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The Use of Comparative Law in Teaching American Civil Procedure

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COMMENTARIES

THE USE OF COMPARATIVE LAW IN TEACHING AMERICAN CIVIL PROCEDURE†

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THE USE OF COMPARATIVE LAW CAN enhance the teaching of American civil procedure, especially by a comparison of foreign formbook material with American forms.[1] In this way, with some basic knowledge of comparative civil procedure, the student will better appreciate our own concepts and will also understand some fundamental principles of the civil procedure of civil law countries when he is confronted with them in private practice.

A comparison of common law and civil law systems will highlight one central distinguishing characteristic upon which the respective systems of procedure build. American civil procedure is based upon the adversary system, while the procedure of civil law countries is not. Thus, in federal courts under the Federal Rules of Civil Procedure and in other jurisdictions which have adopted systems like the Federal Rules, pleading serves only the general purpose of giving notice and not of elucidating facts.[2] The parties then may bring out the facts by an extensive use of discovery methods: depositions, written questions, interrogatories, admissions, and physical examinations. The use of official and non-official forms in our system will demonstrate the resulting brevity of our pleadings. On the other hand, in the civil law investigatory systems, the pleadings, which are greater in length, provide the court with detailed relevant facts so that the court itself can exercise its statutory function of investigating the case by taking the necessary evidence. Practical examples of this investigatory method will highlight our opposite method.

A comparison of different civil procedure systems will illuminate certain specific applications of these general principles. Thus, we follow the rules that parties need not plead evidence, that parties should plead averments concisely, and that parties should avoid argumentative de-

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[1] An outstanding example of a casebook which sets forth some comparisons is R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 228-35 (3d ed. 1973), in which the authors provide a comparison between civil law and common law systems of civil procedure.

[2] The American civil procedure system did not always have the purpose of giving notice. Historically, the emphasis in pleading was upon "issue formulating" at common law, changing to the emphasis upon "stating the material, ultimate facts," under the codes. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 3-4, 56-7 (2d ed. 1947).

nials. More elaborate pretrial statements frequently follow our brief forms of pleading.

Use of the contrary civil law forms will highlight our precepts, and students will better understand the merits of our adversary system.

Finally, the use of different civil law concepts will illuminate some general policy considerations of our system which pertain, for example, to the proper relationship between the attorney and prospective witnesses, and to difficult questions of legal aid as they relate to court costs and attorneys' fees.

I. Don't Plead Evidence

Every teacher of civil procedure has repeated the slogan that parties do not need to plead evidence in a complaint;[3] for example, we do not list the names of witnesses in the complaint or describe in detail the contents of letters seeking to prove a point. The official forms attached to the Federal Rules or to the Ohio Civil Rules bear out this point.[4] A comparison with foreign examples shows how this teaching is actually disobeyed in civil law systems. In a West German book of collected pleadings the following statement appears in a complaint for the payment of rent:

> PROOF: Testimony of the wife of the plaintiff, Mrs. Fredericke Heimig, to be subpoenaed at the home of the plaintiff.[5]

Or, in an Italian form, plaintiff in his contract complaint offered documents which were filed in the clerk's office, and persons were offered as witnesses on a specific issue if testimony should be required.[6]

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[3] *See, e.g.*, SEC v. Universal Serv. Ass'n, 106 F.2d 232 (7th Cir. 1939), *cert. denied*, 308 U.S. 622 (1940); Sierocinski v. E.I. DuPont de Nemours & Co., 103 F.2d 843 (3d Cir. 1939); Ketcher v. Sheet Metal Workers' Int'l Ass'n, 115 F. Supp. 802 (E.D. Ark. 1953); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F.Supp. 728 (W.D. Ky. 1941).

[4] *See, e.g.*, Fed. R. Civ. P. app. (Form 9); Ohio R. Civ. P. app. (Form 8).

[5] Schopp, *Aktenstücke zur Ausbildung, Zivilprozess* [*Files for Education, Civil Procedure*], Complaint in the matter of *Heimig v. Dentig* at 3, in Aschendorff's Juristische Handbücherei (1968)(as translated). Another example of this practice can be found in W. Bernhardt, Grundriss der Zivilprozessrechts [Basic Elements of the Law of Civil Procedure] 202 (2d ed. 1951) (as translated):

> It is true that the defendant on October 1, 1950 purchased the automobile from the plaintiff. The price was to be paid on January 1, 1951. However, in the beginning of December 1950 plaintiff, upon the request of defendant, agreed to a postponement of the due date of the purchase price until April 1, 1951.
>
> *Proof:*
>
> (a) Merchant Friedrich Schulze,
> Munich, 5 Belgradstreet,
> witness.
>
> (b) examination of the party.

[6] The statement was in part, as follows: "Copies of three letters written by the plaintiff to the defendant, one of which by registered mail, return receipt requested." M. Cappalletti & J. Perillo, Civil Procedure in Italy 428 (1965).

A more complete excerpt from the complaint, showing in detail the documentary and testimonial evidence which is set forth in the complaint form, is as follows:

> The attorney, Bianco Bianchi, as the representative . . . Invites Mr. Rosso Rossi to make an appearance at the time in the manner provided by article 166 of the Code of Civil Procedure, with the warning that if he does not appear, he will be

In a Swiss formbook setting forth many examples of complaints, a sample of a social insurance claim evidences the manner in which, in addition to evidentiary matters of a factual nature, legal points and their "proof" by secondary authorities are advanced in a complaint. This excerpt demonstrates the wide use of textbooks, sometimes even in preference to court decisions, in the civil law practice:

> Plaintiff is insured with the defendant, even though his employer has failed to report him as insured and has not paid any insurance premiums for him. Plaintiff's insurance, as an employee, is independent of the actions of the employer. See Gepko and Schlatter, Textbook on Accident Insurance, pages 42 and 44; W. Lauber, The Practice of the Accident Insurance Courts, pages 49, 104, 174; Giorgio and Nabholz, The Obligatory Swiss Accident Insurance, pages 1, 4-6, 26, 33-46, 52, 134, 215. EEV [Decisions of the Federal Insurance Court] 1928, pages 12, 26; 1929, p. 100; 1930, p. 79.[7]

In the margin there is set forth a more complete excerpt of the complaint showing the extensive manner in which documents, witnesses, and parties' testimony are listed as items of proof.[8]

proceeded against in *contumacia*, and to appear at the hearing of December 3, 1963, before the examining judge who will be designated by the President of the Tribunal; and

Offers the following documents, filed in the clerk's office:

(1) Contract entered into between the parties on August 10, 1962 (doc. 1);

(2) Copies of three letters written by the plaintiff to the defendant, one of which by registered mail, return receipt requested (docs. 2-4);

(3) The return receipt of the registered letter mentioned in (2) above (doc. 5); and

Asks that, if it be necessary, testimony be taken as to the following issues:

(a) If it be true that Mr. Andre Andrax and his wife were unable to live in the villa owned by them, located at 158 Via del Vescovo, until July 10, 1963, because of a lack of furnishings. (The following are indicated as witnesses:

Mr. Verde Verdi, residing at 119 Via S. Niccolo, Florence;

Mr. Nero Neri, residing at 256 Via del Paradiso, Florence);

(b) If it be true that Mr. Andrax and his wife from January 10, 1963 to July 10, 1963, for lack of a place tolive in Italy had to stay at the Hotel Belgique at a daily rate of 10,000 Lire. (The followin are indicated as witnesses:

Mr. . . .);

(c) If it betrue that the furnishing of the villa was undertaken by another furnisher on July 10, 1963, at a cost of 8,000,000 Lire, which was the market price at the time. (The following are indicated as witnesses:

Mr. . . .).

Id.

Compare this with the brevity of a promissory note complaint in FED. R. CIV. P. app. (Form 3); OHIO R. CIV. P. app. (Form 2), and of a contract complaint in 2 S. JACOBY, OHIO CIVIL PRACTICE UNDER THE RULES, Form 8.301 (1970).

[7] R. ZINGG, HANDBUCH FÜR RECHTSANWÄLTE DER SCHWEIZ WEINFELDEN [MANUAL FOR ATTORNEYS OF SWITZERLAND] 153 (1934) (as translated).

[8] On _____ plaintiff suffered an accident. A stone weighing over 50 pounds fell out of a wheelbarrow which plaintiff pushed in front of himself on the street, and the stone fell because worker X.Z. on a cross-road pushed his wheelbarrow against the stone, with the result that the stone suddenly fell on the feet of plaintiff.

Proof: Documents:

Statements in the investigatory file of the defendant against plaintiff, document no. _____

II. AVERMENTS TO BE SIMPLE, CONCISE, AND DIRECT. NO TECHNICAL FORMS OF PLEADINGS

The idea of simplicity and conciseness permeates our modern civil procedure. Not only is the lack of formality different from our own tradition,[9] but also the greater freedom of modern pleading ("a short and plain statement of the claim showing that the pleader is entitled to relief"[10]) makes traditional requirements inapplicable.[11] Civil law examples again show, by way of comparison, what imprecise and prolix pleading can amount to. For instance, in the German book mentioned above in the complaint for payment of rent the detailed descriptive statement occurs: "When the defendant in 1950 or 1951 had to leave his apartment, because his landlord needed the apartment himself, plaintiff upon the request of his late wife offered to get him an apartment in his 'Kotterhaus' built in 1813."[12]

Plaintiff suffered severe bruises. He was fully disabled from _____ to _____, 50% disabled from _____ to _____, and after _____ he is supposed to become fully able to work, without any remaining disability.

Proof: I. Documents:
1. Medical statement of Dr. med. X.X. in accident file, page no. 10
2. Needed statement by Dr. med. J.K. in acbident file, page no. 13
3. Medical expert opinion by Dr. med. K.K. in accident file, page no. 30

II. Interrogation of plaintiff

On _____ plaintiff began to participate in a "repeater course," and on _____ returned (after 14 days). During this period he felt no pains and was not for a single day in the sickroom.

Proof: I. Documents:
1. Worksheet of plaintiff, page ____

II. Witnesses (comrades in the same group as plaintiff)
1. F.F. in _____
2. G.G. in _____
3. H.H. in _____

On _____, thus eight days after discharge from the "repeater course" plaintiff felt such serious pains that he had to discontinue the work and had to be examined by Dr. med. C.C. in _____. The latter ascertained that the bruise, which had been deemed to have been healed, was not as yet fully healed. Reference is made to the investigatory file, appendix 35.

Proof: Documents:
Appendix 35 to above-mentioned investigatory file.

Id.

[9] *See, e.g.*, evidencing the traditional formality: Rhodes v. Sewell, 21 Ala. App. 441, 109 So. 179 (1926) (despite filing by plaintiff of an attachment affidavit and a bond, the proceeding before the court was held to be *coram non judice* and void because the required complaint was not filed); New Haven Sand Blast Co. v. Dreisback, 104 Conn. 322, 133 A. 99 (1926) (even stipulation of the parties held not to dispense with the requirement of written pleadings); Munday v. Vail, 34 N.J.L. 418 (1871) (issue not called in question cannot be decided by court).

[10] FED. R. CIV. P. 8(a)(2). Redundant or immaterial matter may be stricken. FED. R. CIV. P. 12(f).

[11] For instance, Ohio traditionally considered insufficient a simple charge that defendant "negligently and carelessly operated and handled its said locomotive" because it did not give notice of what acts would be attempted to be proved. New York, C & St. L. R.R. v. Kistler, 66 Ohio St. 326, 333, 64 N.E. 130, 132 (1902). With the adoption in 1970 of the Ohio Civil Rules, modelled after the Federal Rules, the *Kistler* allegation would now be sufficient. *See* OHIO R. CIV. P. app. (Form 8), which is the equivalant of FED. R. CIV. P. app. (Form 9); 1 S. JACOBY, OHIO CIVIL PRACTICE UNDER THE RULES 63 (1970).

[12] Schopp, *supra* note 5, Complaint in the matter of *Heimig v. Dentig* at 2.

The full impact of the long-winded statement is shown by the more complete text of the attached scholarship opinion applying Ohio law. The complaint:

Or, in a French form of a complaint for damages for encroachment, one of the typically French "whereas" clauses reads:

> Whereas Mrs. Rivière is the owner of a building, located at Paris, 3 Boulevard Roses, which she inherited from Mr. Rivière, her predecessor in title, who had acquired the property by a notarial instrument drawn by Mr. Merlin, notary, the second of June 1895, and had built the building which stands there now.[13]

III. Argumentative Denials Should Be Avoided

This admonition is firmly established in American civil procedure. For instance, early cases under the Federal Rules held that verbose and argumentative matters should not be contained in an answer. Such material may be stricken by the court *sua sponte*.[14] The possible verbosity of answers is dramatically shown by civil law examples. Extensive historical facts are set forth in an answer provided in a German book.[15] For example, among others, the following statement occurs:

Plaintiff, who was born in 1890, shortly after World War I had

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Reasoning:

The defendant is the son of the late first wife of the plaintiff. The latter is the owner of the house in which the parties live. When the defendant in 1950 or 1951 had to leave his apartment, because his then landlord needed the apartment himself, plaintiff, upon the requests of his late wife offered to get him an apartment in his "Kotterhaus" built in 1813. The necessary capital was furnished by taking up a mortgage of DM 12,000, at a savings bank. In lieu of paying rent the defendant was to pay the interest and the amortization of the mortgage.

This was done until August 13, 1965. On August 15, 1965, plaintiff was able to sell a part of the land which belonged to the Kotten. Accordingly, he was able to pay the remaining portion of the mortgage. When plaintiff now demanded that defendant pay to him (plaintiff) interest and amortization of DM 80.--monthly, defendant claimed that out of his own resources he had also put money into the renovation, and he contended to set-off the claim resulting from these expenditures against the obligation to pay rent. Defendant contends that in addition to the DM 12,000 obtained from the savings bank he used DM 13,000 for the work of renovation. This is impossible. He has been unable to specify this DM 12,000 and the labor was done without cost, by means of the reciprocal assistance of both parties in the course of their family co-operation.

In view of the fact that for a long period defendant has not paid rent, plaintiff has terminated the lease on May 15, 1966 without a grace period.

So that defendant would not be thrown onto the street, plaintiff let him live in the apartment, after the parties had agreed to an increase in rent to DM 160. monthly, beginning June 1, 1966.

Proof: Testimony of the wife of the plaintiff, Mrs. Fredericke Heimig, to be subpoenaed at the home of the plaintiff.

Suit was brought because, despite repeated reminders, defendant has not paid. The right to terminate again without grace period and to secure eviction is reserved, if again defendant fails to pay the full rent punctually.

Id. at 2-3.

Compare this elaborate form with the succinct forms appearing in American formbooks for complaints for payment of rent due. *See, e.g.*, S. Jacoby, *supra* note 6, at Form 8.707.

[13] P. Herzog, Civil Procedure in France 650 (1967).

[14] Strahle-Johnson Supply Co. v. John Douglas Co., 1 F.R.D. 279 (E.D. Tenn. 1940); Hindleman v. Specialty Salesman Magazine, Inc., 1 F.R.D. 272 (N.D. Ill. 1940).

[15] We, of course, do not plead facts in answers. For a discussion of the civil law practice of pleading facts, *see* notes 3-8 and accompanying text, *supra*.

> married the mother of defendant, whose father, — after approximately two years of marriage — had been killed in the year 1914. The marriage of plaintiff with the mother of defendant, also produced only one child. This stepbrother of defendant did not return from World War II. He is a missing person, but so far has not been declared dead.[16]

Similarly, a certain portion of a French example is sufficient to demonstrate the argumentative, verbose character of an answer:

> Whereas the expert has stated in his report:
> "The fences enclosing the front yards were built in accordance with the specifications, without regard to whether the length of the frontage, under the contract of sale, actually was 17 meter and 22.57 meter. The fence on the side of the properties enclosing the front yard dates from the same period, 1877.
> "This is shown by its nature, its looks, and its old appearance.
> "Since fences were put along the frontage of No. 1 and No. 3, and on a small part of the side of the property, as indicated above, the strip of land of 1 meter width was thus closed off against the street, and, as it were, landlocked."[17]

In addition to being argumentative, defendant's answer in an Italian proceeding shows its hypothetical character:

> In the event that this tribunal does not deny plaintiff's prayer for relief on the ground just stated, the defendant also states that, about two weeks after the contract between plaintiff and defendant was concluded, there occurred a sudden, extraordinary, and unforeseeable rise of 25% in the market price of the goods contracted for, making performance of the contract pursuant to its terms excessively burdensome to the defendant.[18]

IV. Court Decisions Ordering the Taking of Proof

The further development of litigation in the civil law world shows the purpose of the "pleading of evidence." Evidence is taken by and pursuant to orders of the court. The "plea of evidence" enables the court to formulate a "Decree of Proof" setting forth the name of the witness who shall be heard and on what issue.

In a German formbook the following Decree of Proof is set forth:

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[16] Schopp, *supra* note 5, Answer in the matter of *Heimig v. Dentig* at 2.

[17] P. Herzog, *supra* note 13, at 664.

[18] M. Cappelletti & J. Perillo, *supra* note 6, at 430-33.

March 12, 1951

Thereupon, the following

Decree of Proof

is issued:

Upon the application of the defendant, the merchant Friedrich Schulze, Munich, 5 Belgradstreet, shall be heard as a witness on the defense of the defendant that the plaintiff in December 1950 agreed to a postponement of the due date of the purchase price of the automobile until April 1, 1951.

March 19, 1951, 9 A.M. is set for the taking of the testimony and for resumption of the oral hearing.

The witness will be ordered to appear only if defendant until March 14, 1951, will have paid DM 5. — to the registry of the District Court as advance for the expense."[19]

This Decree of Proof was executed a week later (showing the "piecemeal" character of civil litigation), as follows:

March 19, 1951

As a witness: the merchant Schulze.

After the witness was admonished to say the truth and the importance of the oath was called to his attention, he was examined and testified, as follows:

"My name is Friedrich Schulze, I am a merchant, 40 years, and related to neither party.

"I know both parties. In the beginning of December we were together in a restaurant. We talked about the present difficult financial situation. Mr. Becker's debt of the purchase price was not mentioned at all. I know nothing of a postponement to April 1, 1951."[20]

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[19] W. BERNHARDT, *supra* note 5, at 204-05.

[20] *Id.* The following is another example of an execution of a Decree of Proof, this time in an Italian court:

The first witness adduced by the defendant is introduced and warned by the examining judge of the religious and moral importance of the oath and the penal consequences of false or reticent statements; then the examining judge invites him to take the oath and reads the formula: "Conscious of the responsibility which by the oath you assume before God and men, swear to tell the truth, nothing but the truth." The witness standing, says the words: "I so swear." Interrogated on his identification, he answers: "I am Mirto Mirti, born in Siena on August 15, 1941, residing at 327 Piazza del Limbo, Florence, and a clerk in the store of Rosso Rossi."

At the request of the judge, the witness states that he is not related by blood or marriage to either of the parties, and, although he is employed by the defendant as a clerk, he is not interested in the case.

The attorney for the plaintiff alleges that the witness' testimony is suspect because of his employment by the defendant.

The judge, taking note of the aforesaid, questions the witness on the items of proof. On the first item formulated in the defendant's answer, he replies: "It is true. I was present when Mr. Andrac and Mr. Rossi made their agreement."

On the second item, he states: "I cannot, in good conscience, give a precise answer." Upon questioning by the judge, he clarifies his answer by stating: "I was busy in the store with another customer and, although I heard generally what was said, I didn't hear all the specific details. The only thing on the point I can state with certainty is that, soon after Mr. Andrac left, I heard Mr. Rossi

Then, on the same date, a second Decree of Proof was issued:

> Thereupon the following
> Decree of Proof
> is issued:
> Upon the application of the defendant, plaintiff shall be examined before the Court on March 26, 1951, 9 A.M. on defendant's allegation that he obtained a postponement of due date of the purchase price.[21]

The significance of the Decrees of Proof for the attorneys of the parties is shown by the following Swiss example. In the civil law world, the attorneys do not present their cases but by means of suggesting Decrees of Proof and, i necessary, their changes, they seek to influence the conduct of the litigation. The Swiss example shows how a party sought to have the court modify the Decree of Proof:

> Application to Modify the Order of Proof
> To cancel the order of proof of . . . and to impose the burden of proof on the defendant, that he issued the note of . . . without a proper basic consideration (causa). . . .
> (3) Accordingly, it is not the duty of the plaintiff to prove the consideration of the debt, but it is the task of defendant to prove the non-existence of a consideration for the debt. Fick, Note 6 to Art. 17, Code of Obligations, Oser, Note IV 1(b), (d) to Art. 17, Code of Obligations.
> 4. From a procedural point of view, an order of proof may be modified at any time, section 169, Zürich Code of Civil Procedure. Plaintiff has shown that it is proper to distribute the burden of proof differently, and the Judge should reconsider his order and should issue a new order of proof.[22]

V. Some Additional Lessons

In their recent book, *Procedural Justice: A Psychological Analysis*, John Thibaut and Laurens Walker discussed some "cross-national comparisons" between the "Adversaries versus Inquisitors" and stated that the relative merits of dispute resolution procedures are most often articulated "by legal theorists."[23] Our references to procedural forms do not give merely the views of legal theorists; they show the practical implications of the systems.

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and Miss Rosalie speak of the fact that the client had agreed to pay one-half of the price within a week."

There being no further questions to put to the witness, he is released after the reading to and confirmation and signature by, him of this *verbale*.

Read, confirmed, and signed.

M. Cappelletti & J. Perillo, *supra* note 6, at 436.

[21] W. Bernhardt, *supra* note 5, at 205.

[22] R. Zingg, *supra* note 7 at 216-17.

[23] J. Thibaut & L. Walker, Procedural Justice: A Psychological Analysis 22 (1975).

A. *Single-Day-in-Court System*

Our discussion[24] has illustrated the practical significance of an absence of a "single-day-in-court" system. This fact can be used when an attempt is made in American law to show the meaning of certain methods. For instance, when discussing the procedure before the trial judges of the United States Court of Claims, it should be noted that that procedure is not fully governed by the maxim of a "one-day-court" proceeding, but permits piece-meal trial;[25] to a slight extent, it is similar to the civil law system. It is interesting to observe that in some respects the discovery proceedings before the Court of Claims are less advanced than the regular district court proceedings,[26] and, again, to compare this with the fact that discovery proceedings are rather unknown in the typical civil law system.[27]

B. *Execution of Decree of Proof*

The practical examples showing the execution of decrees of proof in the civil law world[28] explain why, in view of the simple paraphrase of the witness' testimony and its non-verbatim report, it was necessary in 1963 to add the last sentence to Rule 28(b) of the Federal Rules of Civil Procedure. This sentence concerns the taking of depositions in foreign countries pursuant to a letter rogatory for use in American litigation: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath. . . ."

C. *Attorney-Client Relationship*

The execution of the Decree of Proof, quoted above,[29] shows that a witness named by a party testified that he did not know anything about the matter. This highlights the principle, existing in some civil law countries, that it is unethical for a lawyer to discuss the facts of a case with a prospective witness.[30] This practice can be usefully discussed in comparison with our contrary practice.

D. *Payment of Court Fees by Poor Litigants*

The Decree of Proof, quoted above,[31] required the party to pay to the registry of the court DM 5 — as an advance of the expense of the court calling the witness. This monetary requirement furnishes a perfect

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[24] *See* text accompanying notes 19-22 *supra*.

[25] FED. R. CT. CL. 132(b); 2 WEST'S FEDERAL PRACTICE MANUAL § 1922 (2d ed. 1970).

[26] *See* 2 WEST'S FEDERAL PRACTICE MANUAL § 1913 (2d ed. 1970).

[27] *See* Jacoby, *Das Erforschungsverfahren im amerikanischen Zivilprozess; Vorschläge für eine Reform der ZPO*, 74 ZEITSCHRIFT FÜR ZIVILPROZESS 145 (1961).

[28] *See* notes 19-22 and accompanying text, *supra*.

[29] *See* note 20 and accompanying text, *supra*.

[30] *See* R. SCHLESINGER, COMPARATIVE LAW 307 (3d ed. 1970).

[31] *See* note 19 and accompanying text, *supra*.

vehicle for a discussion of the all-important problem of legal aid to the poor civil litigant in the western world. It was in this connection that many years ago the Swiss Supreme Court, in the exercise of its power to declare cantonal, but not federal, statutes unconstitutional,[32] held invalid under the constitutional equality principle[33] a cantonal statute, when applied to a poor person, which required a party to make such small payments.[34] The language of the Swiss Court seems interesting. Thus, the Court declared:

> Article 4 of the federal constitution, viz., the principle of equality of the law, includes the equal right of all citizens to receive legal protection by the state for a civil claim alleged by them. . . . This right would not be preserved if in the case of poor persons the actions of the court or the performance of certain procedural acts were made dependent upon prior payment of court costs or expenses. Such regulation constitutes equal treatment of the citizens only in a superficial, apparent manner. Actually, poor persons are refused legal protection for the prosecution of a well founded or, at least, not hopeless claim, because a condition is attached which the respective person is *a limine* unable to fulfill. This amounts to an unconstitutional discrimination of poor parties in a litigation as against wealthy ones. . . .[35]

The Court added:

> The principle of equality . . . constitutes a barrier not only for the branches of the government applying the laws, but also for the legislator. This holds true also with regard to subjects in which the law-making power in principle remains with the cantons. Such constitutional right, therefore, cannot be denied on the ground that the legislative competence of the cantons in the fields of court organization, court procedure, and judiciary, would be infringed upon.[36]

The equality principle was broadly applied. For instance, it was held that in a civil litigation, payment of appeal costs may not be demanded of poor persons, whether or not they have applied for legal aid in the trial before the lower court, unless clearly no appeal lies in the case or unless the appeal obviously has no chance of success.[37]

Comparing these broad constitutional principles with the hesitant

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[32] As to this power see Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 COLUM. L. REV. 871, 896 (1936).

[33] "All Swiss are equal before the law." (Article 4 of the Constitution), *quoted in* C. HUGHES, THE FEDERAL CONSTITUTION OF SWITZERLAND 6 (2d ed. 1970).

[34] Höcker v. Obergericht Aargau, 57 BGE I 337 (1931).

[35] *Id.* at 343 (as translated).

[36] *Id.*

[37] Weiss v. Grauwiler, 60 BGE I 179 (1934). For a discussion of various problems of civil legal aid in many countries, on a comparative basis, *see* Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940 (1940).

constitutional steps we have taken in the field of court costs of civil litigation, might be a stimulating endeavor. Cases such as *Boddie v. Connecticut*,[38] *United States v. Kras*[39] and *Ortwein v. Schwab*[40] can be compared, and they can show how limited our constitutional protections are. It is true that in *Boddie* female welfare recipients seeking divorces were held, on the basis of due process,[41] to be free from the payment of court costs. However, in the unfortunate decision in *Kras* a voluntary bankrupt was held to be required to prepay the filing fee provided by the Bankruptcy Act, and in the equally unfortunate decision in *Ortwein*, it was held that indigents had to pay the twenty-five dollar appellate court filing fee required for judicial review of unfavorable agency decisions concerning their public assistance. Comparative law might help in rethinking the problems.

In conclusion, it would seem that a study of comparative civil procedure could assist in the examination of specific rules of American civil procedure and in the weighing of general policy problems.

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[38] 401 U.S. 371 (1971).

[39] 409 U.S. 434 (1973).

[40] 410 U.S. 656 (1973).

[41] Only the separate concurring opinions of Mr. Justice Douglas and Mr. Justice Brennan predicated the result on the equal protection clause. 401 U.S. at 383-89.