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Sane Procedural Reform

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In these later days much is said about reforming the procedure of our courts, about recalling our judges, at arbitrarily appointed times, and about reversing their decisions by popular vote. Most of what is said about these matters is said by those who have least reason to say it. It is no exaggeration to assert that those who are most severe in their criticism of the courts and of their procedure and most lavish in their suggestions of reform are they who know little, beyond the most general, about the courts and nothing about their procedure from personal contact with it. From such a class of self-constituted reformers lawyers and judges are not the only sufferers. All kinds of professions, all sorts of people have to submit to their pretentions and endure their intermeddling. Courts are not perfect. Law is not an exact science. It goes without saying that different men chosen to decide controversies among their fellows may reach, in the economy of nature will reach, different conclusions in respect to such controversies and the rights and liabilities of the parties thereto, and that too, whether they be judges appointed by the law or arbitrators chosen by the parties, whether they be referees or jurors; and in reaching their separate but different conclusions each will be governed by no motive other than to pronounce a righteous judgment. The human element was a large factor in the controversy when it began; it became a larger factor as the controversy proceeded and increased in intensity until the controversy was finally determined.

In the administration of the law, the human element is and ought to be present. There is the man first, the judge next. But the judges of our courts, susceptible to the suggestions of the human element, as they must necessarily be, yield to its appeals less than any other body of men. Our better nature would revolt, if in the judgments of our courts, justices were not sometimes tempered with mercy.

We all know that the quality of the judge depends in a very large degree upon his ability to subordinate the feelings, the sympathy, the unconscious bias of the man to the duty of the magistrate. All of us, I dare say, have been surprised to observe, at times, how fully some judges are able to merge the man into the magistrate when they are

exercising their judicial functions. It is a rare gift, an exceptional quality, and happy is he, fortunate is he, great is he, who has it. No reasonable being pretends that the decisions of our courts will be just, sound or reasonable in every case. The limitations upon human wisdom and upon the virtue common to mankind forbid that.

I want to emphasize my belief that the overwhelming majority of our intelligent, observing, thoughtful, well-meaning citizens—laymen and lawyers alike, rest secure in the conviction that, in the main and with comparatively few exceptions, the decisions of our courts are just and proper and their judgments righteous altogether; that they are conceived in reason and founded on sound principles; that they enforce the rights of parties to controversies as they should be enforced and impose liabilities in accordance with right and justice, as right and justice are understood, interpreted and practiced by fair-minded, honest men. Altogether, the great controlling body of our decisions is such as would have been made by intelligent, fair-minded men, capable men of affairs. Without impairment of their general soundness, it may be admitted that decisions sometimes proceed upon technical rather than logical considerations, that sometimes they are arbitrary rather than reasonable, sometimes radically opposed without apparent cause.

Notice to indorser.

Sufficiency of affidavit for attachment.

Here and there, now and then, a court with the best intentions goes astray and renders a decision, to put it in the extreme, radically wrong, rankly unjust, and cruelly oppressive. Such a decision may be and, too frequently, it must be admitted, is, followed as a precedent by other courts, simply because it is a decision, and thus the mischief of the erroneous decision is extended and multiplied. But sooner or later and finally, as all careful observers are aware, the erroneous decision ceases to be regarded as a precedent and it and all its effects and mischief are eliminated by the saner judgments of the law. Here and there too, now and then, too, a court renders a decision induced by bias, prejudice or corruption. But cases of this sort are extremely exceptional. We appeal to the history of our judges and chancellors and to the experience of observing men in our country and in the mother country in confidence assurance of the verity of the statement.

I want to emphasize what I believe the history of the bench and the experience of men unite in declaring, namely, that the instances have been rare, indeed, in which the bias, cupidity, or corruption of the man has triumphed over the duty, fidelity and honor of the judge, the occurrences unusual, when the judge has betrayed the trust reposed in him. I speak within the bounds of moderation when I say that the robe of the judge is as free from stain as the frock of the priest.

Let it be conceded that our courts sometimes go astray. Let it

be granted that our judges sometimes are corrupt, but let it be remembered and, as far as possible appreciated, how much we are all indebted to them and to the system of which they are a part for blessings which are so familiar to us and so much a part of our personal and social being, our business, and political life, that we never pause to inquire into their origin but take them all and enjoy them all as a matter of course. Let it be borne in mind that the Supreme Court of our nation gave shape and stability to our national government; that men less able, less independent, less fearless of the passions of the public and its momentary disapproval, than Marshall and his associates, might easily have converted the national government, that the framers of its fundamental law had in mind, into a weak confederation of states.

The absolute independence of judges is the very basis of our judicial system, the very key stone in the arch of its efficiency.

Our fathers recognized this, from a knowledge born of experience, and so they made this provision a part of the fundamental law of the land: "The judges both of the Supreme and inferior courts shall hold their offices during good behavior; and shall, at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." Neither Congress nor any other agency of the government can coerce the courts by reducing their compensation. This provision conceived in wisdom and prudence has stood for a hundred and twenty-five years without assault from any quarter and with the unanimous approval of our millions of people. Who is rash enough to desire to deprive our judges of their independence by means more objectionable and less liable to be considerate than those which our fathers forbade.

Those of our people who, for one reason or another and frequently for no reason at all, were and are dissatisfied with our courts and who, in consequence, demanded and demand the recall of judges and the reversal of their decisions by popular vote are growing to a more appreciative recognition of their obligations to the courts and to a sounder understanding that upon an intelligent, able, independent, dignified judiciary, more than upon anything else, depend their rights and liberties, their security, their welfare and happiness and all else they hold dear. We have reason to feel assured that the somewhat widespread noisy and truculent clamor for the recall of judges and the reversal of judical decisions if not dead, is at least, morbund.

The soberer sense and saner judgment of the people, induced in large measure by the intelligence and conservatism, the fidelity and patriotism of the bar, have triumphed over their misconceived and misdirected impulses.

But those who would reform the *procedure* of our courts are still numerous and active. They are to be found in the profession and out of the profession. It is men of this latter class who make the most noise and the most extravagant claims. They seem to think that any

thing which involves change constitutes reform. They are too unacquainted with procedure, as it is, to know what changes from present methods amount to reform. They refuse to fail to recognize that they are the beneficiaries of a system of judicial procedure which is a growth and development of the ages; that it is the result of wisdom and experience of capable men; that conservatism has characterized as it ought to characterize, the procedure in our courts of justice, that changes have been made from time to time as new conditions and experience required. These self-constituted reformers fail or refuse to acknowledge what they owe to the past. They are like unto those of whom it was written three thousand years ago. Whether by the inspired law giver and judge of Judea or by some one of later times, matters not; whether in the presence of impressive Sinai or elsewhere, is immaterial, "They live in cities they never founded, they dwell in houses they never furnished, they draw water from cisterns they never dug, they pluck olives from trees they never planted, they sip wine pressed from grapes grown in vineyards they never cultivated, forgetting all the while who brought them forth from the land of Egypt and out of the house of bondage."

Nobody pretends that the procedure of our courts is incapable of improvement. As a matter of history, the bench and bar have engaged and are still engaged in constant but conservative efforts to improve it. As a matter of fact, it has been improved steadily but slowly and carefully by those best qualified and, I may add, by those only qualified to improve it, the judges and the lawyers actually and constantly in contact with it. I plead for a sane reform of the procedure of our courts. I believe that the only safe way to reform procedure is the way pursued by the Supreme Court of the United States in formulating the New Federal Equity Rules.

It is to the modification of the rules of Equity procedure in the Federal Courts which resulted in the New Federal Equity Rules-so-called that I desire as briefly as may be, to draw your attention although I am sensible that I shall be dealing with matters wholly familiar to you.

The Constitution prevented a union of the court of law and the court of equity and made it imperative that the court of Equity should be maintained as a separate tribunal after the manner of the High Court of Chancery in England as it then existed.

The rules of Procedure in the Federal Courts of Equity have been made from time to time under authorization of Acts of Congress.

The Judiciary Act of September 24, 1789 provided: "That all said courts of the United States shall have power * * * * * * to make and establish all necessary rules for the orderly conducting of business in said courts, provided such rules are not repugnant to the laws of the United States."

In any assemblage of lawyers and judges the Judiciary Act of 1789 is deserving of more than mere mention. It is, from every point of

view, one of the great acts of Congress and stands and always has stood a monument to the great foresight and distinguished legal ability of that band of eminent lawyers of our early governmental history who under the leadership of Oliver Ellsworth, formed, without precedent, without analogies and without other guide than their own ability the splendid system of jurisprudence, jurisdiction and procedure of the National Courts which, with slight changes, from time to time, has met the demands of ninety millions of people as well as of four millions; which has proved adequate to the requirements of a territory of the proportions of an empire as well as of a territory of limited area and suited to the complex business and social life of the opening years of the twentieth century as well as to the simpler business and social life of the closing years of the eighteenth century.

What was done in enacting the Judicial Code of March 3, 1911, exemplifies the same reform for which I am contending. With the Judiciary act of 1789 and the amendment thereto adopted from time to time to meet the changed conditions of advancing years and increasing population and business as their guide, the Sixty-first Congress had little to do save to eliminate the obsolete and reject what was unnecessary to present requirements; without it for their guide, the Sixty-first Congress would have been confronted with a task from which the wisest among them would have shrunk. It is no disparagement of the originality or wisdom of the Sixty-first Congress that it followed in the footsteps of the First Congress.

The experience of a century was appealing for the preservation of a system which, though not perfect at any given time, had met, as well as could have been reasonably expected, the needs and requirements of the people through rapidly changing and varied circumstances and was suggesting a revision of previous acts, limited to the requirements and accommodations of present conditions. That Congress heeded the appeal and suggestion is manifest from the judicial Code itself. It creates little if anything. It revises and amends with moderation. The act itself is an object lesson in sane reform.

By act entitled, "An act to regulate Processes in the Courts of the United States" approved September 29, 1789, Congress made specific provisions as to the procedure in the National Courts in these words:

"That until further provisions shall be made, and, except where by this act or other statutes of the United States is otherwise provided, the forms and writs of Execution * * * * * in the Circuit and District Courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the Supreme Courts of the same. And the forms and modes of proceedings in Causes in Equity and of Admirality and of Maritime jurisdiction shall be according to the course of the civil law."

This latter act is supplementary to the Judiciary Act of September 24, 1789. Its purpose was to direct temporarily and until further provision should be made by rules, the procedure in the national courts.

The Statute is mentioned in this connection because it shows the inclination of the First Congress that proceedings on the law side of the Court should be conducted in conformity with the practice in the respective States, but on the Equity side of the court in conformity with the practice of the English Court of Chancery. This act by its terms was to continue in force until the end of the next session of Congress and no longer.

The provisions as to procedure in the courts of law was the result of reasonable desire and sound judgment that two kinds of procedure in the same state—one in the State Courts and another in the Federal Courts—would be confusing and oppressive; the provisions as to procedure in the courts of Equity was the result of the constitutional requirement that the two courts should be separate and distinct. The experience of a century and a quarter has approved these provisions.

The Second Congress by act approved May 8, 1792, entitled, An Act for regulating Processes in the Courts of the United States &c., provided:

That the forms of writs, executions and other process except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said Courts respectively in pursuance of the Act entitled "An Act to regulate processes in the Courts of the United States; in those of Equity and Admiralty and maritime jurisdiction according to the principles, rules and usages which belong to the Court of Equity and to the Courts of Admiralty respectively as contra-distinguished from courts of common law. Except so far as may have been provided by the Act to establish the judicial courts of the United States. *Subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient or to such regulations as the Supreme Court of the United States shall think best from time to time by rule to prescribe to any circuit or district court concerning the same.*

The Twentieth Congress by act approved May 19, 1828, entitled "An act to regulate Processes in the Courts of the United States" extended the provisions of the act of May 8, 1792 to the Courts of the United States held in those states admitted into the Union after May 29, 1792, but did not abridge or enlarge the power and authority of the Supreme Court to adopt rules, as the same was conferred by the act of May 28, 1792. It may be said, however, that the Act of May 19, 1828 added strength to the manifest disposition of the Congress that in actions at law the procedure in the Federal courts should, as near as might be, conform to the procedure then used in the highest court of original and general jurisdiction in the state wherein the federal court was held. The Twenty-seventh Congress by act approved August 23, 1842 in further supplement of the Judiciary Act of September 24, 1789 provided: Sec. 6, "That the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district

and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings in suits at common law or in admiralty and equity pleading in the said courts, and also the forms and modes of taking and obtaining evidence and of obtaining discovery and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering and enrolling decrees, and the form and modes of proceeding before trustees appointed by the court so as to prevent delays and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit." And so stands the legislation authorizing and empowering the Supreme Court of the United States to promulgate rules, from time to time, to regulate the procedure in the federal courts of equity and to alter, amend and reform them as changed conditions, increased knowledge and added experience may suggest. That the power of promulgating and amending the rules of procedure was wisely and prudently lodged in the Supreme Court no one acquainted with the situation has questioned or will question.

It is apparent from the acts above referred to that the Congress gave direction, in general terms to the procedure both in the Courts of common law and in the Courts of equity; in the former the procedure was destined to be as varied as the several states respectively might direct in respect to their own courts of original and general jurisdiction; in the latter as constant or staid as the action or non-action or the Supreme Court might incline. In respect to procedure in the Court of Equity the acts above referred to have been generally understood to adopt the principles, rules and usages of the Courts of Chancery in England.

It was held in Wayman v. Southard, 10 Wheat 141, that Congress had by the Constitution exclusive authority to regulate the proceedings in the Courts of the United States and might delegate that power to the Courts themselves.

I propose to refer briefly to the manner in which the Supreme Court exercised the power so delegated to it.

It appears that by the Act of September 29, 1789 Congress made provision for the general, but temporary, regulation of processes in the courts of the United States. The act itself suggests that Congress expected, if it did not enjoin that further provision should be made to regulate the processes in the courts before the end of the next ensuing Congress; because by its own terms the act was to continue in force only to that time.

At an early period after the organization of the federal courts each of them adopted rules for the regulation of practice therein. At that time the English practice generally prevailed. The rules prescribed by the equity courts themselves, under the authorization of the Statute continued to guide their practice down to July 1, 1822.

The Supreme Court within the February term 1822 prescribed and

promulgated rules of practice for the courts of equity of the United States and ordered that they become effective from and after the first day of July then next ensuing. Those rules were thirty-three in number. Rule 33 provided: "In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the court shall be regulated by the High Court of Chancery in England." These rules continued in force until they were superseded by rules prescribed and promulgated by the Supreme Court in 1842. The rules of 1842, ninety-two in number, were molded in the forms of the English Chancery practice. Some of them may be followed back to the hundred rules of Lord Bacon, the foundation of the regulated practice of the Court of Chancery; many of them are traceable to the later rules of the English Chancery Court; all of them were based upon the practice of that court, a practice which was retained in the place of its adoption long after it had been abandoned, not so much in substance as in form, in the home of its origin. These rules had, and the new rules which have superseded them will have, all the force and effect of law and were and will be binding as such upon all suitors before the court. The Government itself was not and will not be exempt from their operation and control. This results from the well recognized and conceded fact that when the United States voluntarily comes into its courts seeking relief against an individual, it comes not as a sovereign, but as a suitor, and although it is the creator of the court and the fountain head from which all rules of procedure issue, it stands before the court in the same light as any other suitor. UNITED STATES v. BARBER LUMBER CO. 169 FED. 184. The source from which the rules of 1842 sprang, the practice on which they were founded—the practice of a court which had reached a high state of efficiency not only by reason of its great age but more by reason of the distinguished ability of the eminent chancellor who gave its procedure direction and of its successive chancellors—the inherent appropriateness of the rules themselves, warrant the conclusion that they were probably as good as any that could have been adopted, certainly as good as the wisdom and experience of the members of the Supreme Court could prescribe. They were amended from time to time, through suggestions born of experience. On the whole the rules of 1842 as amended served their purpose well. Among the lawyers living today probably not a single one could be found who had ever practiced in the Federal Courts of Equity under any other rules of procedure prior to February 1st, 1913.

I have referred, perhaps at unwarranted length, to the source of the rules of procedure in the Federal courts of Equity, and somewhat to their nature and suitableness to their times and conditions, in the conviction that they decisively point the safest, surest, sanest course of prescribing rules of procedure and of reforming them conservatively and judiciously, as occasion may demand.

The rules of 1842, as amended, became in the course of events the subject of dissatisfaction and criticism. They fell into disfavor more or less marked. They were charged with being unsuited to the changed and changing conditions. The procedure which they prescribed was complained of as too cumbersome, too slow, too expensive. The natural and judicious conservatism of the Supreme Court operated to prevent its lending a too ready or too willing ear to complaints and criticisms of a system which had existed without substantial change for a period of seventy years—really for quite a century—a system to which the bar had become accustomed by long usage and which was quite well understood through construction in numerous cases where the procedure had been challenged as doubtful or dubious. A fixed practice appeals to bar and bench alike. Precedent is the very citadel of those who are ruled by the common law as well as of those who are charged with its administration and enforcement. It is proper that we should, and a verity that we do, in all our public concerns, give heed to the wholesome maxim so aptly expressed in our great Declaration:

"Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; accordingly all experience hath shown, that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

The legitimate offspring of this principle was the disposition which induced a retention of the rules of 1842, as modified from time to time, long after their complete appropriateness to the times and conditions was doubted by members of the bench and bar and later denied; long after the procedure which they prescribed had been quite radically modified in the court from which it was borrowed. It goes without saying that no system of procedure can be devised which will be free from infirmities; none to which objections more or less valid can not be taken. Wisdom, special knowledge and experience can not hope for anything more than an approximation to perfection—without wisdom, special knowledge and experience an approximation to perfection is hopeless. And so I affirm that there can be no sane reform of the procedure of our courts unless it issues from the wisdom, special knowledge and experience of the judges and lawyers who are constantly dealing with the subject. If confirmation of this affirmation were needed we have only to look about us to find that safe and sane reform of the methods of carrying on business in all fields of efficient endeavor has its root and growth in those very fields. Procedure in our courts is the method of carrying on the business of the courts. Faults in the procedure prescribed by the bench and bar for the orderly regulation and conducting of the business of the courts are faults due to limitations upon human capacity, faults in a procedure ordered by others, are faults due to lack of special knowledge to want of experience, to misunderstanding, misapprehension and misconception.

Occasion for new rules.

On the 4th of November, 1912, the Supreme Court of the United States adopted and established new rules for the courts of Equity of the United States and by formal order directed that they should be in force on and after February 1, 1913, and that all rules theretofore prescribed regulating the practice in suits in Equity should be abrogated when the new rules took effect. The power to revise the rules of procedure in the federal courts of Equity is lodged exclusively in the Supreme Court. The new Federal Equity Rules emanated from that court. But the formulation of these rules was the work of a committee composed of forty-six members. The Supreme Court was represented on the committee by the Chief Justice, the late Justice Lurton and Justice Van Devanter. The several Circuit Courts of Appeals were requested to appoint and did appoint members of the bar within their respective circuits to cooperate with the Supreme Court or its committee in the formulating of revised rules of practice. The Committee as finally made up included, aside from representatives of the Supreme Court, forty-three members of the bar conspicuous in their respective circuits for their professional learning and ability and for their aptitude for the special work by reason of their experience as practitioners in the federal courts. The first circuit was represented on the committee by three members, the second by nine, the third by six, the fourth by three, the fifth by six, the sixth by four, the seventh by four, the eighth by three, and the ninth by five.

We can pay no higher compliment to the capacity of the committee than to judge it by the character and ability of the member from Michigan, a man born to the law and carefully trained in its principles, a man of affairs, possessor by inheritance and experience of a peculiar fitness for the sort of works entrusted to him by his appointment.

It may be taken for granted that the committee as constituted would reflect the ideas and sentiments, pertaining to the general subjects, of the whole country, and as a whole would be able to choose and recommend for adoption the best features of procedure. The Supreme Court had not, prior to this time, at least in any formal or significant way, called to its aid in work of like character the services of representatives of the bar of the country.

On the committee were representatives of practice under the code prepared to urge for adoption whatever was of substantial value under that practice. There were also representatives of practice in jurisdictions where the common law courts and Equity courts were separate and distinct tribunals, competent to point out whatever was of advantage in a system of procedure where there was a complete separation of common law courts and Equity courts and competent to suggest what should be retained and what abandoned of the old system of Equity procedure. There were also representatives of practice in jurisdictions where the distinction between actions at common and

suits in equity was maintained but in courts presided over by the judge or the chancellor as the nature of the business in hand might require, qualified to suggest whatever was meritorious in the particular procedure under that system. Probably no feature of practice followed in any state of the union was unrepresented in the committee as it was constituted.

The present English procedure was carefully examined. Mr. Justice Lurton visited England with the view of studying the English procedure in its actual operation. He consulted the Lord Chancellor and received suggestions from him, the result of which is that not a few features of the English procedure are adopted in the New Equity Rules. Members of the committee from the several circuits made suggestions which were considered and adopted or rejected as to the entire committee seemed best.

The manner in which the work was done—which I have only sketched not drawn—the character and ability of the men who had it in charge, the adoption of the recommendations of the committee by the Supreme Court leave no cause for doubt that the new rules embody the best thought of the bench and bar of the country in the matter of what, in view of all the circumstances, should be the proper procedure of the Equity Courts of the Government.

Changes in Procedure made by the new Equity Rules.

It is not my purpose to comment at any length on the changes in procedure made by the New Equity Rules. During the time they have been in force, I have not been in a position to come in contact with them in any practical way. For this reason I would feel it rather an assumption to speak of them in detail or offer any suggestion about the way they have worked out in practice so far. What I know of them in that regard is what I have heard others say about them, and that is wholly commendatory. But it is apparent first of all that the great fundamentals of former rules are preserved. The Court of Equity stands as it did stand. The distinction between actions at law and suits in chancery is not disturbed. I would not mention anything so manifest if I had not heard it asserted by some who are lawyers and by more who are not that all distinction between actions at law and suits in chancery and all equity pleadings have been wiped out by the new equity rules. We are all aware that no such rule could have been prescribed because of the Constitutional provision making it imperative that the two courts shall be kept separate and distinct. Rule 22 provides as follows:

"If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it shall forthwith be transferred to the law side and be there proceeded with with only such alteration in the pleadings as shall be essential."

This is a new rule based upon the English practice under the Judicature Act of 1875.

Rule 23 provides: "If in a suit of equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

This also is a new rule, and is also based upon an analogous English rule.

Is it possible that anybody could have found in these two rules even a suggestion, or any purpose or design to wipe out equity pleading and all distinctions between actions at law and suits in equity?

It seems that the committee had these leading purposes in mind: to simplify the pleadings, to speed the causes to hearing and to lessen the cost of taking testimony and of appeal. A comparison of the new rules with the earlier rules discloses that the procedure has been simplified in many ways, that the old and unimportant distinctions are eliminated, that archaic forms are discouraged. Procedure which tends to, permits, or results in delay, is abolished and in its place is substituted a procedure better adapted to speed the cause to issue and to determination. The changes made insure less delay and expense. Delay in bringing causes to issue and determination has furnished perhaps the chief ground of complaint against the procedure of our courts. It must be conceded that many features of procedure have been such as to permit delay. Delay is the rock upon which the voluntary self-constituted reformer has built his edifice of complaint. But failure in every instance to bring the cause to issue and final disposal within what might appear to be a reasonable time may or may not be delay in the sense in which the termi has been used in speaking of the procedure of the courts. The Supreme Court of the United States was behind in its decisions, at the time the Court of Appeals was created, at least five years. A cause taken to the Supreme Court at that time could not be heard and disposed of before five years had elapsed, unless a showing satisfactory to the court were made for its advancement on the docket. Nobody called that delay. We are all aware that the enforced postponement of the disposition of cases was prejudicial to litigants before that court but we all approved the policy of the Supreme Court in doing well what it did, without reference to the amount of work it had to do. Some people imagine vain things. Some imagine that because a long time elapses between the bringing of a suit and its final settlement, the procedure of the court or the court itself is in fault. It will be admitted on all sides that one must understand what constitutes delay in order to shape procedure which will avoid delay. Only those who come into actual contact with cases in the courts can know what delay is and to what it is due. (SAUER v. CAMPFIELD.)

Many of the new rules are identical or substantially identical with the former rules. Of the eighty rules constituting the new code twenty-one are substantially identical with former rules. Many of the former rules are included in substance in the new rules, with such minor

changes in arrangement and phraseology as would exclude them from the identical or substantially identical class. Of this class there are ten. The remaining rules are in part founded upon and adopted from the rules and regulations of the present practice of the court of Chancery in England. Some few of the latter class are new or original in that they are so much a departure from the form and substance of the English Rules that decisions on the latter would probably not be safe precedents for construction of the former.

As to Pleadings.

The technical forms of pleading in equity are abolished, except so far as they are prescribed by statute or especially required by the rules themselves. The court may at any time in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.* This mandatory provision which closes Rule 19 is of striking significance. The livery in which the suitor appears is made unimportant by the imperative provisions of the rule. Rule 25 deals with the bill of complaint. It is a substitute for the matter contained in former Rules 20-24 both inclusive. It provides that, hereafter, it shall be sufficient that a bill of equity shall contain in addition to the usual caption:

1. The full name, when known of each plaintiff and defendant, and the citizenship and residence of each party. If any party shall be under any disability, that fact shall be stated.

The address or salutation made imperative by former Rule 20 is not required but it may be doubtful whether the language of the rule is tantamount to a prohibition of its use.

2. A short and plain statement of the grounds upon which the court's jurisdiction depends.

3. A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

This provision is evidently the offspring of a desire to avoid prolixity in the framing of bills, but it embodies only what has long been recognized as a fundamental rule of equity pleading.

4. If there are persons other than those named as defendants who appear to be proper parties the bill should state why they are not made parties—as that they are not within the jurisdiction of the court or cannot be made parties without ousting the jurisdiction.

5. A statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit is sought, the bill should be

verified by the oath of the plaintiff or someone having knowledge of the facts upon which such relief is asked."

The prayer for subpoena is not required. Rule 12 provides that when the bill is filed the clerk shall issue the subpoena thereon, as of course, upon the application of the plaintiff.

Demurrers and pleas are abolished *in form but not in substance.* The defense raised by demurrer under the old practice may be separately presented, separately heard, and separately disposed of and the same is true of the defense raised by the plea under the old practice. Rule 29 declares in terms: "Demurrers and pleas are abolished." This opening sentence of the rule has led to considerable misconception of the purpose of the rule itself. We would not expect the Supreme Court to enjoin by rule a defense founded in law to a bill which on its face stated no cause of action, or to require parties to try on its merits a suit only to find at the end that the law interposed an insuperable objection to its maintenance, nor would we expect the Supreme Court to sanction a rule which would preclude the parties from raising a single defense formerly interposed by the plea. Demurrers and pleas are abolished in form only, their substance is preserved and all this is done for the purpose of preventing delay in reaching an issue and disposing of the cause.

In two respects the new rules make quite a radical change. First, as to parties. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, trustee of an express trust, a party in whom or in whose name a contract has been made for the benefit of another or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought.

As to Testimony.

In all trials in equity the testimony shall be taken orally and in open court except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence as in actions at law. This is the substance of Rule 46, and makes a marked change in the trial of equity causes. Taking testimony in open court is now the rule; taking it before commissioners is now the exception.

Whether these rules are all that could be desired involves a subject too idealistic to engage our attention. That they are all that could have been reasonably expected is acknowledged I believe without appreciable dissent. In their formulation the representative wisdom, experience, and special knowledge of the bench and bar of the whole country were enlisted. They embody all that long use had proved to be valuable, all that experience had suggested was necessary or desirable to changed and changing conditions, all that tends to make procedure more simple, less expensive and altogether better calculated to meet the needs and requirements and serve the convenience of litigants before the court, which is the end to which all procedure

should be ordered. These rules constitute what to my notion is sane procedural reform. Who can suggest a better method than the one employed? Shall the work of improving or reforming the procedure of our courts be confided to irresponsible persons without special knowledge or experience, or shall it be intrusted, as in the case which has been engaging our attention, to those who are unquestionably qualified to preserve it and improve it and not through ignorance or passion to destroy what we have? We are well aware that agitators and theorists, revolutionists and zealous self-constituted reformers, may like some unshorn Samson, tear down the temple of Justice, we are aware also that with all their strength they have not the power to restore it from its magnificent ruins.

The new Federal Equity Rules came at an opportune time, at a time when the movement for the recall of judges and their decisions and the clamor for change in the procedure of our courts were at fever heat. They have played a significant and important role in teaching the people a wholesome lesson. May their effect be as lasting as it has been potent in leading our people to saner, soberer judgment.