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THE PLACE OF THE FEDERAL RULES IN THE TEACHING OF PROCEDURE

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If there is any proposition upon which teachers of procedure seem to agree it is that the Federal Rules ought to be a focal point of interest in the study of their subject. Most casebooks on general procedure published in recent years emphasize their concentration upon the Federal Rules: Vanderbilt's *Cases on Modern Procedure and Judicial Administration,* Field and Kaplan's *Materials on Civil Procedure,* Brown, Vestal and Ladd's *Cases and Materials on Pleading and Procedure,* to mention only a few. And when older casebooks, like Scott and Simpson's *Cases and Other Materials on Civil Procedure* or Clark's *Cases on Modern Pleading* are revised, the revision almost invariably is in the direction of greater attention to the Federal Rules. The remarkable thing about these books is that not one of them is designed as a vehicle for the teaching of federal procedure as such. Every one is offered as a vehicle for the teaching of procedure generally.

Is this tendency just a fad? Or merely a device to boost sales by offering a product which can be described as national in scope? Or is it a sound development? Some men would answer without hesitation that the development is to be applauded. For example, Professor James William Moore, writing a review in 1950 on a casebook in the special field of federal practice, said:

> "The authors have, quite naturally, given us a casebook for a specialized course designed to supplement supposedly basic procedural courses. The tables should be turned. Federal jurisdiction and practice should be the basic procedural course in the law schools. Other procedural courses, if necessary at all to nod provincially at such states as Connecticut, New York, Pennsylvania and Texas, would be fillers. Such suggestions, however, have an appalling effect upon curriculum committees. For there is nothing like membership on a curriculum committee to make a black reactionary out of an otherwise normal and forward looking person. The sadism of Lord Coke and his forms of action, the cant of the equity pleader, the hodge-podge of code pleading, and the reverence for by-gone procedures cast a spell. And from the spell, curriculum committees emerge with today's masquerades that are known as the basic procedural courses."[1]

Whether Professor Moore's point of view is a sound one depends, I believe, upon the place that the Federal Rules occupy in the entire field of procedure.

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1. Moore, Book Review, 59 YALE L.J. 1557, 1558-59 (1950).

First, let us look at the obvious limitation that the Rules apply of their own force only to cases in the federal courts. A relatively small proportion of the litigation of the nation is carried on in those courts. Most practitioners spend a good deal more of their time in the state courts than in the federal courts. While every lawyer *ought to* know his way around in the federal courts, he *must* know his way around in the courts of his own state. If, therefore, a choice has to be made in law school between state practice and federal practice, prima facie it ought to be made in favor of state practice.

But, the makers of casebooks might reply, the Federal Rules have been extensively copied. Nine states have adopted them almost in toto, and many other states have copied particular provisions. All this is true, and seems to be an excellent reason for concentrating on the Federal Rules in law schools located in states which have adopted the Federal Rules wholly or in large part. The trouble with the argument, however, is that substantially the same thing might be said of the Field Code which went into effect in 1848 in New York, and which, as of the present moment, has been far more extensively copied than the Federal Rules. It would be no great feat to demonstrate statistically that a much greater number of cases today are being conducted along the pattern of procedure established by the Field Code than along the pattern established by the Federal Rules.

But the Federal Rules are the rules of the future, say their enthusiasts. No one would dream of copying the Field Code now, whereas every year the Federal Rules gain new ground. They are rational, simple, clear—altogether the best set of rules now available, and the one likely to prevail generally in the future. Maybe so. Maybe New York and other states laboring under the Field Code or some modification of it will some day adopt the Federal Rules. But when? A generation hence? Two generations? And in the meantime, what shall the students study who intend to practice in such states? Shall they eschew learning about demurrers, causes of action, bills of particulars and similar "antiquities" on the ground that those devices and concepts may some day be abandoned?

Enough has been said to indicate that whatever justification there is for concentration upon the Federal Rules in the teaching of procedure does not lie in the practical present day importance of those rules.

Another difficulty with concentrating on the Federal Rules is that they are very limited in scope even with respect to procedure in the federal courts. No one, by studying them alone, could learn enough of the basic concepts of procedure to be able to handle the simplest sort of case. A man might know the Rules by heart and understand

perfectly every case interpreting and applying them, but still know precious little about procedure. The reason is, of course, that the Rules do not purport to be anything like a complete code. They leave untouched vast and important areas of procedure. For example, jurisdiction and venue are not covered or affected by the Federal Rules.[2] Yet an understanding of these matters is a prerequisite to even getting into court. Similarly, the remedies available in judicial proceedings, a knowledge of which is fundamental to any lawyer, are not covered in the Rules. The same is true of the nature, scope and availability of appellate review. Again the knowledge is essential and again it cannot be acquired from the Rules. Even the application of the Rules, involving as it does the doctrine of *Erie R.R. v. Tompkins* with its manifold complications,[3] is not spelled out in the Rules themselves.

There were adequate reasons for the draftsmen of the Rules not to cover such matters (because, of course, the rule-making authority of the Supreme Court was limited), but the fact that they are left out means that knowledge as to them has to come from other sources. Even on topics within the scope of the Rules, the treatment is sometimes sketchy in the extreme. For example, Rules 38 and 39 deal with trial by jury, but they cover only the mechanics of demand and waiver. The far more important, interesting and basic problem of the right to trial by jury is left untouched. That has to be learned by studying the applicable constitutional provisions in the light of the history of law and equity and their merger. Similarly, Rule 50 deals with the motion for a directed verdict, but provides no light on the crucial question of when such a motion should be granted. Only mechanics are covered. Rule 59 deals with the mechanics of the motion for a new trial, but where is one to learn the grounds for such a motion, or the scope of the trial court's discretion in reaching a decision?

In some cases, the Federal Rules make explicit reference to state practice. Thus on such crucial matters as the execution of judgments or the use of provisional remedies, the only source of knowledge even in connection with federal cases lies in state practice.

This is not a complete catalogue of omissions. Any practitioner or procedure teacher can expand it with many examples of other procedural concepts not touched upon or not developed in the Rules.

The truth of the matter is that the Federal Rules are nothing more than a fragmentary gloss on the law of procedure. The fundamental presuppositions of the subject—the nature of the judicial process, the

2. FED. R. CIV. P. 82.

3. See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Keeffe, Gilhooley, Bailey and Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949).

adversary system, the substitution of rational methods of inquiry in place of force or supernatural guidance—are not to be discovered by any amount of concentration upon the Federal Rules. And, as indicated above, even a coherent and reasonably comprehensive picture of the main surface rules for conducting litigation does not emerge from the Rules. Excessive preoccupation with them can serve only to distort the picture.

What then is the proper place of the Federal Rules in the teaching of procedure? Are they to be disregarded? Certainly not. Not only do they have a very substantial value in understanding the operations of the federal courts and other courts functioning under substantially similar rules, but they also have great general educational value. They represent some of the best and most influential thinking about procedure in our time. They provide better solutions to a large number of problems than can be found in the Field Code or others patterned after it. They are, for the most part, simple, clear and sensible.

But it must not be thought that the Federal Rules provide the final solution for the problems with which they deal any more than that they tell the whole story. Some of the Rules are unduly complicated and burdensome, like Rule 50b.[4] Others are unnecessarily vague and confused, like Rule 60.[5] Others are of highly debatable intrinsic merit, like Rule 8.[6] No one should become complacent about any aspect of procedure in the foolish belief that the best possible solution to even a single problem has been found and embalmed in the Federal Rules. The millennium has not been reached, but only a marker on the way.

All this is but a roundabout way of saying that the Federal Rules should be kept in perspective. An easy and proper way to do this is to use them comparatively, along with parallel state rules. Thus similarities and differences can be noted, explored and appraised. After all, federal practice is not a thing apart, divorced and unrelated to state practice. It is not even sufficiently different to warrant a separate course in law school. Nor, for the reasons expounded at length above, is it sufficiently important to pre-empt the field. It can and should be studied alongside of state practice, and in the light of the rich history of the entire subject of procedure. The important thing, as in all law study, is to discover the basic problems, not to

4. Especially as interpreted in Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 73 Sup. Ct. 125, 97 L. Ed. 77 (1952), 6 VAND. L. REV. 791 (1953). See Peterfreund, *Federal Jurisdiction and Practice*, 1952 ANNUAL SURVEY OF AMERICAN LAW 681, 692.

5. See Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623 (1946).

6. See, *e.g.*, McMahon, *The Case Against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953); Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading; Epose des Motifs*, 13 LA. L. REV. 395 (1953).

brood upon a particular, limited and temporary solution to a few of them.

The Federal Rules are but one tool for the teaching of procedure. They are not the entire workshop.