Denver Law Review

Volume 12 | Issue 11 Article 3

July 2021

The Spirit of the Code

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THE SPIRIT OF THE CODE

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(An address given on May 25, 1935, by Supreme Court Justice Butler at a meeting of the Western Slope Bar Association.)

Mr. President and Gentlemen:

I appreciate the invitation to be with you. It is a pleasure to leave what has been called the "cold austerity of the bench," to cast off for the time being that frigid thing known as judicial dignity, and enjoy the warmth and the mellowing influence of good fellowship.

The lawyers of the Western Slope, some personally, others by name, are well known to us in Denver. We have been so fortunate as to lure to the capital city a number of Western Slope lawyers. They have made enviable reputations for themselves. We are proud of them.

In casting about for a subject upon which to address you today, it occurred to me that even so dry a subject as the Code might be of interest. This paper is the result of reading done by me in an attempt to learn something of the history of the Code, and to acquire a better understanding of its underlying principles and a more intelligent appreciation of its spirit. I have entitled the paper "The Spirit of the Code."

This paper is neither original nor profound. It consists of information gleaned from the books, with occasional comments thereon. Such as it is, I submit it to you. It is intended for those, including myself, who are in need of elementary information. I do not flatter myself that it will add anything to the knowledge of the grizzled, battle-scarred veterans of the bar.

Let us first survey procedure as it was at common law.

Let me take you to a distant isle of the sea, and usher you into the temple of justice. The presiding judge is an imposing figure, duly bewigged and begowned, a man of profound learning who has drunk deep at the fountain of the law.

It seems that Brown, a tenant of certain land, has received a notice purporting to be signed by Jones, informing

him that Smith has sued Jones for damages for ousting the plaintiff from the land in question. The notice further states that Jones, having no claim or title to the land, advises Brown to procure an order of court making him a defendant in the case in Jones' stead, and warning Brown that if he fails to do so Jones will permit judgment to be entered by default, in which event Brown will be turned out of possession of the land. This notice is written at the foot of a declaration, in which, omitting legal verbiage, it is made to appear to the court that one Rogers has title to the land; that he leased the land to the plaintiff, Smith; that the plaintiff entered into possession of the land under the lease, and that he was ousted or evicted by Jones. Wherefore the plaintiff says he has sustained damages in the sum of 50 pounds.

Brown, by his lawyer, is applying to the court to be substituted as defendant in the place of Jones. Thereupon the court informs him that the order will be made upon condition, and only upon condition, that he enter into a rule of court to confess, at the trial, first, that Rogers gave the lease to Smith, as alleged; second, that Smith entered into possession as alleged, and, third, that Smith was ousted or ejected by Brown himself. Now, as Brown knows very well that Rogers never made any such lease, and that Smith never entered under any lease, or at all, and that he, Brown, never ousted or ejected Smith, he says so to the court, and in plain, unambiguous language voices his refusal to solemnly admit as a fact what he positively knows to be false. Thereupon everyone is shocked at such blasphemy, and the offender is summarily removed from the presence. In his office the lawyer explains the situation to Brown. He tells Brown that Jones is not a person at all; that he is what is known to the initiated, and to them alone, as a casual ejector, and that he is invisible, intangible and exists only in contemplation of the law; that as a matter of fact the judge and the lawyers are fully aware that Rogers never gave any lease to Smith, and that Smith never entered into possession, and that he never was ousted or ejected either by the mythical Jones or by Brown himself; that the proceeding, to quote from an authority highly regarded by the sages of the law, "entirely depends upon a string of legal fictions," and that "such is the modern

way of obliquely bringing in question the title to lands * * * in order to try it in this collateral manner." This is poser to plain, matter-of-fact Brown, who is accustomed to call a spade a spade without circumlocution. Being solemnly assured, however, that this is the law, and being further assured that law is the perfection of reason, and concluding that this man of the law, who is able to see reason where the average man fails to discover the slightest trace of it, must be a being of superior intelligence, he pays the lawyer a substantial fee to intercede for him in the temple of the blind Goddess.

We again find ourselves in the court room. The case is tried. It is found and determined with all due formality and solemnity that all these things that never happened and that everybody knows never happened had happened in truth and in fact, in manner and form as alleged in the declaration. This eminently satisfactory and thoroughly logical result being arrived at, judgment is entered awarding to Smith one shilling damages and the possession of the land; whereupon Smith's advocate arises and waives the damages. Now Smith, though named as the plaintiff, is only a dummy, a nominal plaintiff, having no real interest in the action. Indeed, he may be as mythical as Jones, the casual ejector. The real party in interest is Rogers, the supposed lessor of Smith. The waiver of damages comes as a shock to Rogers, who had caused his dummy, Smith, to sue for 50 pounds. Being one of those unreasonable creatures who want to know, Rogers expresses his surprise and disappointment, and asks his lawyer why his barrister waived the trifling damages awarded. His lawyer, after first assuring him that such is the law, and that law, as everybody knows, is the perfection of reason, explains that if he wishes to recover substantial damages sustained since the entry, he must sue therefor in a separate action at law; that if he also wishes to recover damages sustained before the entry he must resort to a court of equity, and that in order to recover damages in another action it was necessary to waive the nominal damages awarded in the present action. Rogers wonders why the admiralty court and the ecclesiastical court are not permitted to share in the distribution of prizes. He determines, however, to stand up for his rights, cost what it may, though being gifted with only ordinary common sense,

he cannot understand why his rights, that seem to him to be so simple and so clear, cannot be determined in one proceeding instead of three. So he goes again into law, and he then goes into equity, and he winds up in a court that he did not have in mind when he began, the bankruptcy court.

And after it is all over, and Rogers ponders on lawyers and judges and their inscrutable ways, and recalls the sober countenances they maintained during all the mummery he has witnessed, he might well remember, if he were given to browsing among the books, that Cato wondered how a Roman augur could look another Roman augur in the face without laughing. But Rogers possesses no acquaintance with Cato, so he remembers nothing of the sort, but expresses his opinion of lawyers and judges in plain, blunt, Yorkshire dialect.

I hasten to assure you that this illustration was not taken from Gulliver's Travels, or from Baron Munchausen, or from the libretto of some comic opera, or from any dramatic burlesque of the law. It was the regular course of proceeding in common law ejectment cases, devised and practiced by lawyers and judges who were not only intelligent, but who were eminent in the profession—great men whose names we revere. But we must not blind ourselves to absurdities or perpetuate them because they are associated with great names. Certain absurd rules of evidence were associated with great names, but the merciless pen and the unanswerable logic of Jeremy Bentham held those rules up to merited ridicule, and finally they were banished from the courts.

The example I have given is only one of many that could be given, to illustrate the super-technical character of common law pleading and practice, and the fictions resorted to in a crude attempt to do justice. Some were nonsensical, but harmless; some were merely vexatious; others produced the grossest injustice.

The administration by separate courts of two distinct systems, law and equity, caused much annoyance, delay and unnecessary expense. A few examples will suffice. A wished to foreclose a mortgage. This was an equitable suit; but in that suit he could not recover judgment for the deficiency; this required a separate action in a law court. Again, A assigned to B a claim against X. B sued X in a court of law.

The court dismissed the action because at law things in action were not assignable; hence A alone could sue. If A had attempted to sue in equity, the court would have dismissed his suit, because in equity things in action were assignable, and as A had parted with his interest to B, B alone could sue. Again: A, by false pretenses, induced B to enter into a contract with him. A sued B at law upon the contract. B pleaded the fraud as a defense. The court disregarded his plea, and entered judgment against B. B was obliged to bring a separate suit in equity to enjoin the enforcement of the judgment. This situation caused Lord Westbury, on one occasion, to declare that it was "a shame that a plaintiff should be able to recover judgment on one side of Westminster hall, and on the other side be branded as a fraudulent rogue for having recovered it."

It was the boast of the common law pleader that facts only were pleaded, whereas the contrary was the case. Fictions and legal conclusions abounded. It was also a pleasing fiction that the pleadings produced a single and certain issue. The singleness and certainty were frequently verbal and in form only, not in substance. For example, the general issue included several defenses, and gave no notice to the plaintiff of the real defense upon which the defendant intended to rely. A writer in the *Saturday Review*, supposed to be one of the foremost English barristers, described the system. I quote from a note in Pomeroy's Code Remedies:

"The first striking difference is this, that, on the common-law plan, a plaintiff is required to state, not the facts, but what he considered to be the legal effect of the facts. If his advisers take a wrong view of a doubtful point, and make him declare, say, for goods sold and delivered when the real facts, as proved, only make a case of goods bargained and sold, the unlucky plaintiff is cast, not because he is not entitled to recover, but because he has not put his case as wisely as he might have done. In practice, dangers of this kind are mitigated, though by no means invariably escaped, by inserting a multitude of counts, all giving slightly different versions of the same transaction, in order that on one or other of them the plaintiff may be found to have stated correctly the legal effect of the facts. The permission to do this was in fact a recognition of the plaintiff's inherent right to ask alternative relief; but it was clogged by the absurd condition that he could only do so by resorting to the clumsy fiction of pretending to have a number of independent grounds of action, when he knew that he had only one, but

did not know exactly what the court might consider the legal effect of his facts to be. This was not only unscientific and irrational, but, in some cases, it has led to enormous expense by compelling a plaintiff to declare on, and a defendant to plead to, scores of fictitiously differing counts, when there was only one matter in dispute between them. We do not suppose that the greatest zealot among special pleaders would say that such a queer scheme as this is preferable to one under which the plaintiff states the facts on which he founds his claim, and asks for such relief as their legal effect may entitle him to!"

Another writer says:

"Now, I deny, in the first place, that the production of an issue, according to the course of the common law, does really lessen the number of questions of fact. The declaration may contain any number of counts, each setting forth different causes of action, or the same cause of action in different forms. If the same plea is put in to all the counts, there will be as many issues as there are counts. But the defendant may plead as many pleas to each count as he likes; and the plaintiff, with leave of the Court, may put in as many replications to each plea as he may happen to have answers to it. Suppose, now, a declaration containing five counts—no uncommon thing—three pleas to each count, and a single replication to each plea. Here are fifteen issues; and, if there be two replications to each plea, there will be thirty.

"In a case in the 23d of Wendell, there were thirty replications to the plea. Now, this of itself certainly does not prove that the mode of pleading might not have lessened the number of issues, but it proves that under the common-law system thirty questions or more may be presented to the jury in one case; indeed, that an indefinite number of issues may be presented to the jury, whom the law supposes capable of disposing of them all. But who ever heard of thirty substantial questions actually arising in a single cause? In fact, it has been the effect of this system to raise up a great number of issues upon mere verbal distinctions."

Judge Dillon, in his Lectures on the Laws and Jurisprudence of England and America, says:

"The common-law forms were inelastic and inadequate, besides which the common lawyers were idolators of the system, and regarded innovation as a species of legal sacrilege. They had, moreover, much of the fondness of the schoolmen for verbal subtleties, puerilities and refinements, which obscured and thwarted sound reasoning, and which, being essentially sterile, could never bear any wholesome fruit."

This was the condition existing in the state of New York in 1839, when David Dudley Field addressed a letter to Senator Verplanck, urging procedural reform. He called at-

tention to the fact that the chancellor and the judges, to whom the legislature had referred the matter, had accomplished nothing beyond recommending some changes in mere details. He remarked that "it was not to be expected that they should report any vice inherent in the system in which they were the chief officers," and added:

> "It is curious to see how fruitless have hitherto been all the inquiries which the Legislature has ordered. References have been made to the Judges—their reports have suggested no adequate remedy, or have not been adopted—the commissions have been extended to the bar, that the experience of the bar might be added to the experience of the bench; and we find ourselves, nevertheless, in the seventeenth year of the new Constitution, not only not relieved, but in a condition to which our former history affords no parallel. The difficulty has gone on increasing, and at this moment we are in a state in which justice is virtually denied to great numbers of people. Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare.
>
> "The evil can be endured no longer. If they who are the most competent for the work, or those who are most nearly connected with the present judicial establishment, and therefore most interested in preserving much of the present structure, do not undertake the work of reform, it will fall into less competent hands, or be done with an unsparing will, and without regard to the preservation of anything that we now have. The day of reform will come sooner or later, and, if it is put off by those who should lead it, it will hereafter push them aside or leave them behind."

From that time forward until the adoption of the Code of Civil Procedure, Field worked unremittingly to further his cherished plan of simplifying the procedure, by removing the obstructions created by the old system, "to make legal proceedings more intelligible, more certain, more speedy and less expensive," so that justice "may be brought within the reach of all men." He wrote letters and pamphlets on the subject; he delivered addresses to legislative committees; performed most of the work in the preparation of the Code of Civil Procedure and the other codes; drafted reports to the legislature on behalf of the commission, of which he was a member; and at the same time he was engaged in active practice at the bar. His capacity for work is described as prodigious. He performed for procedural reform what Bentham accomplished for the reform of the law of evidence. Like Bentham, he attacked ancient abuses and deep-seated prejudices that for gen-

erations had resisted change. He was attacked "as an agitator and a visionary, in seeking to disturb long settled usage, and in thinking to reform the law, in which was embodied the wisdom of ages." Writing to a member of the legislature in 1842, Field stated the situation in these words:

"We love to repeat the mental processes to which we are accustomed. The lawyer's studies, moreover, lean rather to laws as they are than to laws as they ought to be. It is his profession to understand them, with all their inconsistencies, their verbal distinctions, their scholastic refinements—not to make them. By an easy process, he comes to regard the arbitrary rules, from which he daily reasons, as natural and true.

"It is natural, then, that there should be many of the legal profession, and those, too, among the closest of its students and the most successful of its practicers, who set themselves against all innovations. They may be men of the purest character and the profoundest learning. They obey the law of their minds. They cannot act as the expounders of one system and be the advocates of another. They find it difficult to conform to a rule, and to see, nevertheless, that the rule is wrong.

"How many men are there, of the older members of that profession, who did not dislike the abolition of fictions in the action of ejectment? The men of straw, in whose names the controversy was carried on—the casual ejector and the like—had taken possession of their imaginations, and they parted from them as from real entities whose presence was essential to justice. A few years have changed all this; and they would now, doubtless, be very sorry to own their former partiality for these solemn fictions.

"These champions of things as they are, however, by no means represent the majority of the profession; with the larger body of lawyers, the opinion is very prevalent—an opinion that gains ground every day—that the present system is unreasonably arbitrary, dilatory, and expensive."

In an address before a legislative committee he said:

"And yet this opposition was but natural. The new system was a complete overthrow of the old. Nothing of the kind had ever before been attempted. It shocked the theories and prejudices of the profession, hardened by the incrustation of centuries. No wonder that it was received with amazement at the audacity of proposing it, with scorn for the reasoning with which it was supported, and with hate for its destruction of the learning of so many lifetimes. No wonder that lawyers scoffed at it, and judges rebuked it."

Later, in a letter to members of the California bar, Field wrote concerning the opposition to his Civil and Penal Codes:

"This hostility, it is true, does not greatly trouble me, who have seen the Code of Civil Procedure treated in New York, first with derision, and then with hate; ridiculed, vilified, dreaded, misconstrued, but winning its way all the while, till the opposition to it has dwindled to insignificance."

Let it not be supposed that Field was a weakling, unable to cope with his professional brethren in technical warfare, and that, smarting under repeated defeats, he favored a simplification of procedure in order to place himself upon an equality with his opponents. The very reverse is true. He was a great lawyer. Austin Abbott says that he was the most commanding figure at the bar. He was particularly strong on points of pleading and practice.

For example, Boss Tweed was convicted of 204 different misdemeanors, charged in as many counts of one indictment, and upon 12 of the counts separate sentence, to the full extent allowed for a misdemeanor of the grade charged, was imposed on each count, the sentences to be cumulative, making a total imprisonment of 12 years. At the end of one year Field obtained Tweed's release on habeas corpus, and the Court of Appeals upheld Field's technical point that imprisonment beyond the one year was unlawful; a decision, by the way, that is rarely mentioned in these days without emphatic condemnation.

Field's forensic quiver was filled with the technical arrows of the common law, and no one could send them straighter to the mark. Conscious of his great advantage in this respect, he willingly sacrificed it upon the altar of justice.

In 1848 Field's Code of Civil Procedure became a law in New York, and it was speedily adopted with modifications in other states.

In 1915 Elihu Root, addressing the New York Constitutional Convention, said:

"Under the old common-law system practice had become so complicated and difficult that it was hard for an honest man to get his rights. There is a good deal of human nature in that. It has been so since the laws of the Medes and Persians were formulated; it has been so since the day of Egypt's power. Wherever a special class of men have been entrusted with the formulation and administration of law, they tend to make it a mystery; they tend to become more and more subtle and refined in their discriminations, until ultimately they have got out of the

field where they can be followed up by plain, honest people's minds, and some power must be exerted to bring them back. The constitution of 1846 exerted that power to bring the practice of the law out of the discredit into which it had fallen because of the intricacy and the complication and the technicality and the subtlety of the old common-law practice. Mr. Field brought it back with the code, of three hundred and odd sections, which bears his name, and the reform in procedure went all over the country."

The adoption of the Code in this country put new life into the English movement for law reform. Field was lionized in England. Lord Sherbrooke, Chancellor of the Exchequer, in 1851, declared that Mr. Field had "provided a cheap and satisfactory code of law for every colony that bore the English name; * * * that he had laid the foundations of peace, happiness and tranquillity in the establishment of a system which would make law a blessing instead of a scourge to mankind; * * * that no achievement of the intellect was to be compared to that by which Mr. Field had removed the absurdities and technicalities under which New York, in common with England and her colonies, had so long groaned; * * * that while England was timidly debating upon the propriety of some small and paltry reform in the administration of the law, a great master in the art of administrative reform had risen" in America in the person of Mr. Field, and "had solved the problem." Lord Chancellor Cairns said that Field "had done more for reform of the law than any other living man." Lord Hatherly grasped Field's hand, and said, "Mr. Field, the state of New York ought to build you a monument of gold." John Bright said, "I wish we had in England a man to do for us in the way of reform of the law what Field has done for America." From a Biography of Field I quote the following:

"England, impressed with what America had done, appointed a parliamentary committee and a crown commission to consider the whole subject of law reform * * * and not long afterward a substantially statutory form of pleading and practice was adopted by the Judicature Acts of 1873 and 1875. * * * Following the example of the mother country, sixteen British colonies and dependencies enacted the Code's chief features, and in 1874, when Field went around the world, he had the pleasure of finding his system of practice in the courts of India."

In 1873 Field said, "The Code of Civil Procedure, in whole or in part, has been adopted into the laws of twenty-

three states and territories of this union. * * * It has also been adopted for the consular courts of the United States in Japan." In 1898 the number of states having the Code of Civil Procedure had increased, and Field's biographer states: "So far we have yet to learn of a single state or territory that, having adopted these codes, has gone back to the 'beggarly elements' of the old, tedious and roundabout way of obtaining justice."

States that did not adopt the Code were profoundly affected by it, however, and as a result of the general demand for reform, many of them adopted or amended so-called practice acts doing away with much of the old procedure that the Code was designed to remedy. In 1861 Illinois adopted a practice act that was the model for the Colorado act of early days. But upon the admission of Colorado as a state a Code of Civil Procedure was enacted based upon the New York Code, and we have practiced under a Code ever since.

The present Colorado Code has 479 sections. Here let me call attention to the condition that arose in New York that may serve as a warning to us. The New York Code of 1848 had 391 sections. By 1911 it had attained enormous proportions, having at that time 3,384 sections. The original simplicity of the Code had been forsaken, and there was substituted a vast network of minute regulations that produced a condition almost as unsatisfactory as that existing before the adoption of the reformed procedure. Codes of procedure should contain "only the necessary fundamental rules of procedure, leaving all the rest to the rules of court." When it is attempted to prescribe minute regulations for every conceivable contingency, the process is never-ending, and the results cannot be otherwise than disastrous. Elihu Root, in 1911, thus described the conditions then existing in New York:

> "For many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process by which, under a multitude of varying conditions, suitors may get their rights.
>
> "Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency inevitably leads to continual discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. Whatever we do to our code, so long as the present theory of legislation is followed, the code

will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong; the theory is wrong; and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone."

Colorado has been fortunate indeed in having its Code kept within reasonable compass, and above all in having on its statute book the law of 1913, leaving the matter of practice rules to the Supreme Court. By all means we should resist the fatal tendency, to which New York yielded, to add section after section or rule after rule until so much of the lawyer's time is spent in attempting to master the intricacies of procedure that he has little time left to devote to the real object and purpose of the law, the administration of justice between man and man. Some changes may well be made from time to time, but they should take the form of the elimination or alteration of existing sections and rules rather than the addition of new ones. When it is proposed to add a new section or rule, the candidate for admission should be subjected to the most painstaking scrutiny, and its merits and demerits should be thoroughly debated. Whatever changes are made should be for the purpose of simplifying the procedure and rendering it more flexible. After all, the success of the Code depends much, very much indeed, upon the attitude of the bar and the bench toward the Code, perhaps more upon the attitude of the bench than upon that of the bar. For some time after the New York Code was adopted some judges assumed a hostile attitude toward it, treating it as an impertinent intruder, and practically nullified some of its most important provisions by applying narrow, strict rules of construction. It seemed impossible for them to grasp the true meaning of the reform, or to comprehend the spirit of the Code. As the older judges were succeeded by younger men there was a marked improvement in this respect, but in the meantime precedents had been established that greatly limited the usefulness of the Code. For example, the right to counterclaim was unduly curtailed by a narrow construction put upon the words "transaction" and "subject of the action." It is said that a trial court held

that where A sued B for damages for assault and battery, B could not counterclaim for damage for assault and battery committed by A during the same encounter, for the reason, as it is said, that the beating of B by A is one transaction and the beating of A by B is an entirely different transaction. So there had to be two separate suits, with identically the same evidence, and with the possibility that the verdict in one case may be inconsistent with the verdict in the other.

Now plain common sense required the determination of that whole controversy by one jury and in one action; and I submit that the construction put upon the word "transaction" partakes of that subtle discrimination that brought enduring fame to "Hudibras," of whom the poet writes:

> "He was in logic a great critic,
> Profoundly skilled in analytic;
> He could distinguish, and divide
> A hair 'twixt south and southwest side."

Other refinements have been indulged in to an extent wholly at variance with the spirit of the Code, but time forbids my giving further illustrations under this head.

England, though she lagged behind us in procedural reform, grasped the real spirit of the Code far better than we did, and surpassed us in adopting rules tending to bring about a decision on the merits without unnecessary delay or expense. I will mention a few of the rules, some of which we might well copy. I abbreviate them to save time.

Persons claiming jointly, severally, or in the alternative, may join as plaintiffs; but the court, in its discretion, may order separate trials.

Where action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been brought in the name of the right plaintiff, the court, if satisfied that it has been so commenced through a bona-fide mistake, and that it is necessary for the determination of the real matter in dispute, may order any other person to be substituted as plaintiff upon such terms as are just.

All persons may be joined as defendants against whom the plaintiff alleges any right to relief, whether jointly, severally, or in the alternative.

Where the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants and have it determined which of the defendants is liable, and to what extent.

No cause shall be defeated because of misjoinder or nonjoinder of parties plaintiff or defendant.

Liberal provision is made for joinder of causes of action. The statement of claim shall be in summary form and as brief as the nature of the case will admit; and under certain circumstances there may be a trial without any pleadings.

Relief in the alternative may be demanded.

The claim and counterclaim may arise out of entirely different transactions, and the counterclaim may be against the plaintiff and a third person.

A defense or counterclaim arising after answer is filed may be pleaded by leave of court.

The practice with reference to amendment is far more liberal than ours. Lord Justice Bowen has said: "I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the court ought not to correct."

In 1921, Chief Justice Taft said:

"The degree to which the English courts now go in helping a litigant to present the merits of his case without restriction is hardly understood here. The English courts are determined that no prejudice shall be suffered by any litigant through a technicality or a requirement as to pleading which the courts may relieve by amendment, and that is what we ought to have here."

When Lord Chief Justice Coleridge visited this country some forty years ago, he delivered an address before the New York lawyers. Discussing the old procedure and the then recent reforms in this country and in England, he said that "a distinguished practitioner once said that he did not think the world or England would be worse off if every case in 'Meeson and Welsby' had been decided the other way." But this conservatism had not been confined to England, for he had been told that in one of our states these old methods of practice shone as bright as ever. To such worshipers of the past he suggested that, as we had "in Yellowstone park a collection of the prodigies and monstrosities of nature, so the lovers of

these old forms should set up a park for quaint pleadings, where the absque hocs and surrebutters might be preserved to gratify future generations."

In England the criminal procedure is such that there is little chance for the wealthy criminal to escape through fine-spun technicalities urged by eminent counsel. In the United States there is a wholesome tendency in the same direction. It is growing more and more difficult for the successful rascal, by a judicious distribution of a part of his loot under the respectable name of "fees," to be turned loose on some hair-splitting technicality to ply his trade with impunity, while his brother rogue, who has been less successful in his operations because he possesses less cunning, and is therefore less dangerous, is made to pay the penalty of the violated law. So also in the civil branch of the law, the advantage that the rich possess over the poor is growing less and less.

So fearful were the framers of our Code that lawyers and judges possessing what Elihu Root terms "subtle, acute, highly-trained ideas," would again entangle justice in "a network of form and technical refinement," that in various parts of the Code they inserted repeated injunctions and warnings to guard against such a misfortune. For instance:

"The rule of the common law, that statutes in derogation thereof, are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice."

Again:

"The provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction."

Again:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Again:

"An affidavit, notice or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding."

Again:

"All courts shall be liberal in allowing amendments, and in construing this chapter so as to promote the objects thereof."

Again:

"This act shall be liberally construed, and no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons or in the service of the summons, which error, defect or omission does not affect some substantial right of the defendant or defendants therewith served."

And finally, section 84 contains this sweeping and explicit language:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

This imperative command, in effect, is made a part of every section, and should be read in connection therewith. It should be memorized by every lawyer, whether at the bar or on the bench. It should be printed in conspicuous characters on the wall of every court room in the state.

This paper has failed in its purpose if it has not given you a general idea of the old law, the mischief and the remedy. Let this be indelibly stamped upon the memory, that specious distinctions, scholastic subtilities and all other unreasonable obstructions in the way of asserting rights and redressing injuries should be removed root and branch; that pleadings are means and that justice is the end, and we should never mistake the one for the other; that "we are not so much concerned with the development of an artistic and symmetrical system of pleading as we are with having a practical procedure which will result in a speedy determination of disputes upon the merits"; that form must give way to substance; "that in a country where the people are sovereign, * * * where education is nearly universal," it is not possible to "keep the practice of the courts enveloped in mystery"; that the gulf between procedural law and the plain common sense of the average layman should be narrowed, not widened; and that, to quote the father of the Code, "above all other things is justice: success is a good thing; wealth is good also; honor is better; but justice excels them all. It is that which raises man above the brute, and brings him into communion with his Maker." This is the Spirit of the Code.