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IN THE HOPE OF A NEW BIRTH OF THE ONE FORM OF ACTION.

"It is a tragedy when a good cause of action is lost by failure to observe some rule of practice."^a

I. AS A FELT NEED IN THE COURTS.

Virginia's Early Call for Help.

"**W**ERE it not that I think myself tied down, and bound by precedents," said a Judge of the Supreme Court of Appeals of Virginia in 1808, "I should have differed in opinion from the Judges who have preceded me on the first great point in this case, (to wit, the nature of the action,) because it does appear to me, from the reason of the thing, and upon sound general principles, that three things only are essentially requisite to maintain an action: 1st. That the plaintiff make out such a case as will entitle him to recover; 2dly. That he state his case in such a manner as to afford the defendant a fair opportunity of making a full and complete defence; and, 3dly. So that a recovery in the suit may be pleaded in bar to any future action for the same cause. All this seems to have been done in the case now before the Court."

The remark is a dictum by Fleming, J., delivering one of the three concurring opinions in the earnestly discussed case of *Taylor v. Rainbow*.¹ In its day this was a leading case in the doc-

^a Senator Thomas J. Walsh. In Minority Report, Judiciary Committee, on Uniformity of Procedure Bill, U. S. Senate, July 1, 1926.

¹ 2 Hen. & M. 423, 444-445 (Va. 1808). Briefly put, the facts in *Taylor v. Rainbow* were as follows: The defendant, "through neglect and want of due care," but without design to harm, had discharged a loaded gun in a public place where many persons were assembled. The shot thus discharged struck the plaintiff in the leg, wounding him so grievously that his leg was amputated. As a result he was put to great expense for surgical and medical treatment, and was disabled for carrying on his business. With these facts, the plaintiff sued in trespass on the case, went to trial under the gen-

trine of the Common Law Forms of Action; on its facts and the reasoning of the Court it is even in this day a noteworthy case in the history of the rise of the One Form of Action in America and in England. It brought before the Court, in an unusually clear cut form, what was to become the leading question in that long continuing movement in Anglo-American law for such a change in our judicial procedure as would prevent the "tragedy" to which Senator Walsh has referred, when, as happens so frequently, "a good cause of action is lost by failure to observe some rule of practice."²

In *Taylor v. Rainbow* there was but one question considered by

eral issue, and obtained a verdict in heavy damages. On a second trial he again had a large verdict. The judgment of the trial court followed the verdict. This judgment was affirmed in the District Court and the defendant thereupon went to the Supreme Court of Appeals, with the one question whether trespass on the case or trespass *vi et armis* was the proper action.

² Report of U. S. Senate Judiciary Committee, July 1, 1926, on Uniformity of Procedure Bill; Minority Views, against passage of the bill, expressed by Senator Walsh, page 22.

The effect of this minority objection last July was to postpone once more the passage of the Uniformity Bill. Within four weeks after this postponement, the U. S. Circuit Court of Appeals, Eighth Circuit, gave a striking illustration of the mischief which the Uniformity Bill is designed to prevent. The case is *Denison v. Keck*, Fed. (2d) 384 (July, 1926). Here the complainants, out of possession, sued in equity, claiming ownership in fee simple and the right to immediate possession of certain real estate, and alleging that the defendants claimed some right, title, and interest in this real estate, and were in possession thereof. The complainants asked to have their title quieted, and for a cancellation of a mortgage. No objection was made by defendants that there was an adequate remedy at law. From a decree for complainants, the defendants appealed. Held by the Circuit Court of Appeals, that, the District Court, "sitting as a court of equity, had tried an action at law," and that the decree must be reversed; "when it is quite obvious," said the court, from the case presented and tried as a suit in equity, "that there is a plain, speedy, and adequate remedy at law," it is the duty of the appellate court to raise the objection *sua sponte*.

Here, it will be observed, in a case where the real controversy revolved around the question of legal title and the possession of land, the decision of the court, in setting aside the decree entered by the trial court, was based, not on a mistake in substantive law, but upon a failure to observe a rule of practice in a court administering both law and equity.

How far this result, if subjected to the test of substantive justice, falls behind the result reached even in the early days of the One Form of Action, will appear from such cases as *White v. Lyons*, 42 Calif. 279 (1871); *Leonard v. Rogan*, 20 Wis. 540 (1866); *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357 (1861); *Phillips v. Gorham*, 17 N. Y. 270 (1858).

the court, whether, on the facts of the case, the plaintiff should have sued in trespass *vi et armis* rather than in trespass on the case. The objection that he had mistaken his form of action was not a threshold objection. The plaintiff's cause of action had been fully presented on its facts, tried twice and twice established. The defendant had received as full notice of the plaintiff's cause, and had been given as full opportunity to defend and to prepare for trial, as he could have had if the form of action selected had been trespass and not case. The Supreme Court was unanimous in holding that the plaintiff had mistaken his form of action, that he should have sued in trespass and not in case. With this result, the real question was essentially whether substantial justice should be sacrificed to a Form of Action. Apparently the two lower Courts had in turn disregarded the nice distinction between trespass and case, somewhat as the English Common Pleas in 1767 had refused "to look with eagle's eyes" to see whether an action in case should have been in trespass if the court can see that "the plaintiff has obtained a verdict for such damages as he deserves."³ But this the Supreme Court would not do. Neither would it resort to a judicial camouflage under which, while professing to maintain the distinctions between the Forms of Action, the Court could regard the action at bar as in trespass or in case, according as substantial justice might require.⁴ With expressed regret on the part of each of the three judges, they concurred in reversing the judgment for the plaintiff.

The Law vs. Common Sense and Common Convenience.

Few cases before or after this Virginia decision in 1808 illus-

* Slater v. Baker, 2 Wilson, 359, 362 (1767), per Curiam: "That the plaintiffs ought to receive a satisfaction for the injury, seems to be admitted; but then, it is said, the defendants ought to have been charged as trespassers *vi et armis*; the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case; when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible."

⁴ This was strongly urged by one of the plaintiff's attorneys: "If we are left unfettered by the decisions of the English Courts, no good reason can be given why this action is not case as well as trespass. The defendant has the same opportunity of defending himself, has as full notice of the plaintiff's cause of action, and may be as fully prepared for trial." Taylor v. Rainbow, *supra* note 1, at 430.

trate so well the tyranny of the Forms of Action. Few cases or none had made a stronger appeal for a radical change which would enable the Courts to prevent the denial of justice, or its grievous delay, merely because counsel had erred on a question of formal procedure in a case in which a good cause of action had been established in the trial court. In its decision, *Taylor v. Rainbow* was in line with accepted precedents, in full accord with the standard doctrine that "we must keep up the boundaries of actions or we shall introduce the utmost confusion."⁵ It had the support of an array of "strong decisions," English and American—"strong," that is, within Chief Justice Erle's definition, as decisions which followed the precedents to the uttermost, but were "opposed to common sense and to common convenience."⁶ And there were judges in his day, said the Chief Justice, "Who delighted in nothing so much as in a strong decision."⁷ But *Taylor v. Rainbow* was not a decision in which the judges rendering it "took delight." Their opinions expressed the reluctance of each of them to decide against the real merits of the case, and contained, in substantial effect, a suggestion that "from the reason of the thing and upon sound general principles" there should be "an action" in which the administration of justice should be free from the restrictions of a hard and fast formulary system of pleading.

This expressed discontent with the common law formulary sys-

⁵ Thus, the Chief Justice in *Reynolds v. Clarke*, 1 Strange, 634, 635 (1725), where, with a cause admitted on the records, the plaintiff failed because he had sued in trespass when he should have sued in case. So, a century later, with many like cases between, the Supreme Court of Ohio found that "the necessity of preserving the boundary of actions" (thus the Court described the situation) required the denial of substantial justice in a cause of action pleaded and proven before them. *Case v. Mark*, 2 Ohio 169, 173 (1825).

⁶ 1 SENIOR, CONVERSATIONS WITH DISTINGUISHED PERSONS (1878) 321.

⁷ "The indifference to real and unreal, and so to right and wrong, which besets a barrister bred in the world of words rather than of facts, often follows him to the bench. Besides this, I have known judges, bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common sense and to common convenience. * * *

"A great part of the law made by judges consist of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last on some matters becomes such a nuisance, that equity intervenes, or an Act of Parliament must be passed to sweep the whole away." Chief Justice Erle, in 1 SENIOR *op. cit. supra* note 6, at 320-321.

tem of actions and this expressed suggestion of the need of relief through the creation of one form of action gave promise of coming good. But it was long in coming; indeed, it has not yet fully come. The "strong decisions" continued, but with a growing protest through the first half of the last century. We have courts of law—so the protest ran, and we have a court of equity; but have we a court of justice?⁸

If the lawyers of today could go back a century in their professional habit of thought as to civil procedure, they would find nothing surprising in the firm hold which the distinctions between the common law actions and between these actions as a class and the suit in equity then had upon Bench and Bar. The Forms of Action were our Institutes of the Law.⁹ Through some five hundred years our forefathers at the Bar had thought in the terms of these forms, and were accustomed to make them, almost instinctively, the tests of right and obligation under the law. With this habit of thought there was a co-operating influence which naturally had a wide effect. Why should the work of years be discarded and a radically different system be instituted? Why should practicing lawyers and judges busy in the trial of cases, be required to ignore the ancient land marks, and to find their way

⁸ The distinction was pointedly made in the early stages of the reform movement in England and in America. "In this country equity decides equity and law decides law. But is there, we ask, for it comes to this, is there in all England a single tribunal which administers *justice*? Would it be presumptuous in us, would it be untrue, to say that there is not." *ENG. LAW MAGAZINE* as quoted in the Ohio Constitutional Convention of 1850. 1 Ohio Debates 559.

The adoption of one form of action has made "courts of justice" possible in many Anglo-American jurisdictions; but in no State of the Union have they been fully attained. In our own day President Wilson repeated the call to "make courts of justice out of courts of law." See his address in New York, November, 1916.

⁹ "Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things. * * *

"Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children." 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* 561, 674.

along an unknown, unmarked course, in the midst of dangers of which they had neither knowledge nor warning?

The same professional habit of thought as to the distinctions between the actions at law and the procedural separation between law and equity had a retarding influence in the forty years' effort in England to obtain a more efficient system of civil procedure. At "long last" there began to grow up, in the minds of the English reformers, "the vision of a great and united Supreme Court of Justice, with uniform principles, uniform law, and uniform procedure."¹⁰ But as late as 1852, after twenty years of agitation, English lawyers hesitated over an avowed abolition of the Forms of Action. This had been recommended by the Common Law Commissioners; but it was supposed that if the recommendation was adopted, "the law would be shaken to its foundations."¹¹

Approaching One Form of Action Through Judicial Construction.

With the decisions which held a cause of action, admitted or proven before the Court, to the test of a most rigid formalism, there appeared, as time went on, decisions which permitted the mere form of action to "bend to the substantial justice of the case."¹² Some judges, looking to the convenience of justice, would permit a considerable degree of variability in the same form of action.¹³ As "an indulgence granted on account of the

¹⁰ JENKS, *SHORT HISTORY OF ENGLISH LAW* (1920) 372.

¹¹ See the remark of Bramwell, L. J. in *Bryant v. Herbert*, 3 C. P. D. 389, 390 (1878).

As a result, the elaborate Common Law Procedure Act of 1852, in striking contrast with the New York Code of 1848, contained no provision which expressly abolished the forms of action; but the English Statute, as described by Lord Justice Bramwell, merely "provided as far as possible that, though forms of action remained, there never should be a question what was the form."

¹² *Clafin v. Wilcox*, 18 Vt. 605, 609 (1846); where Judge Redfield approved "the rule of practical common sense, of making, as far as can well be done, the mere form of the action bend to the substantial Justice of the Case."

¹³ In *Ditcham v. Bond*, 2 M. & S. 436 (1814), the declaration in trespass was framed in four counts: for breaking and entering the plaintiff's house, for assaulting and beating him, and for beating his servant *per quod servitium amisit*. Under a plea of not guilty the plaintiff had a verdict. The defendant moved in arrest of judgment because of a misjoinder, on the ground that the last count was in case. "And he argued that the actions for beating the plaintiff's servant, or for seducing his daughter, or for adultery with his

difficulty of tracing the dividing line" between trespass and case,¹⁴ one occurrence might sometimes be treated as giving rise to either *trespass* or *case*, at the election of the plaintiff.¹⁵ And now and then a statute lent a helping but cautious hand in making the procedural boundaries of certain actions at law somewhat elastic. A Virginia statute in the second quarter of the last century provided that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case."¹⁶ Similar statutes appeared in other states.¹⁷

This later, ameliorating doctrine, however, was stoutly rejected in some cases as fundamentally unsound.¹⁸ The net result was a

wife, *per quod consortium* or *servitium amisit*, all stood on the same ground, and had been treated by this court as actions upon the case." Several cases in support of this were cited. Lord Ellenborough saved the case at bar on this principle: "For some purposes indeed we have considered it as case, but for general purposes we will leave it where the ancient forms and the most recent decisions have placed it. We restore the old practice and adopt the last case."

¹⁴ Pearson, J., in *Kelly v. Lett*, 13 Iredell Law (35 N. C.) 50, 54 (1851).

¹⁵ "The question is not whether trespass will lie, but whether case will not lie also; and I have known from pretty long experience that either will lie." Lord Abinger, C. J., in *Chamberlain v. Hazlewood*, 5 M. & W. 515, 517 (1839). So also Parke, B., in same case: "There may have been no direct decision on this subject, but it has been the constant practice with pleaders to declare either in one form of action or the other."

¹⁶ Va. Code (1849), c. 148, § 7, Code of 1904, § 2901.

¹⁷ This Virginia Statute was adopted in West Virginia, Code 1906, Art. 3491. It throws an interesting light on the hesitating application of this liberalizing enactment that it was construed strictly, according to its letter: "It is provided that 'in any case in which an action of trespass will lie, an action of trespass on the case may also be maintained.' But the converse is not provided; and the action of trespass, therefore, as to the cases in which it will lie, remains as at Common Law." Per Berkshire, P. J., in *Barnum v. B. & O. R. R.*, 5 W. Va. 10, 16 (1871). Accordingly, in both these States, the pleader when in doubt whether to bring trespass or trespass on the case, was advised to sue in trespass. See *Jordan v. Wyatt*, 4 Gratt. 151, 152 (Va. 1874), note.

In Ohio a statute in 1845, did away, "in some degree with the embarrassing differences between trespass and trespass on the case." O. L., Vol. 42, p. 72. It was regarded by the Ohio Code Commissioners in 1853, "as the beginning of the work we propose to finish" through the enactment of the one form of action. Report 1853, p. 5 referring to 42 Ohio Law 72.

¹⁸ The question was earnestly considered by the Ohio Supreme Court in 1825, *Case v. Mark*, 2 Ohio 169. The result was a re-affirmation of the rule as "clearly and judiciously settled, that where the injury is direct and immediate the action must be trespass, whether the act were done willfully or by negli-

frequent uncertainty and confusion in the use of the common law actions. As late as 1849 the Rhode Island Supreme Court was frankly seeking a rule which "will do substantial justice to parties without involving them in that doubt, perplexity, uncertainty, and technical absurdity into which some of the adjudged cases [on the distinction between Trespass and Case] might seem to lead them."¹⁹

But in all this there was a latent promise of progress towards a more simple and efficient administration of justice. A vision of one Court with full jurisdiction in law and in equity and with one instrument of remedial justice was slowly growing in the minds of some American reformers. To them, it seemed, that if the courts lacked authority or purpose to reach this result through judicial construction, relief should come through legislation.

Outside the influence of mediaevalism in our Anglo-American civil procedure there was nothing essentially abnormal in the principle of one form of civil action for all causes at law and in equity. The practical convenience of having one instrument of remedial justice, instead of the historic armory with its many weapons each for a special use,²⁰ had long been felt in our

gence and want of case," Per Burnet, J., p. 179. In support of his opinion, Judge Burnet made this remark at page 173: "One of the reasons given for not sustaining actions on the case where the circumstances amount to a clear trespass, and *vice versa*, is the necessity of preserving the boundary of actions, by which I understand the rules that prescribe what particular action or form of suit, shall be brought for each particular injury. These rules cannot be uniform, if plaintiffs are permitted to garble their cases, so as to convert an unequivocal trespass into trespass on the case. Were this permitted, I cannot conceive of any trespass that may not be sued for in the form of case."

¹⁹ Haile, J., in *Brennan v. Carpenter*, 1 R. I. 474, 475 (1849).

²⁰ "The metaphor which likens the chancery to a shop is trite; we will liken it to an armoury. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace. To drop metaphor, our plaintiff is not merely choosing a writ, he is choosing an action, and every action has its own rules.

The great difference between our medieval procedure and that modern procedure which has been substituted for it by statutes of the present century lies here." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 9, at 561.

Courts. American lawyers eighty years ago were familiar enough with an evolutionary process which had been slowly working in the courts for generations. Through judicial construction, running sometimes into judicial legislation, resorting sometimes to fictions, a common law form of action had slowly widened its range while preserving its letter. Ejectment had supplanted many highly differentiated real actions, and become generally available to recover possession of land. Trespass on the case had developed into a general residuary tort action; within its scope were broad classes of torts, some resting on acts of absolute liability, some on negligence, some on malice. No one, it was said, had sounded the depths of Trespass on the Case. The Action of Assumpsit, developing far beyond the limits of a strict contract action, had usurped a large part of the field of Debt; it had become available even in cases where an actual contract between the parties could not be inferred from the facts of the occurrence but where, from "the equity of the plaintiff's case," the defendant was under an obligation to refund as if there had been a contract.²¹

Long before 1848, the courts, through century-long judicial construction, had been developing a system of pleading based upon a few broad forms of action which, each in its own extensive sphere, was a *quasi* one form of action. Logically, the one form of action for all civil causes, at law and in equity, although requiring perhaps the aid of legislation, should have been on a far judicial horizon, as a result which was both possible and to be desired.²²

²¹ *Moses v. Macferlan*, 2 Burr. 1005, 1008 (1760).

²² The hesitating caution of some Courts in this reform is illustrated in the history of the Michigan Constitutional provision of 1850 that "The Legislature shall, as far as practicable, abolish distinctions between law and equity proceedings." (Art. VI, Section 5.) Referring to this provision Professor Sunderland, of the University of Michigan Law School, made this remark in 1916: "Evidently there was a popular demand for a reform of the same general character as that introduced in New York, and the people through their constitution did all that peremptory language could do to obtain suitable legislation on the subject. But the legislature failed to carry out the people's mandate. Instead it sought to shift the task upon the Supreme Court, and in 1851 a statute was passed which provided that—'The Judges of the Supreme Court shall have the power, and it shall be their duty, within three months after this law shall take effect, by general rules to establish, and from time

II. THE STATUTORY ONE FORM OF ACTION.

The One Form of Action made its appearance as a working principle in our civil procedure in the revolutionary year 1848. It came in a way that was shockingly different from the way in which procedural reforms through judicial construction had come in Anglo-American law—slowly bringing in the new under the guise of the old. The age-long reign of the Forms of Action, at least their reign *de jure*, was terminated by the most direct legislation, and with almost dramatic suddenness.²³

Short and positive enactments, passed under high pressure, abolished expressly the distinctions between the different actions at law, the distinctions between actions at law as a class and suits in equity, the forms of all such actions and suits then or previously in use, and "all the forms of pleading heretofore existing." By the same legislative fiat there was thenceforth to be "but one

to time modify and amend, the practice in said Court and in the Circuit courts, * * * and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with a view to the attainment, so far as may be practicable, of the following improvement in the practice: 1. The abolishing of the distinctions between law and equity proceedings, as far as practicable. * * *

"Probably the legislative conscience was satisfied by the passage of this act, for nothing more was done by the legislature for more than sixty years. Doubtless also the Supreme Court was not at all disturbed by this gratuitous bequest from the legislature, for no response was vouchsafed by the court. For two-thirds of a century the legislature has waited for the Supreme Court, and the Supreme Court has waited for the legislature, and until the last session the people failed to obtain relief, although the same demand for legislative action was repeated in the constitution of 1908.

"In the Judicature Act of 1915 the legislature at last took up the matter. It did not in terms abolish all distinction between legal and equitable proceedings, as the New York Code had done. Its language is much less sweeping and its immediate object much less pretentious, but a brief survey of the results reached by the reforms in New York and elsewhere will show that the modest provisions of the Judicature Act have really covered a considerable part of the available field of reform."

²³ The first report of the New York Commissioners on Practice and Pleadings, providing for the abolition of the forms of actions and pleadings in cases at common law and for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, was reported to the legislature about the first of March, 1848. The bill was considered, amended in some 80 of its 391 sections, and passed before the middle of the following month (N. Y. Laws of 1848, c. 371. Act of April 12). This impetuous haste appears in the enactment of most of the earlier Codes.

form of action for the enforcement or protection of private rights and the redress of private wrongs." To this new instrument of remedial justice, the statutes gave the name of "civil action," and declared that the forms of pleading in the civil action, and the rules by which the sufficiency of the pleadings was to be determined, "shall be those which are prescribed by this act."

By such legislation in 1848 the One Form of Action, for the first time in the history of Anglo-American law, was given an authoritative place in the administration of civil justice, whether at law or in equity, or in both. Its enactment in New York was followed in rapid succession by its enactment, within five years, in Missouri, California, Kentucky, Iowa, Minnesota, Indiana, and Ohio. Within the next five years it had been enacted in Oregon, Washington, Nebraska, and Wisconsin. By the end of 1868 the legislatures of Kansas, Nevada, Dakota, Idaho, Arizona, Montana, North Carolina, and Arkansas, had required its adoption by the courts. Within the next eleven years, 1869-1879, it was enacted in Wyoming, South Carolina, Utah, Colorado, and Connecticut.²⁴

Meanwhile, on the other side of the Atlantic, the English Judicature Acts and Rules of 1873-75 had in effect abolished the Forms of Action, in their ancestral home, and in their stead had established an "action" of so wide a scope that it included causes at law, causes in equity, probate causes, and causes *in rem* or *in personam* in admiralty.

Thus, within the course of thirty-one years after 1848, this sudden, revolutionary change, affecting the habits of thought and the daily work of a most conservative profession, had become an accomplished result in the State Courts of more than half of the Union, and in England. A perfect result it was not, and naturally so. It was a first effort in a wide and difficult field. Some of its provisions were crude or incomplete. It lacked facilitating devices, as, for instance, a procedural device which would enable the court, acting through officers appointed for the purpose, to exercise a supervision and effective control over the preparation of cases for the trial dockets. It stood in special need of "the

²⁴ In later years the Code was enacted in the then Territories of Oklahoma and Indian Territory (1890), New Mexico (1897), Alaska (1900), the Philippine Islands (1901), Porto Rico (1904).

advantage of experiment in the laboratory of the courts." ²⁵ But it is significant that with the faults and defects of a pioneer effort in our law, and open to repeal by any legislature, this system of one form of action pleading still endures in all the States named above. ²⁶

III. RETARDING CAUSES IN THE COURTS.

With such a beginning, it might have seemed fairly safe to prophesy that the one form of action would ere long supplant our inherited formulary system in most of the other State Courts and in the Federal Courts in all the States. The signs now point to such a result in the near future, at least for the Federal Courts. But it was not to come speedily. A little after 1870 there was a notable slowing down of the movement in America for the adoption of Code pleading. The revolutionary impulse of 1848, with its wide popular support, lost its force in the course of one generation; and there were, from the first enactment of the Code, several causes which tended actively to retard. In the first twenty-seven years after 1870, code pleading was adopted in only four States of the Union. ²⁷ In the next twenty-nine years no American

²⁵ See Chief Justice Taft's address before the American Bar Association in 1922, 47 A. B. A. REP. 268.

²⁶ One State, and only one, has repealed the Code. Florida enacted it in 1870, apparently under stress of the reconstruction days, but repealed it in 1873. The resulting system of pleading in Florida is based on the common law rules except as modified by statute or rules promulgated by the Supreme Court under statutory authority. *Mechanics and Metals Nat. Bk. v. Angel*, 79 Fla. 761, 85 So. 675, 678 (1920). These modifications are many and varied. They frequently bring the new and the old into one setting. They maintain a procedural separation between law and equity, yet with changes that suggest an approach towards a unit procedure. See Fla. Rev. Gen. Stat. (1920), §§ 2561-2667, §§ 3107-3245, and especially §§ 2624-2667 (Pleadings at Law) and §§ 3116-3131 (Pleadings in Chancery).

This system, it would seem, has not given full satisfaction. A Statute of 1925 requires the Governor to appoint "five lawyers of eminent ability as Commissioners on Reform of pleading and practice in the Courts of this State * * * to the end that the administration of law and justice may be simplified and expedited in this State." *Laws of Florida* (1925) 400. Possibly we are seeing in Florida, as in England and in our Federal Courts, a movement up a line of cautious statutes towards a simple and scientific system for the administration of substantial justice.

²⁷ Colorado in 1877, Connecticut in 1879, Oklahoma in 1890, New Mexico in 1897. The last two were Territories when their codes were first enacted.

State adopted the Code.²⁸ The result is the more significant because, within this period, various procedural reform movements appeared in the United States, with important results in several of the older States.²⁹

These retarding causes have been, in the main, quite distinct from a deliberate judgment upon the essential value of one form of action for legal and equitable relief. They have resulted in a state of mind which was significantly expressed last July by Senator Walsh, when he submitted the views of a minority of the Judiciary Committee of the United States Senate against the passage of the Uniformity of Procedure Bill. Referring to the Code of 1848, the outcome of David Dudley Field's long efforts, Senator Walsh makes this remark:

"Field entertained the hope that his Code, or something modeled upon it, would come into universal use. I have never been able to understand why it has not. Having been bred under it, I am convinced it approaches as near simplicity and perfection as any mere human work may. But I know that to a multitude of lawyers, among the most eminent and learned at the American Bar, it is anathema, and that a very considerable number of States will have nothing of it."³⁰

Perhaps it may be worth while to notice the source and nature of causes producing such a result within a learned profession. "Justice is not to be taken by storm; she is to be wooed by slow advances," so Judge Cardozo has recently pointed out.³¹ We are still witnessing, it may be, some of the effects of an attempt to take procedural justice by storm. In its sudden impetuosity, its wide sweep, its devastating effect upon the long established principles of our procedure, the movement which brought on the American Codes came as a storm of startling violence and extent. Its rapid progress from State to State was ascribed to "a craze for reform which had swept over the country as a tidal wave."³²

²⁸ But a code was enacted in Porto Rico in 1904.

²⁹ As in New Jersey, "The Practice Act" (1912), N. J. Laws, 1912, c. 231, pp. 377-416; in Pennsylvania, The Practice Act, 1915, Pa. Laws 1915, 483-487, Pa. State 1920, §§ 17,062-17,326; in Michigan, the elaborate "Judicature Act of 1915," Mich. Comp. Laws (1915) No. 314, in eighty-one chapters and 482 pages.

³⁰ *Supra* note a.

³¹ CARDOZA, *THE GROWTH OF THE LAW* (1924) 133.

³² FIELD, *THE LIFE OF DAVID DUDLEY FIELD* (1898) 357.

The radical changes which it caused in our judicial procedure had not been sought by the Bench and the Bar, or desired by the profession generally;³³ rather they were imposed upon the courts by sudden and drastic statutory requirement.

The underlying cause may be found in that movement against class-privilege and in favor of the rights of the common people which culminated, after years of greater or less intensity, in the "revolutions of 1848." This many-angled movement convulsed Europe from the Danube to the Irish Sea with threats of social and political change. In America it carried no serious threat to the administrative side of the government, but it manifested itself in an ultra-democratic reform sentiment, strongly anti-privilege, anti-expert, anti-specialist. Its main point of attack in America was the existing judicial system. The judges must be made directly responsible to the people. The law must be recast so that "a person of common understanding" could know what was intended and could apply it himself. The right of every good citizen to practice law must not be denied him.³⁴

Whatever the cause, the change in America found the Bench and the Bar unprepared for it, doubtful as to the results, and sometimes scornfully hostile.

³³ "My life was a continual warfare. Not only was every obstacle thrown in the way of my work, but I was attacked personally as an agitator and a visionary, in seeking to disturb long settled usage, and thinking to reform the law, in which was embodied the wisdom of ages. This was perhaps to be expected when I undertook such radical changes in the face of the most conservative of professions." David Dudley Field, referring to the opposition which he had to encounter because of the Codes. *FIELD, op. cit. supra* note 32, at 83.

³⁴ "Any man may give either medicine or gospel and collect his dues. * * * I want the lawyers to stand upon the same platform with the priests and the doctors. A man's property is no better than his life or his soul"—such was the argument in the Michigan Constitutional Convention of 1850. ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921) 89.

It is significant of the strength of this sentiment that the New York Constitution of 1846 abandoned the principle of an appointive judiciary and adopted the principle of a short term elective judiciary.

This period of social unrest produced in New Hampshire a statute which made eligible for admission to the Bar any male citizen who was at least twenty-one years old, and of good moral character. Act of 1842, N. H. Rev. Stats. c. 177, § 2; HOLLIS R. BAILEY, *ADMISSION TO THE BAR* 59. In Indiana a constitutional provision, which still endures was enacted, that every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice. Constitution 1851, Art. VII, § 21.

IV. IN THE FEDERAL COURTS AND CONGRESS.

Halting and Faltering.

In the year 1920 the One Form of Action was an established working principle of civil procedure for the administration of legal and equitable relief in twenty-eight States of the Union. These States had then a population of not quite fifty-five millions, out of a total population in the forty-eight States of a little more than one hundred and five millions. In twenty-four of these Code States this principle of procedure had been in continuous operation for at least half a century; in some of them for seventy years or longer. The same principle had then been in successful operation in England for about forty-five years; in Ontario, for thirty-nine years; in New Zealand for thirty-eight years; in Victoria, for thirty-seven years; in Nova Scotia, for thirty-six years. And in these jurisdictions outside the United States, the American reform, as it was at first called, had been carried further than with us. This was so in various respects which need not be noticed here. But it is especially noteworthy that even in the American Code States the One Form of Action had not been given to all the courts of record within their boundaries; for the Federal Courts throughout the Union remained closed to a unit procedure for law and equity. The American reform movement which has had such a wide and enduring effect in the States of the Union, and later in other jurisdictions administering our ancestral common law, had met through many years, a halting and faltering in Congress which outdid the halting and faltering of the English reform movement through the forty years preceding the Judicature Acts of 1873-1875.³⁵ This procedural condition

³⁵ In 1851 an English law periodical made this comment upon the reform movement in England and America: "While all people are agreed that reform is needed and while the new common law commission are issuing suggestions, halting and faltering, willing, perhaps, but unable, to free their minds from that peculiar tone which long and successful practice under our present system inevitably induces—a practical people in the western hemisphere have appointed a commission, and, quietly, expeditiously, and cheaply, and out of laws similar to our own and derived from us, have created a simple, single and intelligible judicial system, which has hitherto worked well in the state (New York) by which it was first sanctioned, and has in consequence been adopted by several other states of the American Union. And let us not forget that it is not among a poor, homely, uneducated, and simple people that

still endures throughout the United States. It is the more remarkable because we are now centuries this side of the age when, in the infancy of the Courts of Justice, substantive law had "the look of being gradually secreted in the interstices of procedure;" and lawyers could see the law "only through the envelope of its technical forms."³⁶ We are now able, in theory at least, to view procedure as the machinery of Justice; and we live in the age of machinery. We are keen to improve it—to make our machinery more and more efficient. Why should it be necessary, in this day and in these United States, to change the carburetor of the automobile of Justice whenever we pass, with one and the same substantive cause of action, across a State line or from a State Court into a Federal Court in the same State.

But a law reform, although gloriously slow in its coming, is not theretofore to be despaired of.³⁷ And Congress has been moving forward, although hesitatingly and through a long course of years, towards a great reform. Congress has not yet created one form of Civil Action; but recent statutory provisions, as Chief Justice Taft points out, "manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and these are long steps towards Code practice."³⁸

this great experiment in legislation is being tried, but among a people who are our rivals in commerce, equal to us at least in intelligence, wealth, and luxury, with all the wants of a high state of civilization, and whose laws to be successful must embrace nearly as wide a field as our own. The boldness of the attempt, and the righteousness of the motives which led to it should at least command our respect and sympathy. We venture to express a hope that the example may not be entirely lost upon ourselves, but that it will stimulate our law reformers to raise their minds at once to the contemplation of a radical and efficient reform; for they now have before them a proof that it is possible to sweep away all pre-existing laws without rushing into chaos." XIV *Law Magazine* (N. S.) (London), pages 1, 2, 17, 18.

³⁶ MAINE, *EARLY LAW AND CUSTOMS* (1883) 389.

³⁷ "History shows that great law reforms are accomplished only after long periods of agitation. Notably has this been the case with the two great systems of law under which Western civilization has developed, that is, the common law which prevails in the English-speaking countries, and the Roman law, which is at the foundation of the legal systems of the French, Spanish, Italian and German nations and, recently, of Japan." HENRY W. TAFT, *LAW REFORM* (1926) 1.

³⁸ *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235, 244 (1922).

There is also the significant movement in behalf of the Uniformity of Procedure Bill, one section of which provides that the United States Supreme Court "may at any time unite the general rules prescribed by it for cases in equity with those in actions at law, so as to secure one form of civil action and procedure for both." This movement, in the special charge of the American Bar Association's Committee on Uniform Judicial Procedure, and under the leadership of its tireless chairman, Mr. Thomas W. Shelton of Virginia, has now the widest support of Bar Associations throughout the United States and of individual members of the active profession. Apparently no other proposal for a radical, widespreading change in court procedure has ever received so extensive a presentation, and such full approval from our active Bench and Bar. This approval has appeared in Congress also, where eighty-two Senators and over eighty per cent of the members of the House, responding to a questionnaire, have expressed themselves in favor of the bill. A Committee rule may once more block its passage. But it may be, as respects this reform in the interests of substantial justice, that Congress will presently stand at an open door with only a threshold to cross.

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