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THE INDIANA RULE MAKING ACT—HOW PRO- CEDURE AND PRACTICE CAN BE IMPROVED UNDER THE ACT

In Four Parts

PART I

By CLAUDE V. RIDGELY*

As Mr. Cole has suggested, four are to participate in this general discussion, and it is expected that there will be general discussion from the floor. Under those conditions, we are limited as to time, so in the interest of brevity, I have reduced my suggestions to writing.

I did not know until yesterday, when I heard from the Judge of the Supreme Court that they, with the diligence and promptness that has been so characteristic of that court in recent years, had already anticipated two of my suggestions. However, I will present those two suggestions with the others that you may have an opportunity, if you so desire, to discuss or even criticize them as I presume that will be tolerated.

The General Assembly, after relinquishing to the Supreme Court the power which it (the General Assembly) has by practice asserted to be its own, to adopt rules of procedure, at the same session enacted sixteen laws relative to procedure. I shall assume that these acts are subject to the act we are now discussing, and that the Supreme Court has the authority

* Of the Gary Bar, former Judge of the Lake Superior Court.

to modify, change or set them aside by other and different rules.

Before embarking on a policy of a general revision of rules, it would seem wise to inquire into the actual working of our present system.

A number of years ago, I made an analysis of fifteen volumes of Supreme Court reports, to determine the percentage of reversals due to error in practice made by the trial court before trial. I was astonished to learn that there were practically no reversals due to such errors. This may be due in part to the liberal right of amendment and to the liberal construction by both Trial and Appellate courts on such questions.

Recently I made an examination of the reports of seventy decisions rendered by the Supreme and Appellate Courts, taking them in order as reported in the *Northeastern Reporter*. It showed that in twenty-two of the seventy cases, there were either dismissals on questions of practice and procedure, or points were raised for decision that the court refused to consider because of such defects. This would indicate that at least thirty per cent of the appealed cases were refused consideration because of defects in practice and procedure.

This limited study might lead to any one or all three conclusions, i. e.: That the lawyers are incompetent (this is probably the principal reason), that the rules are arbitrary and uncertain, or that the courts are unduly strict and harsh in the construction of the rules.

While the first examination does disclose that, under the present rules, the correct result was generally reached on questions of practice preliminary to the trial in the trial court; yet it does not necessarily follow that the result was reached by the best or most inexpensive method, and in fact I am sure that the present rules can be improved.

However, I think it must be admitted that there should not be a wholesale adoption of rules. Care and caution should be the standard.

Judge Fansler yesterday sort of hinted, as I gathered, that they might have in mind making our rules conform to the rules that are to be adopted by the federal courts. Of course, if that procedure should be followed, no validity should be attached to this last statement, and there should then probably be a wholesale revision.

I am quite aware that the conditions in the industrial and urban districts are different from those of the rural district, and what I shall say is the result of my observations in the former. Neither shall I attempt, because of lack of knowledge, to speak of criminal procedure, and I am sure that the learned gentlemen of the Supreme Court need no suggestions as to rules of practice in that court. Their experience, practice, and knowledge are ample assurance that the rules of that court will be sensible and workable.

With these limitations, I proceed to specific suggestions:

First: The act of the last General Assembly found on page 897, providing for a shot gun motion to be addressed to all pleadings, should be eliminated. It can only lead to confusion, uncertainty, and injustice.

Second: The last General Assembly passed an act (Acts 1937, page 406) providing for an additional method of appeal. Either this method of appeal is superior or inferior to the former methods; if the first is true, the former should be repealed—if the latter is true, this act should be abolished. There should not be two methods of procedure on appeals.

Third: The same observation is to be made relative to making the instructions a part of the record. Quite frequently, the trial judge is confronted by the adverse attorneys, each wanting to use a different method. If the judge adopts one method, he is thought to be partial; if he consents to follow the wishes of the adverse parties, the record is incumbered and usually defective. One of the two methods is superior—let us determine which is best, and abolish the other.

Personally I am quite in favor of the method used in the federal court on the question of instructions.

Fourth: (This will probably be controversial.) A rule should be passed abolishing the answer in general denial. The defendant should be required to admit the facts not in dispute and to allege his defense with the same certainty that plaintiff is required to allege the cause of action. The time is past when the court should be required to listen to proof of facts not in dispute, and when a defendant should have the right to offer a concealed defense which the plaintiff has no opportunity to meet.

Fifth: I should urge that terms of court be abolished. In Lake County, the courts of civil jurisdiction have five terms of eight weeks each, or forty weeks in all each year. Deducting legal holidays and Saturdays, on which days the courts are not in session, we have the net result that the courts are actually in session only thirty-two weeks out of fifty-two weeks. Of that time, the trial judge devotes at least one-half to the disposition of motions, formal matters, defaults, and various other items of clerical and administrative nature.

It would seem to me that courts should be in session continuously, without term, with a rule allowing the judge a vacation of not to exceed thirty days each year, to be taken at such times as the court might provide by rule. It would necessarily follow that a rule would be required limiting the time in which a judge might correct errors without notice.

Terms of court, in pioneer times, were required where the circuit was composed of several counties, but where the court has jurisdiction over a single county, I cannot see any reason for the continuance of the present system.

Sixth: In all appeals where money judgments are rendered, I think that the appeal bond should be conditioned that on affirmance, the judgment or order should provide for judgment against the surety and that execution issue against him, to be served after the property of the principal is exhausted. This should apply to appeals from the justice courts, city courts, and appeals to the Appellate and Supreme Courts.

At present, sureties frequently leave the jurisdiction and

even the state before appeals are decided. Rarely does a surety perform its obligation on appeal bonds until suit is filed and prosecuted to judgment. The present practice does not afford the appellee sufficient protection.

Seventh: A rule should be adopted that no officer or employee of the court, clerk or sheriff, or any of their relatives, should be appointed as receiver, administrator, commissioner to sell property, custodian, or act in any clerical or fiduciary capacity in any proceeding. It should also provide that such persons should not write, as agent, surety bonds to be filed in judicial proceedings, or recommend to the public for employment any lawyer.

Eighth: A system of rules governing the administration of receiverships should be framed. There are practically none at this time. They should be modeled after the rules in bankruptcy governing trustees.

Ninth: Rules should be adopted doing away with *ex parte* orders in the administration of estates. An administrator should not have the risk and burden he now has in acting, especially in important matters, without an order based on notice (perhaps informal notice, such as is given in Industrial Board actions). Such practice would also offer protection to the estate and relieve the judge of much responsibility. I have passed on many applications involving the preservation or sale of personal property, each of which involved many thousands of dollars; and, though it was my endeavor to protect every one by notice, I was never certain that, from a legal standpoint, any results were accomplished or that, under the decisions, anything could be done. On final reports, publication of notice should be abolished and actual notice given by registered mail.

Frequently, the court is called upon to dispose of stocks involving in some cases many thousands of dollars, and has the duty of selecting what he shall sell the property for and things of that sort, and generally as a result *ex parte* questions will arise which will be embarrassing to the court or to the executor.

Tenth: An order should be made providing for forms to be used when notices are to be given by publication. An examination of a fee book of Lake County, indexing four hundred cases would indicate (assuming it to be average) that the cost of publications of notices in Lake County amounts to about \$40,000 annually. Assuming it averages about the same the state over, it would indicate that \$500,000 is spent for that purpose.

If the act under discussion affords the authority so to do, I should suggest the abolishment of the non-resident notice, and substitute therefor the mailing by the clerk, when the address is known; and, in cases where it is not known, the posting of notice, to satisfy constitutional requirements. It is a rare instance that notice by publication brings a defendant into court. I think the only instances I have known of that to happen were in divorce cases, where a copy of the newspaper, marked by the clerk, was mailed to the defendant.

In other words, we are spending many thousands of dollars each year, and getting no results. If the Supreme Court should determine the act is not broad enough to warrant this action or that there are constitutional objections to it, then I urge that, by rules, they prescribe forms that are much condensed. I think, by condensation, from one-fourth to one-third of the bill could be saved.

I have not attempted to cover the subject. Mr. Cole asked only for some suggestions. The General Assembly, by the enactment in question, has placed the responsibility on the shoulders of the court and the lawyers. No longer can we shift the blame of delay and expense to the General Assembly. The responsibility is ours and, if we do not meet it, the settlement of disputes will be shifted to bureaus and administrative boards, to the detriment not only of the lawyers but also, I believe, the litigants.

PART II

By HOWARD W. MOUNTZ*

I thank you very much for giving the members who are to lead this discussion an opportunity to read their papers.

From what has already been said in the meetings yesterday, and what has been said this morning, I find so far as I am concerned, everything has been covered. I am sorry for the last man.

As the gentleman who preceded me said, the only way to keep a lawyer within the time is to limit him, and the only way he can keep himself down, is to write out what he has to say.

Reference has been made by the Chairman to my location, northeastern Indiana. That probably explains, as you will see, why I am on this program.

I was at first somewhat surprised and at a loss to understand why I should have been selected for a place on this program, and especially to take part in the discussion of so important a question as the new procedure act under rules of the Supreme Court. However, upon making a somewhat timid inquiry about it, I was informed that the three other gentlemen assigned to the subject were attorneys from and fairly represented the metropolitan centers of Indiana, and it had been concluded that, in order to show impartiality, one lawyer who was distinctively and unquestionably from a country district of the state should be given an opportunity to express his views of the subject—should be, as it were, a sort of a “grass roots” representative, and I was pointed out as being in that class.

Of course, I am compelled to admit, and I do so with some pride, that I come fully within the country classification. In view of the fact that in the courts of the country counties we still practice law “without gloves,” and with more vigor and enthusiasm, and perhaps with less refinement, than our brethren of the cities, we are probably more interested in the

* Of the Garrett Bar.

technicalities of the procedure and practice and the restrictions by which we are to be circumscribed by the new powers of the Supreme Court, than any other single group of lawyers in the state. I will, therefore, attempt to discuss the subject from our standpoint.

I think that the Act of the recent General Assembly which first attracted the special attention of the members of the Indiana Bar, was Chapter 185, which did away with the demurrer and substituted in place thereof, and at the same time in place of any and all motions permissible under the old practice, the general motion, of which one only could be directed to any pleading. This change was so radical and such a needless departure from what is probably the oldest and most practical form for testing a pleading, that it aroused the disapproval of the great majority of practicing attorneys.

I note that in the June issue of the Journal of the American Judicature Society, which I understand speaks for one of the most modern group of legal theorists, the Indiana Bar Association is given credit for the passage of that act, and is complimented for the achievement. If this Association had been responsible for that piece of legislation, it would not have been matter for congratulation or boasting, but rather for repentance and prayer.

We found in the new Acts several new laws of practice and procedure, most of them of uncertain value and importance, but what made the lawyers out in the country really sit up and take notice, was Chapter 91, the Act now under consideration.

When we read in that act that, "All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect *only* as herein provided," we fellows out in the country, who then knew nothing about the authors, the history of the adoption of the act or the real purposes of it, and who have to live, work and pray by the Revised Statutes, were simply overwhelmed.

It is bad enough to get old and reach the age of senility and seventy and forget what you know. It is even more dif-

difficult to have the Supreme Court of the State change its mind on you, and take away from you a large part of what you know, but God forbid, gentlemen, to continue to be compelled to have all we know fixed by a corrupted legislature and to have all we know suddenly repealed.

Think of it, gentlemen, at one fell swoop, by one short paragraph containing but three sentences, the hundreds of sections of the statutes covering every procedure law of the state from Justice of the Peace Courts to the Supreme Court, were wiped out. In other words, the legislature had repealed all we knew about practice and procedure and left us stranded on a desert island of legal doubt and uncertainty.

However, after a couple of weeks of despair, it was certainly gratifying to know that, the Indiana Supreme Court had met the situation as it always can be relied on to do, by adopting a comprehensive set of rules, under the authority of the act, which have brought order out of the apparent chaos, and has started the state upon the way of a sane and practical course of judicial reform in procedure, which should be of inestimable value both to the bar and all litigants.

I have in my paper the first two rules. I understand you are familiar with them. They are the rules already adopted by the court which practically reinstate our old code of practice and procedure and the new acts of practice, except they have fortunately eliminated Chapters 15 and 76.

Rules of the Supreme Court of Indiana

“Pursuant to the authority conferred by Chapter 91 of the Acts of the 80th Session (1937) of the General Assembly, and the inherent rule-making powers of this court, the following rules of practice and procedure are adopted by the Supreme Court of Indiana, this twenty-first day of June, 1937.

“The rule affecting chapters 76 and 185 of the Acts of the 80th General Assembly shall be in effect from and after the first day of July, 1937.

“The rules concerning appeals to the Supreme and Appel-

late Courts shall be in effect as to all appeals from judgments in civil and criminal cases in which the judgment is entered or a motion for a new trial is ruled upon subsequent to the 31st day of August, 1937."

These are, of course, practical and sensible rules and retain all of the former laws of procedure except as expressly modified, and clear up all uncertainty that might otherwise have arisen under Chapter 185. To have left all procedure and practice laws suspended or even in doubt as to their being in force or repealed, until the Court could have revised or rewritten them all in the form of Court rules, would have delayed for months all legal proceedings and caused endless confusion in all the courts of the State.

As you will observe, these general rules also effectually dispose entirely of Chapter 185 of the 1937 Acts, and the uncertainty as to proper practice as created by its enactment, and affirmatively reinstate the rules of practice and procedure which it repealed. So we find that by the court's prompt action we have practice and procedure restored, and the state's legal house again in order.

In addition to these general rules the Supreme Court has adopted thirty-five additional rules relating to appeals to the Supreme and Appellate Court, fixing the time and manner of taking appeals, submission of causes, filing of briefs, etc., as it has now a right to do, and in which are incorporated substantially all of the former rules of the Supreme Court relating to appellate practice. It has also adopted rules concerning admissions to the bar.

These rules, in printed form, will be in the hands of the courts and attorneys within a day or two, and there is no need to discuss them here.

This, then, is the situation in which we find ourselves: the Supreme Court has now within its power and control the whole method of legal procedure of all the courts of the state. For the present there are but few changes in the former practice, and these changes are clearly set out in the rules already adopted. The court now may, and it should without haste, with care and with the guidance of precedent

and experience, provide for and adopt such changes and perhaps reforms and improvements in our practice as will, in the mature judgment of the court, simplify the practice, avoid uncertainties, eliminate delays and expedite disposal of the business of all the courts, and at the same time protect fully the rights of litigants and lawyers.

This duty which has been placed upon the Supreme Court, and which it has accepted, is no small one. The procedure and practice acts of this state, the accumulation of legislative enactments for more than fifty years, make up the greater part of Volume No. 2 of Burns Revised Statutes.

Under the most favorable circumstances the task is one of both importance and magnitude, and will require additional and painstaking work on the part of the Court, but I believe the final judgment of the members of the Bar of the State will be that it is the best method that could be established for any improvement of or material change in our judicial procedure.

Other states have tried it and are using it successfully. I have had the opportunity, in preparing this discussion, to examine the rules of practice of the State of Massachusetts, which have been prepared by the Court and apparently fully cover the procedure in that state. They make a volume of more than 300 pages, which indicates the work and care that is required to prepare them and the necessity for our court to have considerable time and opportunity to prepare such a set of rules as will eventually take the place of our statutory procedure.

I think, however, that we should agree that the authority to rewrite, or reform, if you wish to so term it, the legal procedure of our state is at last, for the first time, placed where it belongs. Who could be so well qualified for this work as the men who now are and in the future will be at the head of the judicial department of the state government as members of the Supreme Court?

In making this change or giving it approval we are not criticizing or discarding the established procedure under which our courts have functioned so successfully in the past.

The laws regulating the practice in this state, which I believe have been as simple, practicable, workable and efficient as those of any other state, and much better and in advance of those of many states, have been the product of the best legal minds of the state and of many able members of our profession who have served in past General Assemblies. We are now in a position to modernize somewhat our details of procedure and at the same time preserve and not destroy all the best that years and experience have proved correct.

There has been of recent years a growing tendency of thought and opinion that lawyers have had too great a part in making our laws and administering our governments and that laymen should not only dictate and write the laws governing the people, society and business generally, but that they should also dictate to the courts and lawyers how the legal business of the state and country should be conducted. Every person of any real experience in either legislation or in the administration of the laws, is aware of the fallacy of such a doctrine. It is only through the experience and guidance of competent and trained lawyers that legislation can be produced and written into the statute books which will stand the tests of practical use and honest judicial consideration and interpretation, and it is high time that the courts be freed from the burden of laws proposed and written by inexperienced theorists and wild-eyed crack-brains, and left unhampered to perform their important functions. This new act, therefore, has the great and needed virtue of freeing the courts of Indiana from the present or future danger of being thus impeded, at least in the performance of their own work.

At this time I have no new rules to suggest. The working out of the new procedure should be left with the court, the members of which I am sure will welcome the cooperation of this Association and the lawyers of the state, and through these combined efforts and without undue haste or confusion, the necessary changes will be accomplished without the sacrifice of the rights of any one.

However, we lawyers should remember that demands for improvement in and reforms of judicial procedure are not without some reason. Although much of the criticism that we have heard has been groundless, there has been some reason for complaint in the law's delays. For such unnecessary delays as have occurred the lawyers themselves are largely to blame and they, rather than the average court, merit the criticism. In the country courts, in which I have had most experience, I do know that litigants have had prompt opportunity, when their cause was prepared, to have it disposed of with reasonable expedition, and in the not infrequent examples, in which cases have remained long on the record and the resulting delay has occasioned comment, the explanation can nearly always be found to be the conduct of the parties themselves or their counsel.

Of course, in the larger cities, the problems of both courts and counsel are more difficult, but even there I believe that where reasonable diligence of the attorneys on both sides has been exercised, and the courts have had their full cooperation, the cases in which rights of litigants have suffered from delay are comparatively very few.

We must admit that in nearly every local bar there are one or more attorneys who, because of their incompetence, their negligence or from deliberate purpose, are always seeking delays and it is very difficult for either opposing counsel or the court to make progress in a case in which such an attorney is interested. They take advantage of the almost universal courtesy of the court and opposing counsel, with the result that the court as an institution is blamed and the attorney who is really at fault builds up for himself a reputation of being a smart fellow who can keep his client from being brought to account and can win by wearing out the opposition.

This new legislation will place in the hands of the courts not only the power, but the duty to put an end to such abuses as exist in carrying on their work, and in this they are entitled to and should receive the cooperation of the members of the bar. With this cooperation the looked-for improve-

ments and expected reforms will be realized. Without it, no legislation, however wise or helpful, can fully succeed.

Let us not forget that the courts and their orderly procedure and the performance of their necessary functions as the most important part of our government, are at least facing a challenge, if not already under a cloud of suspicion and doubt. Under these circumstances they are entitled to the whole-hearted support of every member of the bar of our state who believes in maintaining the high standards of independence, efficiency and integrity which for more than a century have written the enviable record of the Judicial system of Indiana.

PART III

By JOSEPH H. IGLEHART*

How far my remarks may cover ground which was covered yesterday by Mr. Gilliom or one member of the Supreme Court, I don't know, but without further apology I shall read, so I may not be too long.

Professor E. S. Robinson of Yale, in his recent book on the subject, discusses "Law and the Lawyers," from the viewpoint of a layman. The average practicing attorney is doubtless startled by his statement that the law is a laggard among the social sciences. Lawyers naturally resent such a suggestion and feel that its author does not appreciate the importance of precedent. Many of us are convinced that there is too strong a tendency in this day of change to disregard the injunction to "hold fast that which is good." But if we are retaining in our practice and procedure methods which have no practical justification, or methods whereby the administration of justice may be improperly delayed, such methods should be changed.

In Indiana we have adhered generally to a system of pleading and practice which has been in effect since 1852. It was recodified in 1881 and there have been important changes

* Of the Evansville Bar.

since then, but the general system is not substantially different from what it was two generations ago.

It is my purpose to confine my discussion chiefly to the question of how far it may be advisable for the Supreme Court of Indiana, pursuant to the provisions of Chapter 91 of the Acts of 1937, to adopt at least certain rules of practice and procedure which may be uniform or substantially uniform with corresponding rules of practice and procedure in our United States Courts. If any suggestions I may make have any value, it will not be because I have qualified myself by any exhaustive study of the subject. It is my purpose to refer to methods which have been found workable elsewhere and which are now being recommended for adoption in our federal courts.

The so-called Conformity Act of 1872 (U. S. C. Title 28, Section 724) has controlled "the practice, pleadings and forms and modes of proceeding in civil cases, other than equity and admiralty cases" in the United States district courts, and has required that they "shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding" in the state courts in the states in which such district courts are held, any rule of court to the contrary notwithstanding.

This federal statute has resulted in different rules of procedure in United States district courts in different states during the last several decades, when great progress was being made in securing uniformity in important fields of substantive law.

On June 19, 1934, Congress enacted a statute (U. S. C. Title 28, Sections 723 b and 723 c), the second section of which authorized the Supreme Court of the United States at any time to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both," with the further provision that the right of trial by jury as at common law shall be preserved inviolate as required by the seventh amendment to the Constitution.

On June 3, 1935, the Supreme Court of the United States appointed fourteen distinguished members of the bar as

an Advisory Committee on Rules for Civil Procedure to draft such rules under said section. After two tentative drafts were prepared, this committee submitted on May 1, 1936, for consideration a Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States.

This preliminary draft of such rules was printed by direction of the Supreme Court of the United States with brief explanatory notes added by the Committee, and was distributed for criticism by members of the bench and bar before being put in final form by the committee. The first report of this Committee was made April 30th of this year, following thorough discussion and criticism in some and perhaps all of the federal judicial circuits where conferences were held. In the report just published the Committee invites further criticisms and states they should be sent in before September 15th, if possible.

The provisions of the 1934 statute provide that after adoption of rules by the Supreme Court, "Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until the close of such session." The Committee in its report points out that such rules as the Supreme Court may adopt will not be reported to Congress prior to the beginning of the session in January, 1938.

If the rules adopted by the Supreme Court are substantially the same as those included in the report submitted April 30, 1937, it would seem that the severest critic of the Supreme Court would be obliged to admit that they will simplify practice in the United States Courts and will greatly expedite the disposition of cases.

An Indiana lawyer accustomed to our system will doubtless not be predisposed in favor of a general overhauling and modernizing of our practice and procedure. This is what would result in substance if, so far as applicable, the rules reported by the Committee were with necessary modifications adopted by the Supreme Court of Indiana.

It would be useless even to attempt to summarize all of the proposed federal rules in the few minutes allotted to me.

They are 88 in number and with the invaluable explanatory notes of the committee fill 216 printed pages. A few references only will be made to matters of special interest in these proposed rules.

A number of the rules proposed are in terms almost identical with provisions of our state statutes, as for example Rule 18, which provides as follows that a pleading which sets forth a claim for relief shall contain:

(1) a short and plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and

(3) a demand for the relief to which he deems himself entitled.

Rule 9 requires that "all averments of claim or defense shall be made in numbered paragraphs," each to contain a single set of circumstances so far as practicable. Such paragraphs may thereafter be referred to by number in all succeeding pleadings. Statements in a pleading may be adopted by reference in the same or another pleading. A copy of any written instrument may be made an exhibit for all purposes.

General denials are not generally permitted, but specific denials of the various charges are required (or a statement that the defendant is without knowledge or information sufficient to form a belief is to be treated as a denial), and when not denied averments (save as to the amount of damage) shall be deemed admitted. (Rule 12 c.)

The court, on its own motion or on motion of any party, may determine what issues are in dispute and require such only to be tried. (Rule 23.)

Rule 10, as to the duty and responsibility of attorneys, is substantially the same in substance as two existing equity rules. It provides in part as follows:

"Every pleading shall be personally signed by one or more of the attorneys of record for the party in whose behalf it is presented and, except when required to be sworn to by specific rule or statute, need not be verified or accompanied by affidavit. The signature of an

attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, the action may proceed as though such pleading had not been served. For a wilful violation of this rule, an attorney may be subjected to other disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

A third party may be joined as a party on application of a defendant to whom the third party may be liable for all or part of the claim made by the plaintiff against such defendant. (Rule 19.) This is permitted in England by recent legislation and in several states.

Rules 17 to 25 relate to parties and in most respects are in accordance with our Indiana law. The law of interpleader is broadened to permit a plaintiff in an action of interpleader to aver that he is not liable in whole or in part to any or all of the defendants whom he has brought into court. (Rule 28.)

Of special interest is Rule 38 which prescribes procedure by which summary judgments may be rendered without trial of issues of fact, where the court determines that there is no issue of fact to be tried. Among other things, admissions made by a party may show this situation to exist, or the submission of affidavits by one party not controverted by the other may show the same situation.

Such summary judgments have been permitted in England for fifty years, and for a number of years in several states, and with particular success in New York. This would seem to be such a desirable feature from the point of view of preventing delay where liability is clear and uncontroverted, that no fair objection could be raised against it. The idea that a clever lawyer should prevail for a defendant in a civil action, because of his ability to prevent an unskillful lawyer from proving a fact essential to plaintiff's case, when in fact the defendant could not honestly deny such fact, has never had much to recommend it.

Failure to request trial by jury within a limited time would under proposed Rule 39 waive such right. Other provisions as to trials vary in many respects from our practice in Indiana, and some of the changes certain rules would make if adopted in this state seem most sensible.

Rule 47 (119) abolishes exceptions—all that is required for the purpose of making a ruling available as error being that the objecting party make known to the court the action he desired taken or his objection—and if there is no opportunity to object, failure to do so shall not prejudice him.

As to procedure on appeal, the suggested rules provide what seems to be a simpler method than do our rules just adopted, although it is undoubtedly true that our method of appeal is now well settled and the rules adopted by our Supreme Court on June 21, 1937, will have the effect of speeding up the disposition of cases on appeal without changing the appellate procedure generally.

The proposed rules leave unchanged the regulations and procedure established by statutes and decisions in connection with applications for appointment of receivers and administration of receivership estates.

A careful analysis of the proposed new federal rules of civil procedure as proposed in the preliminary draft which has since been altered, was made by United States District Judge W. Calvin Chestnut of Maryland in an address delivered at Asheville, North Carolina, in June, 1936, which was printed in full in the August, 1936, number of the American Bar Association Journal. A careful reading of that address by every member of our bar who has not heretofore read it or studied the proposed rules, and who is willing to consider with an open mind the question of changing our civil practice and procedure, is recommended. Some of you doubtless are already well informed on this subject.

There is much to commend the idea of uniformity in court procedure in different jurisdictions. To the extent that any of the rules of practice and procedure which are finally adopted for the United States courts are superior to corresponding rules in the Indiana courts, it would seem

merely a matter of common sense for our Supreme Court to adopt them after investigation and determination that they are in fact superior.

In the January, 1935, issue of the *Indiana Law Journal* appeared an article by Edson R. Sunderland, professor of law in the University of Michigan. Its title was, "The Regulation of Procedure by Rules Originating in the Judicial Council." Later in 1935 Professor Sunderland was appointed a member of the Advisory Committee on Rules and has assisted in the preparation of the preliminary draft of rules referred to. Professor Sunderland in the article referred to expressed the opinion that a court does not have the time nor the incentive to plan and carry out procedural reforms. The fact that the Supreme Court of the United States appointed a committee to draft proposed rules for it indicated that it took the same view.

It is my firm conviction that a most valuable opportunity will be lost if the Supreme Court of Indiana does not take advantage of the very thorough work which is being done by the Advisory Committee appointed by the Supreme Court of the United States. Through the Judicial Council established under the statute passed by the legislature in 1935, or through a committee, our Supreme Court could cause an investigation and report to be made to it as to the features of the federal procedure which will soon be adopted for use in the United States courts, which it may be advisable to adopt in Indiana.

It is, of course, obvious that the federal procedure will furnish no guide for procedure in probate proceedings. It is doubtless also true that it will not be advisable to change our procedure to conform to procedure in the United States courts in every respect possible. But to the extent that we can secure both uniformity and more simple and efficient procedure, it would seem the part of wisdom to wait and see what action is finally taken by the Supreme Court of the United States and then to adopt such features of the federal procedure as will simplify and definitely improve our procedure in Indiana.

England, by its Judicature Act of 1935, frequently referred to in the notes appended to the proposed new federal court rules, seems to have greatly modernized procedure in its courts. Many of the states have passed the stage of experiment as to such matters as summary judgments, narrowing the issues for trial to those as to which there is an actual dispute, and eliminating the technical requirements regarding steps which must be taken during a particular term of court. Indiana should not lag behind.

PART IV

By A. J. STEVENSON*

I am sure, coming at the end of this splendid program, or near the end of it, and after hearing these three splendid papers on the subject assigned, I am very much in the position of a citizen who used to live down at my home town of Danville. His greatest ability lay in the fact that he could drink lots of liquor. After coming to Danville, one day, and making his usual rounds, he stopped at the cemetery. He went through the graveyard and read the epitaphs, came out and sat down at the roadside and began to cry. One of the citizens came by and asked him what in the world he was crying about. He said he had just been in the cemetery, and after reading the inscriptions on the tombstones there, he had come to the conclusion that everybody that ever lived in Danville that was worth a damn was dead.

After hearing these papers on this subject, I have come to the conclusion that everything that might be said on the subject that is worth a damn has been said.

I had arranged to give you a brief review of the new rules adopted by the Supreme Court. Judge Fansler yesterday stole my thunder on that subject, and I have deleted fifty

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per cent of my remarks. About all that is left that I can say, perhaps then, is to comment briefly upon the constitutionality of the new rule making power, and offer a couple of suggestions which I think might serve to expedite our appellate procedure.

The question of the rule making power of our courts is as old as the courts themselves for the common law courts have governed procedure by general rules from the middle ages to the present. The first public action of the Supreme Court of the United States was to make a rule adopting the practice of the court of the King's Bench as the practice of that tribunal.

When American constitutions were adopted the power to make general rules governing procedure was and had been for centuries in the King's Court at Westminster. Hence, if anything was received from England as a part of our institutions it was that the making of these general rules of practice was a judicial function. Indeed this was well understood in the beginning of American law.

So, in 1847 the Supreme Court of the State of New York promulgated rules of practice, very many of which were simply turned into sections of the code of civil procedure, which rules are in force under that guise at the present time.

So from this beginning, during the last ninety years the legislatures in the various states have been prolific in procedural legislation resulting in code and practice acts, which have, in many instances, entirely abolished the common law rules adopted by the early courts for the transaction of their business. As a result of this legislation, in the minute details of procedural operation, there has grown up a demand to the effect that the legislature ought to leave judicial procedure to the judiciary and that the power to promulgate rules of practice for tribunals should be, and indeed always has been, a judicial power. As a result of this popular demand many states in recent years have passed legislation giving to the Supreme Courts of such states the power to promulgate rules regulating the practice and procedure in the courts of such states.

So, in Indiana the Indiana General Assembly in its recent session, by Chapter 91 of its Acts, provided that:

"The Supreme Court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; * * *"

The legislature declared that:

"The purpose of this act is to enable the Supreme Court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice and to abolish fictions and unnecessary processes and proceedings."

Acting under the mandate and authority of this statute, the Supreme Court of the State of Indiana on June 21, 1937, adopted a set of rules and regulations, amending in many particulars, former rules governing Appellate procedure. Acting under the broad power conferred by this statute, their first official interference with legislative authority appears in the fourth paragraph of the rules as adopted, which reads as follows:

"All rules of practice and procedure adopted by statutory enactment and in force as of this date are adopted as rules of this court, except the rules adopted and enacted in Chapters 76 and 185 of the Acts of the 80th General Assembly, 1937, which are hereby abrogated."

You are doubtless familiar with the provisions of Chapter 76 which in brief provided an additional mode of review and method of appealing a case to the Supreme and Appellate Courts of this state, which method was described generally as "a review by certificate."

Chapter 185 of the Acts referred to was the Act which provided that all objections to pleadings in civil cases should be made by motion.

Thus, the first official act of the Supreme Court of the State of Indiana, under its new rule making power, was to abrogate two distinct and separate acts of the legislature

which had been passed governing procedure. These chapters governing procedure had been in force and effect since June 7, 1937. The Supreme Court rule abrogating their provisions became effective July 1, 1937.

Thus, the attorneys in the State of Indiana found themselves in the position, as did the office of the Attorney General, of being forced to present their questions by motion on June 30th, which questions must be presented by demurrer on July 1st, and in one case where this question was raised the Court was compelled to say, in the presence of your speaker, that:

“This motion is proper today, it will not be so tomorrow.”

Acting, therefore, under the power conferred and promptly abrogating recent legislative enactments governing procedure, the question naturally arises in the minds of lawyers as to the constitutional right of the Supreme Court to abrogate and set aside rules of practice set up by legislative enactment. The principal attack upon the validity of such a statute is that it constitutes a delegation by the legislature of its legislative power.

We are committed by our Constitution to the doctrine of separation of powers. It is fundamental that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch. The power to make law is reserved exclusively to the Legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void.

Chapter 91 of the Acts of 1937, however, does not authorize the judiciary to invade the province of a coordinate branch of the government. The power to provide rules of pleading, practice, and procedure is not necessarily a legislative function.

The leading case in the United States on this point is the case of *In re Constitutionality of Section 251.18, Wisconsin Statutes*, 204 Wis. 501, 236 N. W. 717, 718. The Wisconsin statute construed in that case is practically the same as Chapter 91 of the Acts of 1937.

In the Wisconsin case the principal attack upon the validity of the law was that it constituted a delegation by the legislature of its legislative power. The Wisconsin court said:

"It is not only a matter of some difficulty to set precisely the border lines of legislative, executive, and judicial powers, but it also seems quite clear that either by custom or constitutional mandate, or the inherent necessities of the situation, the three branches of government have heretofore exercised other powers than those which, under the doctrine of separation of powers, belong peculiarly and exclusively to them.

"In *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 496, 220 N. W. 929, 938, the court said: 'What it seems to us is demonstrated by the discussion in the Hampton Case (276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624), * * * is that there never was and never can be such a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called coordinate governmental powers. As a matter of fact, they are and always have been overlapping. Courts make rules of procedure which in many instances at least might be prescribed by the Legislature. When courts through a receiver reach out and administer a great railway system extending from one ocean to the other, they are not exercising a strictly judicial power; they are exercising an administrative or executive power, which historically has found its way into the judicial department. The Constitution reserves to the Legislature the power to act as a court in certain cases. When it acts as such, it exercises a judicial power. Every executive officer in the execution of the law must of necessity interpret it in order to find out what it is he is required to do. While his interpretation is not final, yet in the vast majority of cases it is the only interpretation placed upon it, and, as long as it is acquiesced in, it becomes the official interpretation which the courts heed and in which they oftentimes acquiesce as a practical construction.'"

State v. Roy, 60 Pac. Rep. (2d) 646 at 659.

Coming to the later authorities, it has recently been held in Washington, in the case of *State ex rel. Foster-Wyman Lumber Company v. Superior Court for King County*, 267 P. 770, 771, that, assuming the right of the Legislature to make rules for the court, it does not follow that such action is a legislative function. The court said:

"Not all acts performed by a Legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the

belief that one of our law-making bodies has abdicated its duty, and attempted to transfer its legislative mantle to the shoulders of another body, not legislative, thereby subverting the purpose of its creation and denying the people of the commonwealth the right to have the laws which govern them enacted by their duly chosen representatives. This distinction was ably pointed out by the United States Supreme Court as early as *Wayman v. Southard*, 6 L. Ed. 253. * * * Chief Justice Marshall, referring to the point, said:

“It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself.’ * * *”

In *Hanna v. Mitchell*, 202 App. Div. 504, 196, N. Y. S. 43, 51, the court said:

“The power to make rules governing the practice and procedure in the courts is a judicial, and not a legislative, power. This was clearly recognized when the Code of Procedure was authorized to be adopted by the Legislature. A change in the Constitution was found necessary to confer the power upon the Legislature. The federal Constitution (Article 3, Sections 1 and 2) seems to give greater power to Congress over the proceedings in the federal courts than is given by the state Constitution to the legislature, and yet the Supreme Court of the United States said: ‘Congress might regulate the whole practice of the courts, if it was deemed expedient so to do; but this power is vested in the court, and it never has occurred to any one, that it was a delegation of legislative power.’”

Without extending this discussion to cite other authorities it is sufficient to say that in practically every state where the constitutionality of the rule making power of the Supreme Court has been challenged such power has been upheld as not violative of the constitutional provisions. In a recent article on the rule making power of courts, written by Dean Roscoe L. Pound, formerly of the Harvard University School of Law, the many advantages of the rule making power over the legislative authority are discussed and on this subject he presents the following statement:

“Again, rules of court have an enormous advantage in that they are interpreted by those who make them. They are not made by one body

and then interpreted and applied by another body, which is out of sympathy with them. It took more than half a century for judges to acquire sympathy with the codes of civil procedure. For nearly two generations, courts were governed by historical ideas and common law conceptions at variance with the spirit of the codes, and in consequence many of their most important provisions long failed of effect. The relatively rapid development of a modern procedure in England is largely due to the circumstance that those who made the rules interpreted and applied them. Moreover, it is easy to bring professional opinion to bear upon the rule-making power, whereas the difficulty of procuring legislative action with reference to even the most crying needs of judicial procedure is notorious. Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy, too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about: they will not, as has happened more than once when committees of the American Bar Association have gone before Congressional Committees—they will not have to be taught the existing practice and the mischief as well as the proposed remedy. When rules of procedure are made by judges, they will grow out of experience, not out of the axe-grinding desires of particular law-makers.”

It is my opinion, therefore, that the rule making power conferred upon our Supreme Court is not only valid in its provisions but it is my further opinion that it is a power that, having once been conferred, will never be again taken away, for under the authorities above quoted, I doubt seriously if the legislature can take it away. Having this authority conferred carries with it, therefore, a very grave responsibility.

If the Supreme Court is given authority to adopt rules governing procedure in the trial of cases then the administration of justice should not be hampered by rules that are deemed cumbersome and out-moded. Doubtless with this in mind the Supreme Court, in the rules recently announced and which will become effective generally on August 31, 1937,

have taken steps to very materially speed up the submission of cases on appeal. Time will not permit me to mention these changes in detail. Suffice it to say, appeals must now be taken within ninety days of the date of the judgment or the ruling on a motion for a new trial, whereas, one hundred-eighty days was formerly allowed. Cross errors must be assigned within thirty days after submission of the cause, whereas, sixty days was formerly allowed. Under Rule 15, as now adopted, every appeal shall be submitted on the date of the filing of the transcript, whereas, formerly they were not submitted until thirty days after the filing of the transcript and assignment of errors. Rule 16 gives the appellant thirty days after submission in which to file his brief. This was formerly sixty days.

Another departure from the established rule is that extensions of time to file briefs will not hereafter be granted except upon verified petition filed at least ten days before the expiration of the time for filing briefs. This rule does not apply to appeals from interlocutory orders or where it is made to appear by affidavit that the facts which are the basis of the petition did not exist or were unknown to counsel.

Applications for rehearing must now be filed within twenty days from the rendition of the decision. This was formerly sixty days.

Petitions to transfer shall be filed within twenty days after the petition for rehearing has been overruled and parties opposing such transfer may file briefs within ten days after the filing of the petition to transfer.

It will thus be noted that the time for perfecting appeals is very materially lessened. The Court has felt that this action is justified for the reason that the court is now able to hear cases as soon as they are fully briefed.

Our Supreme Court is to be commended on the fact that for the first time in many years a court adjourned with no cases pending that were fully briefed.

Now that power has been conferred upon the Supreme Court to adopt rules governing practice and procedure the court will doubtless be showered with many requests for

the adoption of particular rules. One of the evils that must, therefore, be guarded against will be the tremendous number of rules that will be approved in the days that are ahead.

The history of all states which have conferred upon the Supreme Court the rule making powers has shown the fact to be that these rules multiply very rapidly. Our Supreme Court of the United States is no exception. I hold in my hand a printed copy of the rules proposed, which will doubtless be adopted by the Supreme Court of the United States when they convene next fall. This volume consists of 250 pages and there is embodied therein 88 rules which govern civil procedure in the courts of the United States.

The State of Wisconsin to date has adopted 355 rules. The State of Washington has adopted 52 rules.

Yet this is much to be desired when we reflect that we now have nearly 5,000 sections of the state.

In looking over these rules of the various states I have found two which appeal to me as being worthy of adoption in our state. One of these rules is copied from the State of Wisconsin and reads as follows:

"Sections (Rules) 270.39 to 270.42, inclusive, are hereby consolidated, revised and amended to read as follows: Rule (Section) 270.39. *Exceptions.* In any trial before the court, with or without a jury, or before a referee, exceptions are deemed taken to all adverse rulings and orders made in the course of the trial. No express exceptions need be entered in any bill of exceptions. It shall not be necessary to file exceptions to the judge's charge to the jury or to his refusal to instruct the jury as requested, or to any orders, or to the findings of fact and conclusions of law made by the court, and the same may be reviewed by the appellate court without exceptions; but any party who expressly requests any finding of fact, conclusion of law, instruction to the jury or ruling or order shall not be heard to question its correctness on appeal. This shall not, however, limit the power of the Supreme Court under Section 251.09, Stats."

204 Wis. Rep.—Page VII

This practice has been generally adopted in most Circuit Courts and I think lawyers generally would favor the embodiment of such procedure in a general rule of practice.

The second rule which I would recommend is a rule which now exists in Washington and many other states. This rule is to the effect that:

"No alleged error of the trial court will be considered by the Supreme or Appellate Court unless the same be clearly pointed out in the appellant's brief: Provided, That the objection that the court has no jurisdiction of the appeal may be taken at any time."

I am sure that there are no practicing attorneys who write briefs for the Supreme or Appellate Court who do not feel that the questions presented by the briefs should constitute the basis for the opinion of the court. Article 7, Section 5 of the Constitution of the State of Indiana, provides that:

"The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon."

While this constitutional requirement may operate to increase the length of opinions, yet the appellants involved in the litigation should be required to select their battle ground and having assigned their errors and submitted the propositions relied upon for reversal, it strikes me that the appellee is entitled to have the case decided on the questions raised. Not infrequently courts of last resort seek and find other questions than those presented by the briefs upon which to base their decision. Such a procedure places upon the appellee the burden of not only meeting the appellant on the questions presented but imposes upon him the burden of sustaining the judgment on every other proposition which might appear in the transcript of proceedings. Where a decision turns upon a question not presented by the briefs the only remedy afforded lies in a petition for rehearing, and rarely is a party successful in reversing a decision by anything he may say in a petition for rehearing. As proof of this statement your attention is directed to the fact that during the year which closed June 30, 1937, sixty-two petitions for rehearing were filed in the Supreme Court of our State and each and every petition so filed was denied. It seems

that the case having once been decided, even though it may have turned upon a question not presented by the briefs, chances for further effective consideration are very slight. The judgment of the trial court should be affirmed on appeal if on review, the Appellate Court may fairly do so.

The Constitution requires that the questions presented on appeal be decided. It would seem, therefore, that a rule which requires that only the questions presented be decided would be highly satisfactory to all parties concerned.

I recommend, therefore, the adoption of these two additional rules for your consideration.