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upon the subject; and between them, particularly for literary style, I am rather inclined to prefer Butler's effort. But that is an arguable conclusion. The Meade volume is altogether excellent and reflects a high measure of critical scholarship.

From our standpoint as lawyers, it is to be regretted that some competent legal scholar has not been prompted to prepare a biographical study of him will repay the reading; and that will be doubly certain if the writer will only with special emphasis on Benjamin the lawyer. Perhaps he may yet beckon to a Beveridge of a later generation; and if he does, I am sure that the result behold his subject in its true context, and not endeavor wholly to divorce the lawyer from the statesman, the politician, and the man.

Uniformity in Procedural Matters as Contributing To The Administration of Justice

By VANCE R. DITTMAN, JR.

Professor of Law, University of Denver, School of Law. An address before the annual conference of the Tenth Judicial Circuit, Denver, Colorado June 13, 1947.

In considering the problem of uniformity, we have first to decide exactly how broad we intend this uniformity to be. It is one thing to talk about uniformity in procedure and another thing to talk about uniformity in the interpretation of the rules of substantive law; one thing to talk about uniformity in either aspect within the federal courts alone, and another thing to talk about that same uniformity as extended to all the courts of all the 48 states as well as to all the federal courts. There at least purports to be a uniformity of procedure among the various federal courts, at all levels, in the vast majority of cases coming within their jurisdiction in either the civil or criminal field, and regardless of the state in which that court may be sitting. So, we have at least a framework upon which has been started an already large and a steadily growing body of case law related to the purely procedural field. As to how adequate that will be remains to be determined from that mass of future case law yet unmade.

So far as a uniformity of procedure in that over-all picture which includes the courts of all jurisdictions, we do not, at present, have even a good start to achieve that end. Some effort has been expended in that direction by the adoption of rules of procedure designed after the federal rules, with appropriate changes, as has been done in this state. But such instances are notable because they are unusual, and not because they in any way indicate a trend. Because of this actual picture—uniformity on the one hand and an almost total lack of uniformity on the other—we can form an opinion of some value as to the desirability of the practice.

Before discussing this at greater length, it might be well to dismiss with

a word, as calling for more discussion than this opportunity affords the time for, the matter of uniformity in the interpretation of the rules of substantive law. There was a time when there was every reason to believe that a tendency in that direction was being indicated by the federal courts. But the much discussed decision in *Erie Railroad v. Tompkins* may well justify the inference that whatever start had been made in that direction has now become more difficult, if not impossible, of realization so long as that case stands as law. Perhaps the Supreme Court was motivated by an unspoken feeling that such uniformity was not desirable. There are many who will subscribe to that view. And the issue can be argued most persuasively at length on either side. We shall advert to this decision later on.

Before considering the controversial question as to whether a uniformity of procedure is desirable or not, it is appropriate to see what results have been achieved under a system which purports to encourage uniformity. If uniformity is ever desirable, it should be so in those courts which constitute one large judicial system within themselves. I refer, of course, to the federal court system, in which all cases are potentially subject to the rules of decision of the United States Supreme Court and in which all courts may be guided by the mandates of that high court. But such a view of the matter is only theoretical, for it is obvious that it would be impossible for the Supreme Court to resolve all possible problems of procedure as they arise, nor, indeed, is it to be expected that the court will even attempt to do so. And even if it did, the lapse of time necessary to a full determination of the possible questions would almost surely result in a continual necessity for further review of those older decisions which changing conditions indicate require revision.

But this practical approach actually begs the question of the desirability of such a condition. Let us assume that it were possible to secure a prompt and complete body of decision by the Supreme Court on all basic and significant problems that could arise under the rules, and that all of the federal courts could interpret these decisions uniformly and apply them in a substantially similar manner to the fact situations in all cases. Would it be desirable, even then?

This question, it seems to me, can only be answered in the light of the obvious fact that we do not have an omniscient judiciary in the high court. This is, of course, not peculiarly true of this court, inhering in all human institutions. If rules of procedure sufficiently detailed and sufficiently inclusive to assure uniformity are to be interpreted by one court, we might assure ourselves of a procedural system as rigidly fixed in its course as are the planets in their orbits. That is conceivably possible, but is it desirable? Will it promote justice? And if the concept of uniformity is not carried to this extreme, how can it be uniformity? For example, if a circuit court, by a unanimous decision, decides that a well established rule of procedure must now be departed from, and writes a decision well calculated to induce the Supreme Court to follow in its footsteps, there are two courses open. The Supreme

Court may reverse because the rule has not been followed, or it may affirm, on the theory that the rule must be changed. If it reverses, it thereby discourages all original thinking by the lower courts, and repeated reversals made necessary by the persistancy of a few brave judicial souls will only serve the more to discourage further departures into those paths of experiment which have marked the way for so many new and desirable concepts of the purpose of law. If the Supreme Court affirms, it thereby admits that the rule is not to be one that can be depended upon to apply in every case, unchanged and unchanging. And that means that the concept of uniformity is gone, for then any lower federal court may, with impunity, interpret any rule as it pleases, with the hope, and perhaps the expectation, that its interpretation will later be approved. Thus we ultimately arrive at the point where we started.

Furthermore, as a practical matter, we know that the courts differ in their interpretation of the decisions of the Supreme Court. For example, the recent Supreme Court decision in the case of *Hickman v. Taylor,* which has been the inspiration for so much comment, and which is known to all of you here, did not actually involve the question of privilege in connection with the taking of interrogatories under rule 33, although both the Circuit Court and the Supreme Court tentatively suggested that the privilege rule should apply to rule 33. This was *dictum.* What was actually decided in that case was that discovery proceedings under rule 33 could not be used to secure disclosure of what the Circuit Court called the "work product of the lawyer". That would seem to be clear enough. Yet already, the District Court of the United States for the Eastern District of Pennsylvania, in December 1945, in *Terrell v. Standard Oil Co.,* 5 F.R.D. 510, said: "In view of the very recent decision in the Hickman case, I will not require the defendant to answer interrogatories 39 and 40, since, as put, *they refer to privileged matters.*" The court clearly misinterpreted the Hickman case. Uniformity, if it means anything, should include the ability of all trial courts to apply the rules of procedure in the manner indicated by the Supreme Court. But we know, of course, that any assumption that the trial courts can do so is a false assumption as to the extent of their ability.

But perhaps we take too narrow a view of the meaning of uniformity in the administration of justice. The courts, after all, take a just pride in their ability to see through the form into the substance, and have never intended that rules of procedure shall be treated as so many patterns to be pulled out of the appropriate pigeon-hole. The rules, it may be said, were drawn with sufficient flexibility so that they could be made to fit any case and at the same time fall into their proper places in a total picture, the over-all effect of which will apply in a certain way to a given fact situation under all circumstances. The difficulty is that it is not, or at least has not so far been, possible to draft any set of rules to assure that result. Already experience has proven that the rules need some clarification and extensive amendments have

been adopted, to become effective soon. These amendments will doubtless require many more interpretive cases, some, perhaps, enunciating rules of procedure different than those to be followed under the rules as they now exist, thus introducing still further conflicts to be resolved by the Supreme Court. The very amendments themselves, designed to assure further uniformity, will be the source of divergent constructions, and if we wish to take the chance of making a prediction, will appear to require still further amendments, and so *ad infinitum*. I believe that uniformity either as it becomes apparently fixed by judicial interpretation of a set of rules, or as it is attempted to be embodied in the rules themselves by a complete coverage of the subject matter, with amendments when needed, is an impossible ideal.

But the fact that an end is not possible of achievement in its entirety will not necessarily require an abandonment of all efforts toward that end. It may be that whatever is achieved in that direction is a worthwhile gain, though complete realization is impossible. Certainly some uniformity of practice under some sort of rules will achieve many desirable ends. A very cursory examination of the multitude of decisions by the various federal district courts all over the United States will disclose immediately that the decisions are more notable for their uniformity of interpretation than for their diversity. That is most encouraging for the advocate of uniformity. But is it not putting the cart before the horse to conclude therefrom that a definite policy of uniformity is both possible and desirable.

Would it not be better to view the situation realistically and to recognize that this is not an argument for uniformity, but simply a manifestation of the fact that the courts do think pretty much alike anyhow and that we are very apt to have a uniform administration of rules of procedure by all courts acting under such rules? I mention this to suggest the desirability of permitting the courts to exercise their judgment independently, free from any sense of compulsion to conform to any uniform system. I believe that thereby whatever benefits are to be secured from a uniform practice will be realized, and, at the same time, there will be avoided the stultifying effects that inhere in a system that is avowedly adopted with the idea that it will secure uniformity at all costs. Uniformity, it seems to me, is desirable up to a point, but beyond that point it becomes an evil in itself, for the reasons already suggested.

Passing now to the question of uniformity as it applies to the larger field of both the state and federal courts, the difficulties apparent in the more limited field are many times multiplied. This is true, of course, because of the fact that the state courts are sovereign in a large field of the law that is untouched by the federal court system. This simply means that most of the cases in the state courts are not directly subject to the rules of decision of the United States Supreme Court, so that there is not only the problem of interpretation by the lower courts, which I have attempted to show is a troublesome one, but there is added the factor of many rules of decision arising out of the courts of last resort of the respective states. While this present a very real

problem, in the practical sense, and one which would have to be met before uniformity could be obtained, let us again, for the sake of this discussion, assume that not only would it be possible to have adopted a uniform set of rules, but that we could also have a uniform interpretation of the rules. Again we ask the question—would this achieve a desired result?

The observations already made with regard to the federal courts apply with even more force to this situation, although perhaps the difficulty here may not be as extensive as might be supposed. The main difference as compared with the federal courts is that the inherent weakness is multiplied by one very significant factor—the loss to the whole system of the constructive criticism of a much larger number of judges who are bound by the rule of uniformity to the point where they cannot give to the courts and the profession their mature judgments on possible improvements. And when we deprive our judicial system of the benefits that could be derived from this source, we most surely have limited, to that extent, the administration of justice in the field of even substantive law. A procedure which is to remain uniform for any considerable period of time cannot possibly advance the application of the substantive law under widely varying circumstances.

I have heretofore assumed a possibility of a uniformity of decision in discussing the question of the desirability of such a course. I have done this in order to consider the abstract question alone, stripped of considerations of expediency. I believe that such a discussion is interesting and valuable, but it does not completely, it seems to me, express the considerations which should be taken into account in weighing the advantages and disadvantages of an eslished system of uniformity of procedure. The problem cannot really be stripped of those considerations of expediency. The courts must face conditions and facts as they are, and that includes the practical difficulty already alluded to of securing a real uniformity of decision and interpretation by all the courts. The following observation of Mr. Justice Brandeis, in *Erie Railroad v. Tompkins,* applies with equal force to the courts of the federal system on issues not determined by the United States Supreme Court, as it does to the state courts, and presents a most practical answer to the problem of uniformity in actual practice. That statement is: "Experience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistance of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."

Perhaps it may be said that this statement is truly applicable to those states only which already had a substantial body of decision on questions of common law at the time of the decision in *Swift v. Tyson* in 1842. But the western states, and particularly the states constituting the Tenth Circuit, had no substantial body of such decisions in 1842, nor do they have today so

large a body of such decisions as do the eastern states in the older part of the country. Will Mr. Justice Brandeis' reference to the "persistance of state courts" apply equally well to the federal courts in these newer states? How do we know they will persist in their own opinions? Of course, we do not know. And there may be considerable force to the argument that they will not do so, if given the opportunity to follow a rule of uniformity. But it is submitted that this is not likely, in view of judicial history. They rule of the Tompkins case itself is a departure from the uniformity that was established by *Swift v. Tyson,* and that persisted for almost a century, with only minor invasions, expressed, notably, in some of the dissenting opinions of Mr. Justice Holmes. If ever a rule of uniformity was established, here was the case. And yet the Supreme Court itself adopted a new rule of non-uniformity. It is true that the case involved no positive rule of substantive or procedural law, but the rule established under *Swift v. Tyson* recognized that vast body of general law to which Mr. Justice Story referred when he stated that Section 34 of the Judiciary Act of 1789 did not apply "to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." Is there any real reason to believe that the courts of even this new circuit will feel themselves any more bound by a set of procedural rules that happen to be in codified form, than was the United States Supreme Court bound by the clear rule of the case of *Swift v. Tyson* on a matter of general law?

The problem must, it seems to me, remain unanswered. I have attempted to suggest very briefly, the two phases into which it naturally falls—whether it is at all desirable to have uniformity, and whether it can be achieved in any event. About the first element, it seems to me, there may easily be considerable difference of opinion. I have reached the point in my own thinking where I have grave doubts as to whether we should even try for uniformity. But, at the same time, I recognize that modern methods of communication and ever increasing freedom of intercourse among our citizens may demand a judicial approach that could not be anticipated even so late as 1937 when *Erie Railroad v. Tompkins* was decided. If substantial progress could be made in that direction experience might prove that it is highly desirable. As to whether or not such a goal is possible of achievement, it is doubtful if there can be any real difference of opinion. I believe that most people will admit that complete realization is well nigh impossible. There are those who will contend for the proposition that partial achievement is at least a step in the right direction, and well worth trying. It logically follows, from my own doubt as to the wisdom of uniformity, that I do not advocate even an attempt in that direction.

In concluding, I do not wish to be understood as being opposed to the federal rules of procedure. I merely contend that such uniformity as follows the natural interpretation of the rules is desirable, but that it would be un-

desirable to approach the question from the standpoint that uniformity is the goal to be achieved. The goal is justice in the administration of the law; uniformity is a mere useful incident along the way which should be applied when proper or necessary to achieve the end of justice, but which should not be sought for its own sake. Public interest does not require uniformity; it requires justice.

Board of Governors Meets

A meeting of the Board of Governors of the Colorado Bar Association was held at the Broadmoor Hotel, Colorado Springs, January 31, 1948.

As the first order of business, the treasurer of the Association, Vernon V. Ketring, presented his report which included among other things, a statement that in the calendar year 1947 twenty-five per cent of the receipts of the Association was derived from sustaining memberships as compared to total dues paid, whereas in previous years sustaining memberships had made up to fifty per cent of the total receipts of the association.

Mr. Van Cise then outlined the current plans and activities of the Judiciary Committee, informing the board of the constitutional and statutory obstacles which make difficult the placing of the proposed judiciary revision recommendations on the ballot this fall. He stated that the committee has divided the proposals of the committee into three categories: first, those which are non-controversial such as those dealing with increase of salaries of judges and retirement provisions; second, the debatable provisions against which some opposition has been evident and; third, the controversial measures, particularly the non-partisan election features of the plan. Concerning the variance between constitutional and statutory provisions relating to placing these proposals on the ballot, Mr. Van Cise suggested that it might be possible to secure the cooperation of the governor in requesting an advisory opinion of the Supreme Court as to the constitutionality of some of the statutes involved. If such an advisory opinion were not called, Mr. Van Cise stated a declaratory judgment action might be had in time.

The desire of the committee to subject to a special session if one could be called on the non-controversiay measures was reported by Mr. Van Cise. He stated that it was the plan of the committee to attempt to secure from all members of the legislature their agreement to vote for the non-controversial matters if a special session were called in the thought that the governor would then be more amenable to the issuance of such a call for such a session.

Mr. Stanley Johnson then answered the queries of the members of the board arising in discussion of the proposals made by Mr. Van Cise on behalf of the Judiciary Committee. Mr. Henderson inquired as to whether there would be other matters in the call for a special session if one were made. Mr. Johnson answered that it was possible that school salaries would also be included if special sessions were called this year. Mr. Johnson suggested that