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A ROUNDED SYSTEM OF JUDICIAL RULE-MAKING

An address

by

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Ladies and Gentlemen:

If I were asked to designate the most striking development in procedural reform during the last fifty years, I would unhesitatingly single out the progress of judicial rule-making. In this respect 1938 has been a significant year. It has witnessed the promulgation of the Rules of Civil Procedure for the District Courts of the United States, which, no doubt, will become effective on the first day of September. Thus there will have been accomplished a reform for which the American bar has been struggling for nearly thirty years. When the history of these events is written by some future Holdsworth or Maitland, the year 1938 will be appropriately termed a year of victory for the forces of procedural reform.

We would, therefore, be perfectly justified in devoting this meeting to a celebration of these gratifying achievements. I prefer, however, to pursue a somewhat different course, and speak to you on still another phase of judicial rule-making. As you know in cases in equity, in admiralty, in bankruptcy and in copyright matters, the procedure is now governed by rules of court.

In 1934 the Supreme Court, pursuant to an act of the Congress, promulgated rules prescribing practice and procedure with respect to proceedings in criminal cases after verdict. I think it is generally agreed that these rules are, at once, simple and serviceable. They have worked well. In view of these developments I am led to suggest that the rule-making power be extended to criminal procedure prior to verdict.

I lay no particular claim to credit for this suggestion. It flows rather naturally from the previous reforms. Thus we would close the last gap in our procedural system.

If the extension of the rule-making power to criminal procedure is a worthwhile reform -- if it will make the criminal trial less of a game and more of a search for truth -- then there is no time like the present to begin the study of its possibilities.

An examination of our legal history inevitably leads one to inquire how it came about that lawyers in this country seemed to regard legislative enactments as the natural if not the only source of procedure. Certainly this was not true in England. Professor Sunderland points out that "Never, in the 800 years since the Plantagenets laid the foundations of our system, did Parliament ever undertake to chain the courts to a legislative code of procedure. A few corrective statutes found their way into the law. Magna Charta prohibited the courts from selling justice, gave the common pleas a fixed location, and established the principle of trial by jury. A dozen statutes relating to amendments are found among the records of four centuries of parliamentary activity. Here and there new remedial rights were created and old procedural abuses were cut off * * * Not even during the storm and stress of the 19th century, when the flood of popular resentment threatened to engulf the profession, did parliament lose its poise."

The first great reform movement that culminated in the Civil Procedure Act of 1833 in England specifically provided in the preamble that "The judges should make such alterations in the rules of pleading and practice as they

should deem expedient." An even more explicit provision appeared in the Procedure Act of 1852, which set forth that "the judges were to retain complete power to make any rules regarding pleading and practice that they might deem expedient, anything in the present act to the contrary notwithstanding." And, finally, in the Judicature Act of 1873 a schedule of rules of court was included. The system thus created has become firmly established.

While England was adhering to the practice of fixing procedure by rule of court, the United States for the most part abandoned the theory of judicial control. The Field Code, enacted in New York State in 1848, is, perhaps, the most sweeping illustration of this departure. While that Code accomplished reforms of the first magnitude, it accentuated the trend toward the regulation of the details of legal procedure by legislative action. This movement has been described by some as the result of a popular resentment against the failure of the American bar and the Judiciary to reshape the old English procedure to fit local conditions, or new developments; and, in part, to the leadership of the legislature in the political life of that period. It is not my purpose to discuss the merits or de-merits of the Field Code. I advert to it simply to point out that it was a departure from the accredited system of judicial rule-making; that historically the courts and not the legislatures were the sources of procedure; and that the recent trend which we are now witnessing in this country is in reality a return to the basic concept which permeated English legal development, and also American legal development prior to 1848.

Judicial rule-making is of ancient lineage. Even in Roman law the praetor, by edict which was published when he entered upon his duties, established the procedure which would govern the litigants in his tribunal.

A few years ago a noted legal authority took the position that legislative rule-making was unconstitutional as violative of the doctrines relating to legislative, executive and judicial powers; and that all legislatively declared rules for procedure, civil or criminal, are void except such as are expressly stated in the constitution. It is not necessary in this discussion to go to that length. It is sufficient to point out, first, that it is entirely proper for the legislature to authorize the courts to regulate procedure; and second, that for reasons of policy such rules should be formulated by the judiciary. Professor Sunderland makes this observation: "Seventy-five years under a legislative system of procedure has accustomed the legal profession in America to a dogged persevorance in a hopeless cause. Rules of Procedure, laid down by legislative mandate do not grow spontaneously out of the exact requirements of actual practice, and they fail to show that delicate adaptability to circumstances which distinguished a professional technique."

Let us now consider, more in detail, the nature of criminal procedure in the Federal courts. How is that procedure determined? To what extent is it based upon legislative enactment? Is there an undesirable diversity of practice in the several districts?

The conformity Act of 1872 which requires the Federal courts to conform to state practice in actions at law, does not apply to criminal proceedings. The latter are governed by Section 722 of the Revised

Statutes (U. S. Code, Title 28, Sec. 729) which reads as follows:

> The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Thus, Federal criminal procedure is governed by a strange admixture of various statutes and rules of common law.

Comparatively little difficulty is encountered in dealing with those matters of criminal pleading, practice, and procedure which are covered by specific statutes. These statutes are not numerous. Amongst them are the following: a requirement that at least twelve grand jurors must concur in finding an indictment (U. S. Code, Title 18, Sec. 554); a provision permitting several counts in one indictment "which may be properly joined" (id., Sec. 557); the contents of an indictment for perjury (id., Sec. 558); effect of judgment on demurrer (id., Sec. 561); the requirement that in capital offenses copy of indictment and list of the jurors and witnesses be furnished to the defendant at least two days before the trial (id., Sec. 562); hearings before committing magistrates (id., Secs. 591 and 595); removal proceedings (id., Sec. 591) and search warrants (id., Secs. 611 - 632).

However, the great majority of matters bearing on criminal procedure are not covered by any Federal Statute. In this situation the common law must be looked to, that is the common law as modified by state constitutions and state legislation. To follow the tortuous trail of modifications is often a trying task. Under such a system there exists an inevitable element of uncertainty and confusion. But even if the trail through the forest of modifications were a clear one still the Federal courts would not be free of the entanglements of ancient common law procedure.

Lest these observations seem like over-statements permit me to draw your attention to the vivid words of Mr. Justice Clifford in Tennessee v. Davis, 100 U. S. 257, 299. Commenting upon Sec. 722 of the Revised Statutes he said:

> "Examined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems."

Of course, it is possible for those interested in modernizing our procedure to urge upon the Congress the passage of specific enactments. That has been the traditional, if somewhat haphazard, method. But such a process is necessarily patchwork. The better method is the creation, under rules of Court, of a uniform, simplified and comprehensive system.

In making this suggestion I am not unaware of the difficulties which would be confronted in drafting the rules. For example, it is not always a simple task to distinguish between procedural details on the one hand and matters which affect substantial rights on the other. While it is difficult, in close cases, to make the necessary distinctions, and while the drafters of the rules will be faced constantly with perplexing problems, these facts do not appear to me to be, in any sense, fatal to the project. The same problem was faced by the Supreme Court and its advisers in connection with the preparation of the Rules of Civil Procedure.

I have no reason to believe that the Supreme Court in framing Rules of Criminal Procedure would fail to use the same discriminating care which was exercised in the preparation of the Civil Rules. In any event, if the Court should feel that a particular problem might better be left to legislative determination such matters could readily be excluded.

There is no reason, with the exception just noted, why such a body of rules should not run pretty fully the gamut of procedure from arrest to conviction. Much valuable information has already been compiled. The American Law Institute in 1930 completed a Model Code of Criminal Procedure, which was drafted by a distinguished group of experts. While that code was designed principally for use by the individual states, it would doubtless be of immeasurable service in any comprehensive re-examination of our Federal criminal procedure. For example, the study there given to preliminary examinations in the magistrates' courts would be extremely helpful in any study of procedure before United States Commissioners. The same would hold true of the sections of the Model Code dealing with the grand jury,

arraignment, motions to quash and pleas in abatement, demurrers, procedure for selecting a trial jury, continuances, the conduct of the trial, and the reception of the verdict. As a matter of fact, the framers of that code had in mind its possible use in any State in which judicial rule making had been authorized.

There are many points in our Federal procedure requiring simplification. A single illustration will suffice. I would suggest, for example, the short form of indictment which prevails in many of the states but which unfortunately has been used in the Federal system but rarely and then only with serious heart-burnings and excessive trepidation. An intensive study of our procedural machinery will reveal many defects which cry for remedy. To extend the rule-making power along the lines suggested, would, it seems to me, round out our Federal procedure. Every reason which has impelled us to grant to the judiciary the control of procedure in civil matters and in criminal appeals is equally pertinent to the present proposal.

The American public is keenly conscious of the problems of crime control. There has been a growing demand, and a welcome response to that demand, for efficiency in the investigation and apprehension of criminals. As the public becomes increasingly alert it is insisting upon the scientific treatment of prisoners after they are convicted. Last, but not least, it is demanding efficient disposition of criminal cases. Unnecessary delays will not be tolerated indefinitely. The average citizen has but scant patience with legal refinements that all too often cloud a criminal trial and obscure the main objective - the determination of guilt or innocence - the search for truth. We must reform or be reformed. It is in that spirit that I submit for your consideration the extension of the rule-making power to criminal procedure prior to verdict. It should be the high privilege of the profession to take the lead in this vital matter.