cause of action in a complaint, or in properly presenting the issues he desires to raise in his defense. If a poor lawyer is on the other side it is futile to attempt to corner him on the pleadings. He can always turn to the statute on amendments for an "out."

But observation will also disclose that the poorer the grade of the lawyer, from an educational or character standpoint, the more difficulty there is in the law suit on the procedural side. Questions of procedure assume an importance in the average law suit in an inverse ratio to the learning of the attorneys involved. The reasons are fourfold.

In the first place the smaller lawyer dislikes to try any law suit on the merits if he can help it. In the second place he files numerous pleadings so that he can "conscientiously" charge his client for the additional, but unnecessary work. In the third place, although the less than average lawyer knows considerable about trial procedure, he is very deficient in the more technical game of appellate procedure. He, therefore, raises questions of pleadings and practice on appeal which avail him nothing and as a result the reports are full of cases which reiterate the rules of pleading and practice but which decide no law suits, for scarcely any mistake in the procedural line is reversible error. In the fourth place, he is most often fundamentally deficient in the substantive law. He knows what a complaint is, what a demurrer is, what an answer is, but he fails in his pleadings because he really does not know what the law suit is all about.

In the volume of the Northeastern Digest covering 141-155 N. E. under

the topic of "Pleading" there are 124 paragraphs of digest of Indiana cases. There are 11 paragraphs of digest of New York cases, and 42 paragraphs of digest of Massachusetts cases. The first ten pages of the table of cases in the volume contain 197 cases from Indiana, 107 cases from New York, and 310 cases from Massachusetts. Other portions of the table of cases give about the same relative numbers, so that the first ten pages can safely be taken as showing the comparative number of cases reported from those states. There are, therefore, roughly speaking six times as many decisions in Indiana on questions of pleading as in New York, and almost five times as many as in Massachusetts.

Indiana has the most negligible requirements for admission to the bar; New York and Massachusetts have the highest. It is safe to assert that at least some of the differences in the figures above are directly traceable to those facts.

One must not minimize the necessity of a thorough knowledge of common law and code pleading and practice. The argument here is that they do not need reformation so much as they need honest and intelligent use; that the fundamental need is not for a more acute knowledge or use of the Law of Procedure but that it is for a bar better trained in the substantive law and with a higher conception of a lawyer's business. If a lawyer cannot properly use the present system of pleading and practice is there any likelihood that he would do better with another which must be more complicated and iron-clad if it is to be more useful? If we reform the code so that it will serve a useful purpose it must needs be more strict. We would then be back to the old evil of the decision of a large number of law suits on something other than the merits. So long as we countenance the practice of law by incompetents such a system is so unfair to litigants as to be unthinkable.

A bar that is truly educated should have little difficulty with the present system, or another which it might intelligently substitute for it. A bar of a higher ethical order would find most questions of pleading and practice unimportant. A truly honest lawyer should not be hesitant about framing the issues of a law suit with a view to arriving at a just result, rather than an unfair advantage. Whenever the profession generally commits itself to higher standards of education and conduct for attorneys then, of course, the abuses of the system of procedure will cease.

In so far as the law schools turn out graduates who are unfit, they must share the blame for our present failures. The remedy, however, is not more emphasis on courses in procedure, but on higher standards for entrance and graduation. Law school requirements, however, tend at least to reflect the opinion of the bar and the public generally. When these appreciate that most of the failures of the legal system are the direct result of low educational and ethical standards, then those standards can be raised and enforced. Procedural reform will then pretty much take care of itself.

After all the problems of procedure come back to one of the fundamental needs of all life—more learning by better men. It is well to think about a better system of procedure, but the immediate emphasis must be laid upon the training of an attorney grounded in the foundations of substantive law and professional conduct. If an half-educated attorney does poorly with a poor system of procedure he is likely to do worse with a better one.

BERNARD C. GAVIT.