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### A Foundation for Procedural Reform

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interest which would keep our judicial system from rendering to all who may apply, speedy and equal justice.

#### What Bar and Bench Can Do

The press could have offered no better representative, or champion, than James P. Kirby. Without denying many of the charges leveled at newspapers Mr. Kirby pointed out that the worst faults complained of could be cured at a single stroke by judges who had the courage and good taste to use the power inherent in their office. Bar associations, too, could do much to remedy existing weaknesses in the profession in and out of court. He spoke of the Hall-Mills case, where the judge sat with batteries of cameras to right and to left, while he had permitted installation in the courthouse of a telegraph instrument which served one hundred and twenty reporters at the rate of 20,000 words an hour. The judge could have put a curb on the unholy sensationalism of that trial if he had wanted to. He

told of magistrates who even asked reporters what questions to ask in order to make "good copy." He told of knowing prosecutors who, for campaign purposes, will do anything to give reporters sensational stories. "May I submit that I could give the names of lawyers who, before drawing a pleading, have called me and other newspaper men and volunteered to so draft a pleading as to make good newspaper copy. I do not know what the American Bar Association's code of ethics says on this subject."

As for press influence Mr. Kirby told of the printing of a glowing editorial commending a Cleveland policeman for killing a man, and before the day of publication was over that officer shot and killed as a suspect an innocent employe of the same paper.

"I think it would be a hardy newspaper man who would venture to criticize a judge who had the courage to lay down a rule which would prohibit some of the things I have personally seen happen in court rooms."

## A Foundation for Procedural Reform

Bill Drafted by Prof. Hugh E. Willis and Approved by Indiana Bar Association First to Follow Method Successful in England's Reform.

Only two or three years ago it was possible to say that in spite of a generation of bar agitation the essential reformation of pleading and trial practice had virtually arrived at stalemate. Since then notable things have developed. Broad rule-making power has been conferred on certain supreme courts, notably those in Washington and Wisconsin. In Michigan the supreme court's constitutional power has been exercised liberally through the efforts of the state bar association and with the aid of the Legal Research Council of University of Michigan Law School. In Connecticut, Massachusetts, California, Texas and elsewhere the judicial councils have secured adoption of specific acts of considerable importance.

It would now seem fair to hold that while present influences appear certain to work out substantial reforms in many states it is yet possible to expedite this reform with no loss of judicial expertness in any state where the bar will give support to a real reform act.

In explanation it should be said that England's success in modernizing pleadings and practice after a prolonged struggle came under the judicature acts, which created an expert body of judges and lawyers to advise the supreme court as to needed changes in rules. Ordinarily reference to the English situation stops here, and ignores what was even more

significant. Parliament not only created this machinery, but at the same time enacted a compact body of rules as a foundation for progress. These rules extend in fifty-eight sections from "form of action" and "summons" to "effect of appeal." They form a sort of constitution under which the rules adopted by the supreme court provide the extended operative provisions.<sup>1</sup>

It is entirely clear that this mode swept the ancient and unfit rules out of existence and obligated the court, with the aid of the rules committee, to proceed in a spirit of liberality and sincere compliance with the nation's mandate.

It is conceded that in no state is there a situation precisely comparable to that of England's in 1870. But in most states there is ground for dissatisfaction with practice acts and codes that have permitted the growth of pleadings and trial procedure which over-emphasize contentiousness and stimulate the competitive instincts of counsel. And in most states we developed a strictly American trial procedure in jury cases which largely eliminated the judge as a responsible factor.<sup>2</sup>

<sup>1</sup> This enacted "schedule of rules" was published in full in this Journal, Vol. iv, No. 4, p. 115.

<sup>2</sup> In an argument for the plan involved in the draft act which follows Professor Willis said:

"Code and common law pleading have had much to do with making our legal procedure a game through raising procedural instead of substantive

The question may be said to be whether in any state the bar is willing to accept the leadership of the highest court, aided by a council of trial judges and lawyers, in making our procedure conform more closely to practical needs. In any such state the way is open. An act of legislature may confer on the supreme court full rule-making powers (meaning by that the power to abrogate statutory rules as new ones are promulgated), create the advisory council, as has been done in Wisconsin and is proposed to be done in Missouri, and also define in general precepts the course of reform. This appears to be the appropriate plan for progressives to aim at.

It is the opinion of the writer that such an advisory council, or rules committee, should not be conceived as filling the role of the state judicial council as that role is now understood. There should be, in other words, a judicial council charged with the broadest advisory powers, empowered to obtain all needed data as to judicial administration throughout the state. No conflicts would occur with the rules committee. The judicial council would be absolved from drafting rules of practice and procedure and would devote itself to administrative problems and advising the legislature as to needed acts outside of the field of court rules.

Of course a single body could cover both fields, but presumably with less success than two bodies with personnel chosen for these different functions. There would also be, with two such groups, a distribution of responsibility and honors, a larger body of voluntary workers, and an easier load.

With this cursory attempt to present a situation and suggest the best course it is timely to present steps in this direction which have been taken in Indiana. Prof. Hugh E. Willis, of the Indiana State University School of Law, has obtained full approval of a suitable bill by the State Bar Association's committee on jurisprudence and law reform. It is published below in this form. The Association itself, after thorough discussion, approved of

law points. Notice pleading would do much to correct this defect in our present system. There is no reason for any other requirement of pleading. All that a litigant or an accused needs is notice sufficient to apprise him of the claim or charge against him, and this is all that the court needs before the beginning of the trial. The issues can better be fixed by the trial court itself as was done by the praetors under the Roman law, and as is done by masters or the judge in England today.

"Attorney control over the conduct of cases also has had a great deal to do with the litigation of procedure. Attorneys are always partial. But one of the best ways to obtain justice is through some impartial judicial control. The only way of obtaining this is through the trial judge. It is the business of attorneys to be partial. They are under imperative duty of so being. Judges are under duty to be impartial. Once in a while a court may have a partial judge, but his work can be corrected by a higher court, and it is better to have once in a while a partial judge than never to have

the bill with the exception of the provisions for notice pleading and the broad powers given to the trial judge in sec. 2, par. c. These are substantial matters but enactment of the bill without them would mean a very long step forward, one which may be taken at the next term of legislature. The Indiana State Bar Association has been making strides in the past two or three years and much may be expected of it in the future.

#### Proposed Procedural Act

An act to abolish the present and to provide a new system of legal procedure for all the courts of this state; authorizing the supreme court to prescribe, promulgate, enforce and publish forms and rules for the regulation of legal procedure; providing for an advisory council, reporter and employes; making appropriation for carrying out the purposes of this act; and repealing all laws in conflict therewith.

*Be it enacted, etc.*

Section 1. SUPREME COURT TO MAKE RULES. The supreme court of this state shall have the power to make, prescribe, promulgate and enforce by rule from time to time and in any manner, the forms of writs and all other process; the mode and manner of framing and filing proceedings, papers and pleadings; of giving notice, serving and returning writs and process of all kinds; of giving, taking and obtaining evidence; drawing up, entering and enrolling orders and the keeping of all other records of the court; regulating costs; and generally to regulate and prescribe the entire procedure, including pleading, evidence, and practice, to be used in all actions, motions and proceedings, of whatever nature, in all the courts, including the courts of appeal, of this state. Separate rules shall be made for civil and for criminal trial procedure.

Section 2. RULES OF LEGAL PROCEDURE. The rules of legal procedure in this state shall be such rules as may thus be adopted by the supreme court of this state; provided, that

(a) *Simplification of Rules.* In prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, evidence, practice, and procedure in said courts, so as to promote a speedy determination of litigation.

a chance to get impartiality into the courtroom. The trial judge, therefore, should be clothed with power to impanel the jury with proper safeguards; with the power to examine witnesses; and in marriage, divorce, and probate cases, and in the case of experts even to call witnesses.

"Attorneys are interested in these questions, but clients are not interested in them. If attorneys only were interested, perhaps our system of legal procedure might be said to be working all right, but legal procedure is not for attorneys but for clients. If society were asked to furnish gratuitously a game for attorneys to play for their own amusement it would probably refuse to stand the expense. Yet in actual result this is more or less what society is now actually doing. Other results which follow are uncertainty, technicality, expense, and delays. Even if justice is finally obtained in certain cases it is always at the expense of these other results. In a great many cases in addition to these results, justice even is not obtained."

(b) *Pleading.* All rules of pleading shall be based upon the principle of giving notice of the opposing claims of the respective parties, sufficient to apprise them and the court of the nature thereof [notice pleading]. They shall not be based on the principle of requiring a complete allegation of all the ultimate facts which must be proved at the trial in order to establish such claims [issue or essential fact pleading]. The term pleading as used in this act shall be understood to include affidavits, indictments and all other papers filed or used in any legal proceeding except as evidence.

(c) *Practice: Trial Court.* Every step in the trial of a case shall be taken under the direction and supervision of the court; and the judge shall help to empanel the jury, shall elicit evidence by questions to witnesses, shall instruct the jury upon the law, and otherwise control the conduct of the case. The judge shall have power to select, summon, and place on the stand witnesses not called by the parties. Experts shall be called by the court instead of by litigants, either on the court's own initiative or on request of a litigant; and the expense thereof shall be included as a part of the trial cost.

(d) *Practice: Supreme and Appellate Courts.* No case shall be reversed for a violation of rules of court, or any other technicality, or ever remanded for a complete new trial if the first trial satisfies constitutional requirements, but the supreme court shall, where practical, always render final judgment, and to that end it is empowered to correct any prejudicial errors of the trial court, whether of procedure or of substantive law, and to certify to the trial court for trial any unsettled question of fact on which it has not power to take evidence.

(e) *Rules to Be Not Inconsistent with Act.* All the rules so adopted by the supreme court shall not be inconsistent with any of the terms of this act or with the constitution of the state or of the United States.

(f) *First Rules.* The rules of legal procedure in force at the present time, whether statutory or common law rules, are hereby repealed as mandatory rules and are constituted and declared to be operative as the first rules of court for the appropriate courts of this state.

Section 3. EFFECT OF RULES. All rules of court formulated pursuant to this act, except as required by this act or the constitution of the state, shall, as to the courts, be directory and not mandatory.

Section 4. DECISIONS NOT PRECEDENTS. A decision by any court on a point of procedure,

whether a point of pleading, evidence, practice or any other procedural matter, shall never be regarded as a binding precedent for the decision of a procedural point in a later case. The question whether any point is procedural or substantive shall itself be regarded as procedural.

Section 5. ADVISORY COUNCIL. To assist the supreme court in the revision of the rules of court there is hereby created as a permanent tribunal an advisory council to be composed of the attorney general of the state, the chairman of the judiciary committee of the senate, the chairman of the judiciary committee of the house of representatives, two circuit judges of the state to be appointed by the governor, and the president and vice-president of the Indiana Bar Association. Said council shall be advisory only and shall have no power to change any of the rules. The members of the council shall serve without pay but shall be allowed their necessary expenses.

Section 6. REPORTER, etc. The supreme court is authorized to employ a reporter, an expert in the law of legal procedure, whose duty it shall be to study the present rules of legal procedure and to prepare and report to said council and courts rules designed to carry out the purposes of this act. Such court is also authorized to employ such clerical and stenographical assistance and to purchase such supplies as may be necessary; and to fix the compensation and to provide for the expenses of employes and for the said reporter.

Section 7. PUBLICATION OF RULES. The supreme court is hereby given authority to contract for the publication of the rules of court.

Section 8. APPROPRIATION. There is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated . . . for the purpose of carrying out the provisions of this act, to be paid out on the order of such courts.

Section 9. UNCONSTITUTIONALITY. If any phrase, sentence or provision of this act is unconstitutional it shall not affect the constitutionality of the remaining provisions of the act.

Section 10. REPEAL. All laws or parts of laws inconsistent with this act are hereby repealed. When and as the rules of court herein authorized shall be promulgated, all rules in conflict therewith shall be and become of no further force and effect.

Section 11. TIME OF TAKING EFFECT. This act shall be in force and effect from and after . . .

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Every lawyer knows that the continual reversal of judgments, the sending of parties to a litigation to and fro between the trial and appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession. It is a disgrace to our law, and a discredit to our institutions.—*Elihu Root.*