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A SYMPOSIUM ON THE PROPOSED CODE OF CIVIL PROCEDURE FOR MISSOURI: INTRODUCTION

J. P. McBaine*

"I am especially interested in the matter of procedure, because procedure stands between the abuse of the principles of law and their use for the benefit of mankind. You can have as high and as sound principles of law as possible, but if you have not the procedure by which you can apply them to the ordinary affairs of men, then it does not make any difference what the principles are or how erroneous they may be."

These words of wisdom uttered by former Chief Justice William Howard Taft before the Boston Bar Association are as true and important today as they were when they were spoken nearly fourteen years ago. Reference is made to them to emphasize the importance of the problem before the bar and people of Missouri. Dozens of similar statements might be cited from the public addresses of leaders of the bench and bar during the past one hundred years. A multiplication of such citations would serve no useful purpose and hence should be avoided especially at this time when words should not be multiplied uselessly. Most thoughtful people, lawyers and laymen alike, fully understand the importance of the best procedural devices that human ingenuity can devise.

Civil procedure is of course only a means to an end, viz., the proper determination of a civil dispute. The selection, however, of an efficient means, rather than an inefficient one, may be the difference between doing justice according to law in the particular case and not doing justice. The object of law is to do justice between citizen and citizen, or the citizen and

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the state, and if the procedure for doing so breaks down at crucial stages, justice according to law is only an abstract thing, something in the books, not a reality.

It is an obvious fact that no body of procedural law, which man can devise, can be made suitable for all time to come. Though the writ and common law pleading system at one period in English life may have worked as well as any other system which then could have been devised, taking into consideration the existing political, social and economic conditions, it finally (long before it was swept away) became a hindrance to the administration of justice. What is a sound judicial system in one era may become a poor one the next era. Many important provisions in Missouri court procedure were adopted nearly a century ago. Reference to this fact is made not to suggest that because of antiquity they are necessarily bad, but to suggest that careful scrutiny is in order. It is often no easy matter to determine whether this or that procedural device is not functioning properly and if the conclusion is reached that it is not doing so, it is also not easy to make a change and to substitute another device more suitable for the purpose. The problem is often one of great difficulty—one worthy of the time and ability of the wisest members of the legal profession. It should be approached cautiously and objectively, with an open mind, and with the full recognition that discarding old devices and replacing them with new ones, for a time, may impose burdens on those who must apply the new ideas—the bench and the bar. This burden obviously must be borne, and it should be willingly borne, by our profession which does now and always has occupied a position of great significance in American life.

The Rules of Civil Procedure for the district courts of the United States which became effective September 16, 1938, came as the result of much effort and long discussion by all groups in the legal profession, judges, lawyers, and law teachers. It is probably true that in some instances they are not perfect, that the very best idea did not always win in the competition of ideas respecting procedure. The agreement, however, is general that the result is most satisfactory, that a good job has been done, that progress has been made, that a substantial contribution has been made to American jurisprudence. Some of the major contributions of those rules are the following: Counterclaim and Cross-Claim; Joinder of Claims and Remedies; Joinder of Parties; Depositions and Discovery; Summary Judgments; Declaratory Judgments; Trial by the Court; Voluntary Dismissal; Consolida-
tion of Actions; Pre-trial Procedure; Special Verdicts and Interrogatories; Instructions to the Jury; Findings by the Court; New Trials; Appeals to the Supreme Court and Circuit Courts of Appeals. Other equally important matters dealt with by these rules will no doubt be recalled by those familiar with them.

A proposed General Code of Civil Procedure known as Plan II is recommended by the Advisory Committee appointed by the Supreme Court of Missouri. This Code of Civil Procedure is based upon the Federal Rules. It touches many important topics and suggests many important changes in Missouri procedure. The ideas that were adopted for the Federal Rules very often have been accepted and written into the proposed General Code. A comprehensive code has been the result. The general plan seems a good one for two reasons. In the first place, the Federal Rules represent sound progressive thought in this field of law, and in the second place, it seems highly desirable that uniform civil procedure shall prevail ultimately in all the courts of the United States—state and national. No good reasons are apparent why different systems of procedure should prevail in Missouri and California or New York. There are no fundamental differences in the social, economic and political life of our people in the several states which require different rules of civil procedure. There are obvious practical and intellectual advantages in substantially similar rules of civil procedure in all the states and the national courts. Though the lawyer for the most part practices in the courts of his own state and the federal courts, he often appears in court in adjoining states and, when he goes into another jurisdiction, he should not be confronted with procedural rules which are unfamiliar to him. Furthermore, there exists an advantage which will accrue from the interpretation and application of these rules by the many great courts that exist in America. Another strong argument for pretty close adherence to the Federal Rules is to be found in the fact that they are likely to be continuously studied and improved from time to time by advisory committees appointed by the Supreme Court of the United States. The Federal Rules will be kept up to date, improved as defects in their operation appear, and when better ideas are conceived they will be adopted. The February, 1942, number of the American Bar Association Journal (p. 91) contains a copy of the order of the Supreme Court of January 5, 1942, designating the surviving members of the Advisory Committee—an admirable committee—as a continuing Advisory Committee to propose amendments or additions to
the Federal Rules. This notable undertaking then is not to suffer from neglect, as many codes have, but it is to be kept abreast of the times and revitalized continuously by the labors of highly competent members of the legal profession and the members of the highest judicial tribunal in the United States. This is a most important factor. Rules of law, substantive and procedural, cannot be made so as to endure for all time. They must be re-examined continuously by wise and highly skilled persons if legal institutions are to function in the most efficient manner.

Important provisions of the proposed General Code, Plan II, which no doubt will be studied carefully are the following: article 2, Sections 9 and 10, dealing with Permissive Joinder; Section 12, Interpleader; Sections 13 and 14, Class Actions; Sections 18, 19, 20, Intervention. In article 5, the following sections involve important matters. Section 5, Personal and Substituted Service; Section 8, Return and Proof of Service. In article 6, Sections 1 to 6, inclusive, Pleadings; Section 7, Joinder of Claims; Section 11, Consistency of Pleading; Section 24, Pleading Instruments; Sections 30 and 31, Objections to be Raised by Motion; Section 42, et seq., relating to Counter-claims; Section 55, Pre-Trial Procedure. In article 8, Section 5, Admission of Facts, etc. In article 9 many matters of prime importance are included, such as Section 10, Voluntary Dismissal; Section 14, Instructions; Section 19, Findings by the Court; Section 20, New Trials. Article 13 relating to Appellate Procedure also contains many provisions of interest, e.g., Section 1, Bills of Exceptions Abolished; Section 10, Transcript on Appeal.

The above matters are not the only features of the proposed General Code that are highly significant. Many other matters of importance are included. Reference has been made to these sections to call attention to the broad scope of the proposals rather than to express an opinion as to the relative importance of its various provisions. Obviously much labor and enlightened thinking has gone into the substance and form of the draft and the result is a modern code broad in scope reflecting credit upon those who have participated in the work—a work of major significance which should and no doubt will receive the serious attention of the legal profession of Missouri.

To the bench and bar of Missouri has come a challenge upon a very important matter, one which no doubt will be intelligently accepted, debated, and answered wisely. Only the best civil procedure which can be devised is good enough for the administration of justice in the United States.