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A Symposium on Federal Jurisdiction and Procedure: Forward

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A SYMPOSIUM ON FEDERAL JURISDICTION AND PROCEDURE

FOREWORD

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In the course of his exceedingly well written rejoinder to "The Case against Fact Pleading in Louisiana,"[1] John Tucker, one of Louisiana's legal great, thus opines:

> "A law suit has always been an adversary proceeding and it probably always will be . . ."
> "The trial being considered, therefore, as an adversary proceeding, the necessity for the adoption of rules for its conduct which will keep the fight out in the open, give the opponents equal opportunity, and prevent judicial ambuscade, is imperative."[2]

In the pious hope and fond belief that in the Federal Courts at least the articles making it up will help to do this, the Editors of the *Vanderbilt Law Review* have launched this Symposium, and I have consented at their invitation to write a foreword or preface for it.

As to why they selected me for the prologue rather than some other, anybody's guess is as good as mine. I suspect that it was in part because, though I am not in age, I am in commission the oldest Federal Judge in active service save one, and that one is an octogenarian who is too cagey and wily to be Tom Sawyered into whitewashing fences for others.

I know, though, why I accepted. One reason was that to feel like a trial lawyer, to think like a trial lawyer, to be a trial lawyer, has run for generations in my blood. For more than fifty years now I have been serving in the Department of Errors and have humbly and afar off followed and helped to make and unmake the law. First, a trial lawyer, an inducer of error; next a trial judge, a producer of error; now an appellate judge, theoretically a reducer of, actually, I fear,

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1. McMahon, *The Case against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953).

2. Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading*, 13 LA. L. REV. 395 (1953).

a conducer to error. I count, therefore, with complete confidence upon my colleagues of the Bench and Bar to view my efforts with no critic's eye, but with that precious inner eye of faith which sees "the substance of things hoped for, the evidence of things not seen."

Until I was called to the Bench, now thirty-six years ago, I practiced law in Houston, Texas, with my father, the leader in his day and place of the Trial Bar. I learned from him then to feel about, and then and now to say of, the three branches of our profession, "And now abideth law teacher, lawyer, and judge, and the greatest of these is the lawyer." And when I say lawyer, I mean trial lawyer.

The other was that, in retrospect, I have, as they say in Tennessee, come "a fur piece" since I came to the Bar in 1900. A Federal Court then was not only *terra incognita* and out of bounds for me and the ordinary or run of the mill members of our Bar, but especially in equity and admiralty it was a most fearsome place in which to be. In those early days, except for my father and one or two others for whom bills and bills in the nature of had no terrors, when we stumbled or got dragged into the Federal Court, we practiced there in the valor of ignorance and by mutual agreement.

On the rare occasions when we found ourselves confronted there by a hardboiled lawyer who knew the rules and insisted on practicing in accordance with them instead of by agreement, while *Desty's Federal Procedure,* our only available weapon for offense and defense, was feebly relied on by us, this reliance would have been in vain but for the fact that a sympathetic and thoroughly informed court clerk and a tolerant federal judge were our ever present help in time of trouble.

As our community grew and federal litigation increased, and when in 1912 the great reform took place and the Supreme Court promulgated the New Equity Rules of 1912, some of us acquired Hopkins *Federal Equity Rules,* Foster's *Federal Practice,* and *Benedict on Admiralty,* and, moving cautiously and warily, found the sailing almost as easy in the Federal as in the State courts.

Later, when in 1918 I became a United States District Judge with a crowded docket, and I was floundering and struggling to dispatch it with methods devised in and suitable for a court having little to do and ample time in which to do it, I soon saw that I was in danger of denying justice by delaying it, that theorizing would not save me, only action would. I had been appointed judge. It was up to me to be one. I recognized that judging was administration, at least in the simple sense of getting the business done.

Fortunately under the Federal system, judges may go by assignment from district to district. I soon put myself in the way of acquiring the practical acquaintance, through experience with them,

of rules, methods, and practices elsewhere, especially in districts having much business to do. This acquaintance with their actual working made it very easy to put them into practice in my district.

A simple oral statement of the issues supplanted the reading of long pleadings. A statement of the substance of depositions did away with the interminable, the useless tedium of their long droning. The stipulation of uncontested matters, the clarifying of the issues, and the ascertainment in advance of trial of what matters of fact were and what were not in dispute, and the confinement of the evidence and the argument to contested points within the issues, remarkably clarified and shortened trials for court and counsel alike.

At last there was time to look around a little again for more and better methods and surplus energy to do something about them when found. Administration had served me and others like me well, and would serve us better in the future.

It was not, however, until I ceased to be a district judge and became a circuit judge, that the next, and I believe the most important of the great reforms in Federal Court procedure was instituted by the adoption of the New Federal Rules of Civil Procedure, and judging as the administration of justice in accordance with law began to come fully into its own in the Federal Courts.

These rules seemed to me to embody, crystalize and set down in positive and workable form all of the reforms which we as district judges had been trying to make and also most of our aspirations. I was fascinated and felt at home with them, and though I was no longer a trial judge, I went about over the Fifth Circuit and elsewhere talking at Bar meetings about, and answering questions with regard to, the rules as one having authority and not as the Scribes and Pharisees.

Remembering how in my early years I had lived in terror of the Federal Courts, it seemed to me that the wheel had turned completely over. Now it was in the Federal Courts that judging had become administration and one could walk softly and safely there, while in the State Courts, because of administrative lacks, justice was being delayed and thereby denied.

I was, therefore, very glad when they said to me, "Come, let us who sincerely believe that law and judging at its best is administration at its best, join in laying a predicate in lawing and in judging for more and better administration." For it seems to me that we are again in the bursting time of one of law's long, slow, but greatly glorious springs, and I look for a great flowering. In times like these, judging is administration, and the actual and the ideal draw close in the law. Pragmatic idealists, idealistic pragmatists are again abroad in the law, inquiring not idly and curiously but seriously

and with a purpose, "What are you doing and how are you doing it?" They want to know: (1) if our tools are working well; (2) if not, can they be made to work well; and (3) if not, why not scrap them for other and better tools.

Though the idea that judging is the administration of justice according to law, is very old, there is, in the acute awareness today of the need for, and the meaning of, a functional approach in judging as in everything else, a real modernism. It is almost as if there were great winds blowing, throwing open the shutters of our minds, dashing down old taboo signs and cleanly sweeping away the dust and rubbish gathered there. And so the law procedural, like the law substantive, does grow and, growing, lives.

Thus we have come whole circle around to where we began, the struggle between those two doughty champions, McMahon, the law school man, attacking, and Tucker, the trial lawyer, defending fact pleading in Louisiana, and, without taking sides, I think we can say that Tucker is right when he says:

> "The trial being considered, therefore, as an adversary proceeding, the necessity for the adoption of rules for its conduct which will keep the fight out in the open, give the opponents equal opportunity, and prevent judicial ambiscade, is imperative."

"And now will I make an end. And if I have done well and as is fitting the story, it is that which I desired, but if slenderly and meanly, it is that which I could attain to." *Maccabees II*, 15, 37-38.