

REFLECTIONS ON FIFTY YEARS OF TEACHING CIVIL PROCEDURE

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I. INTRODUCTION

Perhaps the reader will indulge an octogenarian if he gives his thoughts and reflections on teaching Civil Procedure, including regular classes and seminars, at Saint Louis University School of Law since the Fall semester in 1947.

In those days, Saint Louis University had less than ten full time faculty members to accommodate the hundreds of veterans returning from World War II. The Dean did the best he could—courses were assigned to young, inexperienced teachers, who had to become experts overnight—and we stayed four cases ahead of the burly, experienced veterans who were first year law students. Often young faculty members were assigned three separate, wholly different courses to teach in the day division beginning at 8:00 a.m. and in the evening division—the last class from 9:00 p.m. to 10:00 p.m.—all on the same day! A young, inexperienced instructor (notice I did not say “professor”—it took fifteen years to achieve the rank of professor) was assigned Property, Conflict of Laws and Civil Procedure.

It was a time when the General Assembly of the State of Missouri had just adopted the “new” Code of Civil Procedure, generally based on the Federal Rules. Missouri was one of the first states to adopt a system based on the Federal Rules of Civil Procedure. Missouri has always been a leader in the realm of Civil Procedure. The Missouri legislature, a century before the promulgation of the Federal Rules, adopted the Field Code just one year after it was adopted in New York. The goal of Missouri relating to Civil Procedure has always been to “secure the just, speedy and inexpensive determination of every action.”¹ In 1848, the early Field Code abolished the various “forms of action” of the common law and instituted “one form of action.” Missouri went from common law pleading to “fact pleading” (as distinguished from notice pleading in the federal courts) and abolished the formal distinctions between law and equity. Many of these changes remain in place today. So the young

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1. MO. CT. R. 41.03.

instructor assigned to teach the course in Civil Procedure at Saint Louis University learned a lot about Missouri's history in adjudicating civil actions and about the leadership of the bench, the bar and the general assembly.

II. THE TRAVAILS OF TEACHING CIVIL PROCEDURE

Immediately upon attacking the details of the course in Civil Procedure, one soon learns that it is a broad subject encompassing the whole of the substantive law. This young instructor was told: "All you have to do is read the Rules, and you have it made." But if one reads the rule on third party practice,² for instance, or on class suits,³ it is not that simple. How does one explain to a first year law student with no experience just who is a *third-party* plaintiff and a third-party defendant who is *not* a party to the action and when that non-party may be brought into the action?

I have always said that "one who undertakes to teach Civil Procedure already has two strikes against him." I believe this to be true for many reasons.

First, there is not just one set of rules on Civil Procedure. There are as many as there are states in the Union and, on top of that, there is the Federal system. Additionally, there were, and are, several "systems" in the various states, including local court rules.

Second, in order to understand the reasons for modern Civil Procedure, one has to understand the common law, the writ system, the differences between law and equity, the forms of action and a whole host of doctrines developed over the centuries from the days of Henry II—from the "appeal of felony" to the development of *indebitatus assumpsit*.⁴

Third, one teaching Civil Procedure must have a fairly good knowledge of the substantive law in many areas—torts, contracts, constitutional law, legislation, substantive equity damages and so on. How does one teach pleading an action sounding in contract or tort without some detailed understanding of the substantive law in those areas?

Fourth, a Civil Procedure professor has to have an understanding of at least three systems of Civil Procedure—the common law writ system, the Field Code and the rules based upon the Federal Rules of Civil Procedure. Each of these systems was right for its time, each accomplished a certain purpose and each needed numerous revisions to suit the times. Even though most states have adopted systems based on the Federal Rules, there are certain fundamental differences between state and federal rules. For example, unlike the Federal Rules, Missouri is committed to "fact" pleading rather than "notice pleading." Missouri Court Rule 55.05 explicitly states that a "pleading" *shall*

2. MO. CT. R. 52.11.

3. MO. CT. R. 52.08.

4. *See generally* JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS (1913).

contain “a short and plain statement of the *facts* showing that the pleader is entitled to relief.”⁵

With these handicaps the tyro professor enters the classroom to “teach” the course to unsuspecting, young, inexperienced law students. Difficult, indeed! No wonder at the end of the course, the professor shakes his poor head and murmurs, “Lighthouse, Him No Good In Fog.”⁶

III. THE CHASE AND THE SATISFACTION

With all the formidable obstacles to overcome, the professor of Civil Procedure must strive mightily—reading as much as possible, becoming familiar with the Rules to the point of almost memorizing them, studying the various aspects of the substantive law, learning about service of process from *Pennoyer v. Neff*⁷ to *International Shoe*⁸ and beyond, becoming familiar with the long-arm statute and the long-long arm statute or Rule⁹ and becoming knowledgeable about venue and on and on. The chase lasts a lifetime and there is always a new case to learn. There is no end.

But in all this agony there is a great satisfaction in learning much of the law—both substantive and procedural—and in the middle of the night there is a glow that comes in knowing that one has learned a lot which, in turn, can be instilled in the tyros of the law so that each student will become a “good” lawyer or judge who is familiar with the internal practices of the courts to obtain and “secure the just and speedy determination of every civil action.”¹⁰ When one boils down the years in law school there are (perhaps arguably) one or two really important courses—Civil Procedure and Legal Research—know the rules and find the law. These are terrific, satisfying, money-making tools which will stand a lawyer in good stead for the remainder of a lawyer’s professional life.

5. MO. CT. R. 55.05 (emphasis added). Compare the pleadings in *Kramer v. Kansas City Power & Light Co.*, 279 S.W. 43 (Mo. 1925), with those in *Dioguardi v. Durning*, 151 F.2d 501 (2d Cir. 1944). In *Kramer*, the Supreme Court of Missouri held that a petition which stated that an iron step on the side of an electric light pole was old and rusty and not “driven or placed far enough into said pole to maintain or bear the weight of the plaintiff” did not state a claim because this was a conclusion and not the facts. 279 S.W. at 43, 47. In *Dioguardi*, a “homedrawn” complaint satisfied the Federal Rules requirement of notice pleading. 151 F.2d at 501.

6. See William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257 (1948). In an address delivered at the Annual Banquet at Temple University Law School in 1948, Professor Prosser tells the story of a West Coast Indian looking out to sea who said: “Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog came in just the same.” *Id.* at 257. The author likens this saying to the life as a law professor.

7. 95 U.S. 714 (1877).

8. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

9. See MO. CT. R. 54.06.

10. MO. CT. R. 41.03.

IV. THE FUTURE AND A SUGGESTION

The Rules are, of course, constantly being amended,¹¹ as they should be in order to correct deficiencies and to keep them up to date. Keeping up to date as a practitioner or professor is also difficult because the Rules change so fast.

Civil Procedure *is* a fascinating and intricate subject, and a challenging one to teach! Suggestions on how to teach Civil Procedure in law journal articles have been around for a long time.¹² Many make good and practical suggestions to help students learn the intricacies of Civil Procedure. However, perhaps this important subject should be taught later in law school, perhaps in the second semester of the second year or the first semester of the third year, rather than in the first year, when the student has some background in the substantive areas of the law. It would be more comprehensible, and students would be in a better position to understand the concepts in the course and the Rules. In fact, in the mid-1940s, Civil Procedure was taught as a third year course!

Until some changes are made in the curriculum and in the method of conveying knowledge regarding the course in Civil Procedure—a word to the students. Students, be not too hard on your professor who teaches this intriguing, complex and difficult course—that professor is doing the best one can! Good Luck!

11. See SUP. CT. R. 3; Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking*, 52 ALA. L. REV. 529 (2001).

12. See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993); Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998); Elizabeth N. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987) (suggesting development of a lawyering perspective); Charles W. Joiner, *Teaching Civil Procedure: The Michigan Plan*, 5 J. LEGAL EDUC. 459 (1953); Cuthbert W. Pound, *Teaching Civil Procedure*, 4 CORNELL L.Q. 141 (1919) (urging the teaching of trial practice).