

# DO OHIO LAWYERS WANT A STREAMLINED PROCEDURE?

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## WHAT IS STREAMLINING?

Since automobiles became streamlined it has become customary to apply that description to so many things that the expression has little special meaning. However, in a very true sense it is proper to speak of a streamlined procedure. Streamlining is not synonymous with mere modernity, nor does it mean the attachment of new and fancy gadgets. In fact it means the very opposite. It is the removal of all unnecessary attachments so that the object can move through the surrounding medium with the least possible friction.

Does the ordinary litigated case move through the courts without any disturbance of the procedural mechanisms? Does the case quickly reach a decision upon the merits without being shunted off upon some procedural side issue? If that is true there is no need of streamlining. If, however, cases are being delayed because of procedural problems, or if the cases are frequently disposed of on procedural grounds, then it is time to give some attention to streamlining.

That there has been some prostitution of procedural devices will hardly be challenged. The legal profession gives lip service at least to the philosophy that the legal system is set up to settle disputes between litigants or to make certain adjustments between individuals. It will not be openly admitted that the legal system is established merely for the sport of a privileged group or to be exploited by that group for profit. However, many lawyers justify certain present practices on the ground that the legal system is a fixed institution and any litigant is entitled to use it to his own advantage as he finds it.

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This attitude is shown by the boast many lawyers make of the number of cases they are able to dispose of on procedural grounds. Such result may be to the advantage of the administrative group but it certainly is opposed to the basic purposes of the system and it gives the public just cause for criticism.

There is a natural hesitancy on the part of the legal profession to bring about any change in this legal system. This is somewhat justified because for a time such change disturbs the whole proceeding and riles up the quiet waters of procedure which have become settled and reasonably clear. This hesitancy, however, must not take the form of complete opposition, otherwise there could be no improvement. If a change is desired a temporary disturbance may be expected for the ultimate good of the system.

In suggesting any change in the legal machinery it must be recognized that the legal system is not made up entirely of rules of practice. It is controlled very largely by the attitudes of the lawyers and judges. While the rules may be modified somewhat to permit a more free play of new attitudes, yet there will be no significant change without some modification of existing attitudes. This accounted for the hostile reception which the codes received almost a century ago. On the other hand the Federal Rules received such general and public consideration that the legal profession had become prepared for them and a more favorable reception may be expected. Any similar change in the state practice should therefore be preceded by full discussion and explanation.

#### RISKS ENCOUNTERED BY USING THE OLD MACHINE

It has become almost a common-place to view with alarm the future of the practice of law unless some change is made in court procedure. The past record is a familiar story but the bar has too often overlooked its significance.

A generation ago the legal profession was primarily occupied in its litigation with master and servant problems. These

were being disposed of with the traditional techniques of court procedure. The public was dissatisfied with this method of handling these very important problems, and workmen compensation laws were adopted taking the bulk of those cases out of the courts. At the same time the business man was not satisfied with the way the courts handled his litigation and he turned to arbitration proceedings. Then there arose a multitude of disputes in the expansion of administrative activities of government. These disputes have largely been kept out of the courts because of the courts' inability to handle those matters expeditiously.

Recently suggestions have been made to take the present automobile litigation out of the courts and to create administrative boards to handle all automobile accidents upon some system of compensation. If this occurs there would be very little left of court litigation.

This trend away from the courts has been due to two factors. One is the hesitancy of the courts to deal with matters other than actual trials and the other is the retention of practices in court trials which are out of place in the present day.

Courts may be effective administrative agencies to supervise the settlement of legal disputes between parties and do not need to limit their activities to the trial of law suits. This is the role courts are playing in the criminal field. The reports of criminal cases in Ohio show that for the past several years only about 16 per cent of the defendants indicted in the common pleas courts are disposed of by trial, either court or jury.<sup>1</sup> This is about the percentage in other states.<sup>2</sup>

If the court has become a great administrative agency in the criminal field it should all the more be so in the civil field

<sup>1</sup> See *Judicial Criminal Statistics, 1937*, U. S. Dept. of Commerce. Prepared by Ronald H. Beattie. For Ohio the total defendants indicted were 6,010, of these 992 (or 16.5%) were disposed of by trial to court or jury.

<sup>2</sup> *Ibid.* For the states reporting criminal statistics (twenty-nine), except Pennsylvania, there were 10,100 tried out of 61,045 or 16.5%. Pennsylvania is excluded because the record of that state is unusual as 43.6% of criminal cases were disposed of by trial.

where there is greater room for adjustment and compromise. If the courts more actively assist in solving the controversy apart from a trial, courts will win back a large number of disputes now avoiding those courts.

The other failure of the present day court is the retention of a large amount of trial tactics and procedures which are now outworn. There has been considerable discussion of the "sporting theory of justice." But there is more to the problem than a neat phrase. A lawsuit is an application to the sovereign power of a commonwealth to lend its offices in settling a dispute between parties or otherwise establishing their legal relations and in making effective such determination. A lawsuit is not a mere "battle of wits," a forensic game to be played for the amusement of the contending lawyers. It is not a device whereby a clever lawyer can exploit the situation for his own or his client's advantage. Contentious it is and contentious it must be to reach a reasonably satisfactory solution of the problem. But the contention must be carried on to the end that the original dispute may be settled upon its merits. The responsibility of seeing that this is accomplished rests primarily with the judges. Lawyers in their zeal for a client's cause may be expected to push their cause to a conclusion favorable to their client within the limits of the procedural mechanisms.

Fifty years ago litigation may very well have been different. Court dockets were not crowded, court administration was not expensive, and community life was not complex. It could very well happen that at such period the court house was the amusement center of the community. The parties and the public were all prepared for a good show and the drama of the trial overshadowed notions of substantial justice.

In the little litigation that is left in the courts much of this drama of the earlier days has been retained. This dramatic side show, this forensic by-play has so bogged down the trial of cases that litigation has reached its present state.

The legal profession is becoming aroused to the perilous

situation confronting the courts and the profession has therefore taken a new interest in this whole problem of procedural change. The American Bar Association at the Cleveland meeting in 1938 gave much attention to this problem. The reports of committees there adopted have started a new trend toward a readjustment of this whole problem of court administration.<sup>3</sup>

#### BASIC PLAN OF THE NEW PROCEDURE

One significant development has been the formation and adoption of the Federal Rules of Civil Procedure for the District Courts of the United States. These rules, while establishing a new and uniform procedure in the Federal Courts, do much more in serving as a guide for all future procedural changes.

The Judicial Council in Ohio has been studying these rules for the past two years and has recommended the adoption of many of them for Ohio. Such recommendation has the endorsement of the Ohio State Bar Association. However, the bar generally will not fully accept these changes unless there is a proper understanding of the philosophy underlying these rules and the procedure there set up.

The reports and writings of the members of the Advisory Committee furnish the best evidence of the philosophy underlying these new rules.<sup>4</sup> However, it may not be amiss to examine that philosophy as applied to Ohio practice and in the light of the attitude of Ohio lawyers toward change as brought out in the various discussions within recent months.

There are four important features of these Federal Rules which have been somewhat criticized and not fully understood by Ohio lawyers.

<sup>3</sup> See *Reports of American Bar Association*, 1938, Vol. 63, pp. 522-656.

<sup>4</sup> Clark, *The New Federal Rules—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 *American Bar Assoc. Journal* 976 (1937); Clark, *The Handmaid of Justice*, 23 *Wash. U.L.Q.* 297 (1938); Sunderland, *The New Federal Rules*, 45 *W.Va. L.Q.* 5 (1938). See also *Proceedings of the Cleveland Institute on Federal Rules (1938)*, and the *Proceedings of the Institute at Washington and Symposium at New York City (1939)*.

1. Pleadings are not for the purpose of disclosing evidence.
2. The issue-forming stage is to be distinguished from the trial stage.
3. Effective court administration requires greater judicial discretion.
4. Trial economy can be realized only through a judicial pre-survey of the issues.

### *1. Pleadings Do Not Disclose Evidence*

The original codes provided that the plaintiff should state the facts of the case. This seemed harmless enough but a tremendous amount of law developed under the theory that the defendant is entitled to information about the claim and that the statements must be facts, not conclusions.

One basic assumption of the Federal Rules is that the pleadings are not to serve the purpose of furnishing evidence. There has been an ever increasing practice in some quarters to use the pleading device to get more and more information about the opponent's case. The defendant files a motion for more specific statement in the hope that the plaintiff will commit himself to a specific proposition which he will be unable to sustain, or, as is said, "get the wrong sow by the ear." The defendant is not really seeking information about plaintiff's case as his pockets are usually bulging with reports, photographs, and written statements.

If additional information is really sought, the law provides facilities for getting it by extra-pleading devices such as interrogatories to the parties or other discovery practices. The pleading device is not suited for this purpose because in the hands of the experienced pleader the request for more specific information is often answered by giving so much detail that in the end there is no certain information as to the exact nature of the claim.

This sparring for an advantage at the pleading stage gets the parties only further away from the real issue. The pleading is supposed to give notice of the issue and its purpose has been well described by Judge Charles E. Clark as follows:

What we can expect, however, is such a statement of the case as will isolate it from all others, so that the parties and the court will know what is the matter in dispute, the case can be routed through the court processes to the proper method of trial and disposition, and the judgment will be *res adjudicata*, so that the matter cannot again be litigated.<sup>5</sup>

This effort to secure facts, that is information rather than claims, has led to a large amount of litigation attempting to distinguish between the statement of a fact and a conclusion. The Federal Rules avoid this confusion by only requiring a "statement of the claim showing the pleader is entitled to relief." It is conceded that the statement may be in the form of a conclusion. But why not? There is no logical distinction between the statement of a fact and a conclusion. This has been demonstrated by many legal scholars from Professor W. W. Cook to more recent authorities.<sup>6</sup> All statements involve more or less a process of abstraction and inference. The difference lies more in the degree of the conclusion.

Courts have been put to considerable strain to find a rational basis of determining the method of describing a negligence case. The more honest courts have ceased to decide merely by logic and have admitted that precedent and analogy are the only guides.<sup>7</sup>

A few samples of pleadings that commonly arise will suffice. In a case in the Common Pleas Court of Franklin County,<sup>8</sup> which is typical of many like it, the petition alleged that the "collision knocked the plaintiff violently against the left side of defendant's car throwing said plaintiff against the arm rest with an unusual degree of force." The words "with an unusual degree of force" were stricken as purely a conclusion. However, the word "violently" did not seem to bother the defend-

<sup>5</sup> Clark, *The Handmaid of Justice*, *supra*, p. 316.

<sup>6</sup> Cook, *Statements of Facts in Pleading under the Codes*, 21 *Col. L. Rev.* 416 (1921); *Facts and Statements of Facts*, 4 *Chicago L. Rev.* 233 (1937); Clark, *Code Pleading*, 150 (1928).

<sup>7</sup> *Clark v. C. M. & St. P. Ry. Co.*, 28 *Minn.* 69, 9 *N.W.* 75 (1881).

<sup>8</sup> *Latham v. Co-op Cabs Inc.*, No. 143272, Franklin County Common Pleas Court (unreported).

ant. Further on the plaintiff alleged that she "suffered considerable pain since the accident." The word "considerable" was stricken as a conclusion. Several specifications of negligence were stricken because they were conclusions, one of which was "That defendant's agent failed to have the said taxi-cab under proper control."

In 1938 the Franklin County Common Pleas Court considered about 1200 motions and demurrers. Many of these no doubt served a beneficent purpose of making the issues more distinct, but it is also true that a great many had little such effect. Probably they did little except delay answer day a few weeks or months or possibly serve to confuse the opponent.

In the Columbus Municipal Court a similar record can be found. Here is a sample.<sup>9</sup> A motion was sustained to strike as a conclusion the following allegation about an automobile driven "into the path of said plaintiff's automobile in such a manner as to make it impossible for said plaintiff so operating his automobile to avoid striking the automobile operated by the defendant."

It is conceded that in the interest of substantial justice the issues must be reasonably well defined before trial, but it is submitted that the present pleading practices do not accomplish that result and other agencies must be resorted to. In Ohio if the allegation is very brief a motion is made for more specific statement. If the statement is very complete a motion is made to strike portions of it as conclusions.

A decided contrast is a recent case under the Federal Rules. The plaintiff sued for personal injuries received in the explosion of a dynamite cap and alleged that "said explosion and the injuries to the plaintiff resulting therefrom were caused solely by the carelessness and negligence of the defendant in manufacturing and distributing a dynamite cap." The trial court sustained a motion for more definite statement.<sup>10</sup> The Court of

<sup>9</sup> *Jones v. Duvall*, No. 242,289, Columbus Municipal Court (unreported).

<sup>10</sup> *Sierocinski v. DuPont DeNemours & Co.*, 25 Fed. Supp. 706 (1938).



Appeals reversed the case on the ground that the plaintiff need not plead evidence and that he has pleaded the ultimate fact.<sup>11</sup>

This ultimate goal of pleading is probably disturbing to many lawyers who have become accustomed to the meticulous care with which they quibble over trivialities. This change has not yet been recommended for Ohio. However, the procedure cannot operate with directness and common sense until some such change is adopted.

## 2. *Issue-forming Process Distinguished from Trial*

The second fundamental philosophy behind the new Federal Rules is the separation of the pleading stage from the trial stage. This differs from the usual code idea where rules of joinder of issues were arbitrarily made because of some preconceived notion of trial convenience. However, those joinder rules have been found arbitrary and in many cases there was little relationship to trial convenience or an economical disposition of issues.

One hundred persons may have invested in a fraudulent stock scheme based upon the misrepresentations in a prospectus. The only real issues are the questions whether the representations were false and known to be false. These questions are identical and one trial can settle all these cases. The orthodox joinder rule will prevent this single trial because each claimant presents a distinct legal issue. Actually there are only these common issues. The Federal Rules adopt the realistic view and permit a very free joinder of claims at the pleading stage, and if trial convenience is not actually served the trial court can reshuffle the issues for purpose of trial.

There is no thought that all issues should be tried at one time and that one big lawsuit can be used to settle all the litigation for the term. The new plan contemplates a united trial whenever the separate issues can be conveniently tried together and joinder will not depend upon arbitrary and unreal legalistic distinctions.

<sup>11</sup> *Ibid.*, 103 Fed. (2d) — (April 24, 1939).

The argument is made that this new procedure will result in a battle royal. Such argument misses the point. A battle royal will seldom be allowed and when allowed it will be because that is the most convenient way of settling the difficulties.

These free joinder rules have been the subject of considerable discussion on the part of Ohio lawyers. The first reaction usually is that such rules would result in untold confusion. Usually situations are thought of to show the extremes to which this joinder procedure would permit unrelated claims to be joined. Such reasoning overlooks the hypothesis that if the issues cannot be conveniently tried together they need not be. Also such argument overlooks the natural interest of a plaintiff not to make the issues so complex that he will not get anything. The experience in other states where similar rules have been in force for many years shows that these fears will not be realized.

In Ohio at the present time there can be as extreme joinder of claims as is feared will happen under the new practice. Yet these joinders do not occur as no plaintiff is foolish enough to mess up his case with such confusion. All codes permit unlimited joinder of *ex contractu* claims. It is therefore possible to join:

1. Action on promissory note
2. Money due on purchase of car
3. Damages for breach of promise to marry
4. Return of money paid for land induced by fraud
5. Damages upon conversion of property where plaintiff waives the tort and sues upon the implied contract

It is not argued that the present joinder rules should be changed because of the possible abuse of the privilege.

Many lawyers who are disturbed at the liberal provisions of the Federal Rules admit that the present rules should be changed to permit certain joinder now denied, but they favor language which is not so frightening.

Instead of permitting joinder of defendants where common questions of law or fact will arise there has been assent to the proposal that defendants may be joined when they are alternatively or concurrently liable. This provision would remove the present confusion in Ohio law on the question of joint tortfeasors. There seems to be no objection to joining in the single suit defendants who could be sued separately.

In like manner many lawyers who do not like unlimited joinder of plaintiffs do not object to the joinder of a personal injury action of a minor with the father's action for loss of services. This matter may be handled by expanding the provision for consolidation so that actions may be consolidated upon the application of either party if common questions of law or fact exist in the controversies. This will permit the court to consider directly the matter of trial convenience based upon the issues in the particular case. The present law does not permit consolidation unless the causes could originally have been joined, which does not distinguish between the pleading stage and the trial stage.

The Ohio judicial machine cannot serve adequately the present needs unless some change is made in joinder practices. Joinder rules purport to avoid multiplicity of suits. Trial convenience, however, is served when the grouping is based on similarities on a factual basis and not on the basis of legal theory. Free joinder can be permitted upon a factual basis at the preliminary trial stage with the court giving final consideration at the trial stage when the real issues have developed. Thus multiple suits will be avoided in the interest of the public and the litigants.

### 3. *Greater Judicial Discretion*

The third general principle underlying the Federal Rules is closely related to the foregoing. It recognizes the need of extending judicial discretion in all matters of court administration.

Many years ago Dean Pound pointed out that in the early history of the law a rigid procedure was necessary to give adequate protection to litigants as there was no substantive law to guide the courts.<sup>12</sup> Then through the evolution of the law there developed a body of principles which has been called the substantive law which furnished this protection. When the law has reached a stage of maturity the procedural requirements may become less and less rigid. There need be only certain basic procedural requirements, together with enough rigidity to get the business taken care of in an orderly manner.

For the past century there has been a persistent demand to free the administration of law from the over-emphasis upon procedure. The first significant change came in England with the Hilary Rules of 1834 where the technicalities of procedure were sought to be avoided by the multiplicity of specific rules. However, a reverse effect followed when some years later it was reported that fifty per cent of the cases were disposed of on procedural grounds. This same philosophy was behind the code changes in this country beginning in 1848, and the rigidity of the forms of action was supplanted by definite rules.

The English were obliged to adopt a different philosophy and in the Judicature Acts of the Seventies a system was set up giving the maximum of discretion to the trial court. This has been the tendency in recent state revisions and has its fullest realization in the Federal Rules.

The opposition to judicial discretion is based upon a lack of confidence in the courts. The original codes were being adopted about the time that the popular election of judges came into vogue. But if the quality of judges is the objection it can surely not improve their character to tie them down to narrow questions and make them mere umpires calling balls and strikes.

The judges already have tremendous authority in the control of litigation and it can do no harm to admit openly their responsibility. The courts cannot be expected to regain the con-

<sup>12</sup> Pound, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 388 (1910).

fidence of the public until the administration of justice is constantly kept in mind as the primary object of the courts and that the courts cease being arenas merely for the contests of opposing champions.

#### 4. *Judicial Survey of Issues*

The fourth important element of the new procedure is the extension of the practice of a preliminary survey of the issues by the court. Any realistic appraisal of the judicial system will conclusively demonstrate that the present pleading practices do not notify the parties and the court of the precise questions that will be tried in the case. Because the real issues have not been made definite the parties often are required to present evidence of many preliminary matters which are not really controverted. An issue has been raised on paper many times because the opponent has a faint hope that the matters will be difficult to prove and the case may be won on a fluke. This shadow-boxing with collateral issues only prolongs the trial and increases the expense.

Various devices have been suggested and adopted to smoke out the real issue and to eliminate the sham issue. Some courts developed the practice of calling the attorneys for a conference upon the commencement of the trial, other courts have required confidential briefs from the parties in advance of trial so that the court might be informed of the real controversy.

A more specific remedy adopted in England many years ago and introduced in many jurisdictions in this country is the summary judgment procedure. By this procedure a party challenges his opponent to show cause why there should be a trial and if no real issue is apparent the court immediately disposes of the case. This is an effective device to prevent uncalled-for delays in the final disposition of the case where there is no merit in the claim or defense. Even in those cases where the judgment is not immediately entered the procedure is effective in narrowing the trial to the real issue.

Recently another device has been developed called pre-trial procedure which incorporates some of the features of former practices. This is a conference upon the case where the parties and the court go over all the issues to determine the exact matters in dispute and thus narrow the cause to its real limits, and all unnecessary by-play and stage trappings are eliminated. The case can thus be disposed of with greater dispatch and with a great deal more assurance of settling the merits of the controversy.

#### WILL OHIO PROCEDURE BE STREAMLINED?

These Federal Rules have been discussed in Ohio for a number of months, but the bar generally is indifferent to them, largely because the purposes are not fully understood. If the bar desires to help the courts regain the prestige which has been lost somewhat in recent years, then it must aid in improving the judicial machinery so that the case may move expeditiously through the courts to a final determination of the original controversy.

This modern machine is not a fantastic vision of impractical dreamers; it is now becoming a reality in the Federal Courts. The new procedure depends somewhat upon a change of rules but to a greater extent it depends upon the attitudes of those administering it. One cannot change human institutions without a corresponding change in human nature. An enlightened self interest on the part of the bar is envisioning a new procedure, and as this understanding spreads, new attitudes will be formed which will make the new procedure effective. The legal system so envisaged and built upon the philosophies herein set forth will be able to take its place among the many other new institutions in the "world of tomorrow."