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# THE NEW FEDERAL RULES AND PROCEDURAL REFORM IN INDIANA

By BERNARD C. GAVIT\*

## I

Indiana has a disturbing history and a poor reputation in the field of procedure.<sup>1</sup> The Code of Procedure which was originally adopted in 1852 and re-enacted in 1881 was a layman's reform placed on the statute books over the objection of a substantial majority of the lawyers and judges of the state. It was placed there in compliance with the mandate of Section 20 of Article 7 of the Constitution of 1851. That section required the next General Assembly to provide for a commission "whose duty it should be to revise, simplify and abridge the rules, practice, pleadings and forms of the Courts of Justice. And they shall provide for abolishing the distinct forms of action at law, now in use; and that justice shall be administered in a uniform system of pleading, without distinction between law and equity." That section of the Constitution was opposed by the lawyer members of the Constitutional Convention almost without exception. They refused to believe that there was anything wrong with the common law and equity procedure as it had been developed in England during the Middle Ages.<sup>2</sup> Despite this opposition the public inaugurated a reform which resulted in the adoption by the General Assembly in 1852 of the new Field Code of Procedure from New York.

The Code which was thus written into the statute law of Indiana received, on the whole, a cold welcome from the bench and bar. Indeed it is not an exaggeration to say that

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<sup>1</sup> The casebooks on procedure contain a generous sprinkling of Indiana cases. Most of them are included to illustrate a distinctive minority or "erroneous" view on the point involved.

<sup>2</sup> No small amount of time in the Constitutional Convention was devoted to a discussion of this section. Practically all of the opposition came from the lawyer members.

there was something resembling a premeditated rebellion against it. It was treated as an unwelcome relative who had long overstayed his uninvited and boresome visit. It became the step-child of the law. The result has been that we have inherited from the lawyers and judges of the second half of the nineteenth century some very poor case law and an unsympathetic attitude toward the reforms obviously intended by the Codes of 1852 and 1881.<sup>3</sup>

Consider as Exhibit No. 1 the case of *The City of Logansport v. Kihm*<sup>4</sup> decided by the Indiana Supreme Court in 1902. In this case the complaint was for personal injuries in which the plaintiff alleged that a certain street in the City of Logansport, paved with brick, was negligently suffered by the city to get out of repair and to become worn and sunken at a certain point so that a hole formed four inches in depth, two feet in width, and three feet long, three sides of the hole sloping outward and the east end thereof being nearly perpendicular. The plaintiff also alleged "that while she (the plaintiff) was riding her bicycle upon said street she approached the said street, so out of repair as aforesaid, from the west end, . . . and having no knowledge of the defect in said street . . . struck said defective, unsafe and out-of-repair street, and by reason of said street being out of repair she was thrown violently from her bicycle" etc. to her injury.

A demurrer for insufficient facts was overruled, there was a trial, a verdict and a judgment for the plaintiff and an appeal by the defendant. The Supreme Court reversed the judgment with instruction to sustain the demurrer, holding that the complaint was insufficient, for the reason that it did not allege cause in fact, saying that the allegation to the effect that the plaintiff's bicycle struck the defective street was not an allegation that it had struck the defect in the street; therefore there was no connection alleged between the alleged negligence and the injury.

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<sup>3</sup> The Code of 1852 was re-enacted in 1881 without substantial change. It was part of a proposed general revision of the statute law of the state which never materialized.

<sup>4</sup> *The City of Logansport v. Kihm*, (1902) 159 Ind. 68, 64 N. E. 595.

The case is extreme, but not unusual. The decision ignored and violated the following provisions in the Code of Procedure: (Burns' Ind. Stat. Ann. 1933.)

2-1048 (403). *Liberal construction—Indefiniteness, how corrected.* In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 126, p. 240.)

2-1013 (368). *Demurrer overruled—Judgment.* The judgment upon overruling a demurrer shall be that the party shall plead over; and the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined. If a party fails to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 91, p. 240.)

2-1063 (418). *Variance, when immaterial—Procedure when party misled.* No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled; and, thereupon, the court may order the pleading to be amended on such terms as may be just. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 130, p. 240.)

3-1071 (426). *Judgment not reversed for technical errors in the pleadings or proceedings.* The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 137, p. 240.)

2-3231 (725). *Defect in form no ground for reversal.* No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance or imperfection contained in the record, pleadings, process, entries, returns, or other proceedings therein, which, by law, might be amended by the court below; but such defects shall be deemed to be amended in the Supreme Court; nor shall

any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 659, p. 240.)

Down to about 1913 one will look in vain in the decisions of the Appellate courts of Indiana for any consistent mention or serious discussion of those statutes.<sup>5</sup> Since that time there have been some instances where they have been given effect; but the results are highly inconsistent, even down to the present date. For example, in 12 N. E. (2d) 348, 350 will be found two cases both decided by the Supreme Court of Indiana on January 25, 1938.<sup>6</sup> In the first case the court held that in an action on a promissory note where illegality had not been pleaded as a defense evidence of illegality should be disregarded. In the second case the court held that a complaint alleging an oral contract sustained a judgment where the plaintiff proved a written contract saying "with the adequacy of the complaint we are not concerned, since on appeal, it may be treated as amended to conform to the facts."<sup>7</sup>

Similar instances can be multiplied. Again, for example, in one recent case the Appellate Court of Indiana sustained an affirmative equitable judgment for a plaintiff on the theory that he had proved an equitable cause of action although his complaint was clearly based on another "theory."<sup>7</sup> On the other hand, case after case is reported where the court re-iterates the time-worn phrase that recovery may only be had on the "theory of the pleadings."<sup>8</sup>

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<sup>5</sup> In 1913 the case of *Domestic Block Coal Co. v. De Armye*, (1913) 179 Ind. 592, 102 N. E. 99, was decided. The court refused to follow many of the older cases and gave full effect to the statutes set out above. The case constitutes a distinct turning point toward a more liberal view on the subject.

<sup>6</sup> *McCarthy v. Miller*, (1938) 213 Ind. 596, 12 N. E. (2d) 348; *Western & Southern Life Ins. Co. v. Vale*, (1938) 213 Ind. 601, 12 N. E. (2d) 350.

<sup>7</sup> *Hosanna v. Odishoo*, (1933) 187 N. E. 897. This case was transferred to the Supreme Court, where the same result was reached for different reasons. 208 Ind. 132 (1935).

<sup>8</sup> See, *Dickerson v. Ewin*, (1938) 105 Ind. App. 694, 17 N. E. (2d) 496. See also notes, 6 Ind. L. J. 402, 575; 11-482.

## II

The attitude of the courts reflects the attitude of the bar, and I intend no specific or individual criticism of either. The results do indicate, I think, an unhealthy situation. Rebellion against democratic legislative and constitutional authority can hardly be condoned (and in any event the rules of the Code have now become judicial, for on June 21, 1937, the Supreme Court adopted them *in toto* as rules of court). An insistence on the doctrines of common law procedure at this late date is intellectually and politically unsound and is unprofessional.

We will be very wise to accept the philosophy of the Code which went to some length to repudiate the common law doctrine which required that a perfect compliance with the rules of procedure was a pre-requisite to a favorable decision on the merits. In no uncertain terms the Code in Indiana insists that procedure must be subordinated to substantive rights. The Code being constitutionally valid we have no legal right to refuse to accept it. We will be very wise also to accept the facts of experience which demonstrate that the common law dogma to the effect that the issues in a case can properly and with justice to the parties be determined by written pleadings, under penalty of excommunication, is a mistaken hope. The meritorious basis for the Code provision repudiating the common law on this subject is therefore apparent. We will be very wise, also, if we deal rather harshly with those members of the bar who insist upon procedure for delay or unfair advantage.

Every recent development in the field of procedure sustains those propositions. The statutes cited—the increasingly liberal provisions for the amendments of pleadings—express or implied—indicate a common acceptance of a system of pleading which will remove from the field of procedure the last traces of formalism.<sup>9</sup> Experience demonstrates that any acceptance of those developments necessarily destroys the validity of written pleadings, except as a point of departure. If written pleadings are subject to amendment or abandonment

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<sup>9</sup> The new F R C P accept the Code provisions on this score.

almost without limitation they become as unstable as a South American government—as unreliable as a third-rate politician. Wise lawyers rely not upon the pleadings but upon the conditional examination of the adverse party or an exhaustive investigation in determining the real issues and probable evidence in any but a clear-cut case.

It occurs to me that those who would still cling to the contrary Common Law dogmas are in danger of being buried in a dead past—and in turn they endanger the good of the order. One who defends such a position because of the veneration due the Common Law must also by the same sign defend all other Common Law doctrines, for they are all equally venerable. He must operate on the assumption that fraud is immaterial in contract liability; that one is liable in trespass for inevitable accident; that a defendant in a criminal case may not testify, and innumerable other rules which a more recent social judgment has repudiated.

It has been reported that some lawyers have objected to any revision of our rules of procedure along the lines suggested by the Judicial Council as undesirable because it would take the “fun and sport” out of the trial of cases. I don't know how serious those assertions are—but I think I do know that such an attitude is not entirely non-existent—and that under the law it is clearly unprofessional, and constitutes contempt of court and forms a proper basis for disciplinary action.

The Indiana Statutes on the subject follow: (Burns' Indiana Statutes Annotated 1933.)

4-3608 (1038). *Duties of attorney.* It shall be the duty of an attorney.

*First.* To support the constitution and laws of the United States and of this state.

*Second.* To maintain the respect that is due to the courts of justice and judicial officers.

*Third.* To counsel or maintain such actions, proceedings or defenses only as appear to him legal and just; but this section shall not be construed to prevent the defense of a person charged with crime, in any case.

*Fourth.* To employ for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 836, p. 240; 1937, ch. 88, Sec. 1, p. 452.)

4-3614 (1044). *Revoking admission of attorney.* Any circuit or superior court of the county in which an attorney resides shall revoke the admission of such attorney to practice law in the state of Indiana in a proceeding brought in conformity with the provisions of the statutes of Indiana, whenever:

*Third.* He has willfully violated any of the duties of an attorney, as prescribed by statute; or

*Fourth.* He has willfully violated his oath as an attorney. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 842, p. 240; ch. 38, Sec. 2, p. 452.)

Section 12—Article I of the Indiana Constitution provides also: “Justice shall be administered . . . speedily without delay.”

In the light of those rules dilatory tactics in the disposition of litigation cannot be successfully defended. The common argument to the effect that the adverse party’s claim is unfounded, or even vexatious, and that therefore it may be defeated justifiably by fair means or foul is clearly unsound. The law provides methods of dealing with those matters—by contempt—discipline—injunction—liability for malicious prosecution or abuse of process. It further prohibits one being a judge in his own cause and contemplates the settlement of the claim by reasonably prompt judicial determination of the controversy. There is a conclusive presumption that judicial action will determine correctly the merits of the case, and an attorney owes an affirmative obligation to the court and the adverse party to so determine it, “speedily and without (unjustifiable) delay.”

### III

However, an effective and sound set of rules of procedure takes cognizance of that situation, and is designed to expedite the prompt decision of cases on their merits, and it pays some



attention to adequate penalties for those who violate the letter and spirit of the rules on that subject. In those fields the new Federal Rules of Civil Procedure constitute a vast improvement over the present Indiana procedure. For example, it seems entirely fair to say that there is something radically deficient in a system of procedure where it is possible for a defendant to delay judgment on an admitted obligation for a year or more by the simple filing of inconsequential and immaterial pleadings. Many, many times a general denial is filed in an action on a promissory note. It raises no real issue, but the plaintiff has no recourse but to await the assignment of the case for trial, after which continuances may be obtained, and a change of venue taken, although there is nothing to try.

I would claim that it is a self-evident proposition that a lawyer who accepts \$25 for filing such an answer is in exactly the same boat as a tax assessor who accepts \$25 for the approval of a fraudulent assessment. If the administration of justice is public business, and a lawyer is an officer of the state in that business, there is an equally clear violation of a public trust in either case.

In contrast, Federal Rule 56 makes provision for summary judgments. Under this rule either the plaintiff or the defendant, after an answer has been filed, may move for a summary judgment and compel an immediate inquiry into the question whether or not a genuine issue exists as to any material fact. This procedure has been used successfully in New York and other states for some time, and its adoption in this state would make impossible, or at least unhealthy, the assertion of claims and defense for their nuisance or dilatory value. Sub-section (g) provides an adequate sanction:

“Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney’s fees, and any offending party or attorney may be adjudged guilty of contempt.”

This latter provision is a specific application of Rule 11, which applies to all pleadings:

“Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. . . . 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 and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.”

This does no more than state the Indiana law set out above. There has never been any dissent in the authorities on the proposition that an attorney who filed false or misleading pleadings was guilty of misconduct. Certainly, however, an emphatic restatement on the subject by the Supreme Court would go a long way in encouraging observance. It is a safe prediction that a trial court which took action once under a rule similar to either Rule 11 or Rule 56(g) would have only occasional future difficulty on those subjects.

The Federal Rules prescribe definite times within which pleadings and motions are to be filed. If a party has appeared a default judgment may not be entered without three days notice (Federal Rule 55(b)), but it is unnecessary in the first instance to get a rule to plead as under the Indiana practice before a party is in default for failure to plead. The burden is cast not upon the non-defaulting party but it is cast upon the defaulting party to avoid the default. Under this procedure a great deal of the delay which is an incident to our present practice during the pleading stage of the trial would be eliminated.

Rule 12(g) prohibits the filing of successive motions to separate, to make more specific, to strike out, and motions to dismiss for insufficient facts. This is in keeping with Rule

15 (a) which restricts the amendment of pleadings as a matter of course to one amended pleading. Under the Federal Rules a motion to dismiss for insufficient facts, a motion concerning parties, and the other available motions must be specific, and it therefore seems that the limitation as to one amended pleading as a matter of course is not unfair. If a pleader cannot write a good pleading after all of its defects have been pointed out to him in detail he certainly in all good conscience can be required to quit.

A great deal of energy and paper in addition can be saved by the use of Rule 16:

“In an action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplifications of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

“The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.”

This procedure has been used very effectively in other states, and already in Judge Baltzell's court in this state. The judges in Marion County recently adopted it on their own initiative, and the Press has gone to great length in applauding the move.

Federal Rule 38 provides that a written demand for a jury trial must be filed within ten days after the issue to be tried by a jury is closed. In the absence of such a written demand jury trial is waived. A proper demand may not be withdrawn without the consent of the adverse party. The Rule is, of course, designed primarily to eliminate the delay which very frequently occurs under the Indiana practice where there is no similar regulation. A party under the Indiana practice may wait until the day a case is set for trial to raise the question of jury trial.

Federal Rule 41(a) on the subject of voluntary dismissal states a rule which is much fairer than the present Indiana rule. Few, if any, states grant to the plaintiff the privilege of voluntary dismissal without prejudice after a case has been completely tried and the decision indicated as does the Indiana rule. Under Federal Rule 41 the privilege of voluntary dismissal is limited to: (1) At a time before the service of an answer, or (2) By agreement of all the parties. A second voluntary dismissal of the same case, whether the first dismissal had been made in the same or another court, becomes *res judicata*. Under this Rule a defendant could not be compelled to try the same case two or three times at the option of the plaintiff, as he may under the present Indiana practice.

I am convinced that it is a fair commentary on those parts of the Federal Rules that they constitute a great improvement over our own practice. At least judges and lawyers who want to get something done within a reasonable time will have a procedure adequate to the task.

I believe it to be true that there is adequate provision in the Federal Rules for the correction of honest mistakes which a pleader is likely to make. On the other hand, there is likewise definitely imposed upon attorneys, judges and parties a decent standard of professional competence and fair dealing, which we cannot afford to deny as an essential element in the administration of justice in this state. I hope the time has come when the Bar of Indiana is willing to pay something more than lip-service attention to the doctrine that a lawyer is at once a scholar of the law, an advocate and yet also an

officer of the state in the administration of justice. That, it must be admitted, is a paradoxical position, but it simply means that advocacy is to be kept within honest and fair boundaries. An attorney may not do in the name of advocacy what a client may not do under accepted standards of honesty and fair dealing.

#### IV

So far as the general purport of the Federal Rules on pleading are concerned they accept the basic philosophy of the Code. A complaint or answer states the facts constituting a claim or defense. But the inherent weakness of a complete reliance on written pleadings as the sole and final method of determining the issues in a case is recognized. Rule 15 makes substantially the same provisions for amendment as do the Indiana rules, and Rule 12(h) does the same as to the waiver of procedural defects. Rule 61 is almost the exact counterpart of our rules on the decision of cases on their merits.

The Federal Rules therefore contemplate that a party may have to be somewhat content with a pleading which is rather general in its terms, and which is subject to abandonment and amendment before the case is disposed of finally. Detailed provision is made for discovery, deposition and conditional examination so that, as under the present Indiana practice, a party who is really interested in pinning down an opponent to the facts of his case has available an adequate procedure under which he may accomplish that end.

The changes which the Federal Rules would make in the details of procedure can be supported by persuasive reasons. As a preliminary matter, I believe that it is wise, however, to give recognition to the proposition that when the problem involved is a choice of conflicting rules in the field of procedural technics the decision is bound to be somewhat, if not wholly, arbitrary. One well established intelligible rule is as valid as another. Thus I see little to argue about as between a rule which places the burden as to contributory negligence on the defendant and a rule which places it on the plaintiff so far as any meritorious arguments are concerned. I think an

attorney is likely to prefer one over the other depending on whether he represents the plaintiff or the defendant. I have a suspicion that the Indiana statute which places the burden on the defendant in an action for personal injury was passed because of the activities of lawyers interested in personal injury cases for the plaintiff. Had there been a scientific interest in the matter it is inconceivable that the rule in property damage cases would not have been likewise changed.

Again, for example, as between the Illinois rule that *res judicata* is in issue only under a plea in abatement, and the Federal Rule, making it an affirmative defense there is really little to choose. Concededly there might be an advantage in settling the question at the beginning, but this can be accomplished under the Federal Rules by the court ordering the issue tried first. Again, whether the question of jurisdiction of the subject-matter is to be raised by a demurrer, or a motion to dismiss is entirely a matter of form.

Thus in many instances a new or different rule in this field is most certainly as desirable as the traditional Indiana rule.

It must be remembered that the Federal Rules were subjected to the criticism of the Bar of the country. On a number of points alternate rules were suggested, and the one finally adopted received a substantial majority support. In the interests of uniformity, as between the State and Federal courts, and as between the States there is every reason why we should give up a traditional preference for a rule which at most is no better than the one proposed.

Nevertheless one can advance some meritorious arguments for a great many of the proposed changes. Rule 8(b) prohibiting a general denial unless made in good faith on reasonable grounds is a necessary corollary to the general attack on procedure for delay, and is in keeping with the obviously valid proposition that a decent system of pleading is properly designed to eliminate the non-essential and undisputed facts and to narrow the issues in a case to those which are real and substantial.

Rule 8(e) as to alternative allegations is a change in form merely. One may reach the same result under the Indiana

practice by a large amount of repetition in separate paragraphs of pleadings.

Rule 7(c) abolishing the demurrer, in the light of Rules 12 and 21, is not as radical as it might appear. Questions formerly raised by demurrer or plea in abatement are raised by an appropriate motion. A motion to quash, to dismiss for lack of jurisdiction, for improper venue, improper service of process, a motion to add or strike out parties, and finally a motion to dismiss for insufficient facts, are substituted for them.

Rules 13 and 14 remove the present restrictions on counter-claims. There are persuasive reasons why a defendant should be allowed to balance his accounts with the plaintiff through any claims he may have against him, even although there be no factual connection between them.

Rule 18 removes the present restraints on the joinder of actions, which are in some respects even more arbitrary than the Common Law rules. It is a fair corollary to the counter-claim rule. The rule as to joinder of alternative parties is of particular value, for under it a plaintiff may effectively determine liability, for example, in this type of case: a railroad contends it delivered freight, the consignee denies receiving the goods. One or the other is liable, not both, and the rules of procedure ought to allow the controversy to be settled in the presence of all three. That is impossible under the present Indiana practice.

Rule 46 abolishing the exception is clearly desirable. It was always a formality, based upon the presumption that one who did not dissent from a court's ruling consented to it. Lawyers and litigants being what they are that is a violent presumption contrary to the fact, and presumptions which were much less violent have been held to violate the due process clause.

Rule 51 requiring a specific objection to an instruction at the time it is given, out of the presence of the jury, has been condemned as very undesirable in this state. That strikes me as curious, because in no other instance in the law is a party permitted to sit back and make no objection to erroneous

action by a court and then later successfully complain. There is an accepted rule in all other instances which requires a party to make a timely, specific and valid objection to erroneous action before he is legally harmed by it. Few rules would have a more salutary effect than Rule 51. Attorneys would of necessity have to be better prepared, but a case could not be reversed for an erroneous instruction which no one at the time thought was erroneous, or when if he did think so he said nothing about it. It is not a valid argument to insist that an attorney cannot be prepared to make such objections. He can, for attorneys in other jurisdictions have operated under such a rule for many years without difficulty. Likewise it is not a persuasive argument to urge that a case always ought to be decided on correct instructions. It is a fair inference that an error which escapes the judge and counsel will certainly fail to impress the jury. In any event in all other instances a client is bound by the oversight of his attorney, just as he is bound by the conduct of any other agent. If the attorney, for example, permits improper evidence without objection he cannot later claim error and such evidence is more likely to affect the result than an unobserved error in the instructions.

Rules 52(b) and 59(a) allowing amendments of special findings of fact are particularly desirable. The Indiana rule on this subject which makes no provision for the amendment of special findings, and indeed creates a presumption against the person having the burden of proof as to a fact not found or improperly found in the form of a legal conclusion, is at best a vicious rule. Among other things it must often well result in the decision of a case contrary to the clear merits of the case. The rule creating a presumption against the party having the burden of proof is in direct violation of the statutes requiring the courts to decide each case on the merits as they were developed under the evidence. Special findings are a very valuable procedure and are little used in Indiana because of this unwarranted presumption.

Rules 73-75 on appeals can be accurately described as at least infinitely better than the present Indiana rules. An adop-



tion of the Federal Rules on this subject would clarify and simplify the Indiana practice in the following particulars: (1) The present distinction between vacation and term time appeals would be abolished. Notice of appeal would be served in every case, but the appellant would satisfy his obligation on this score by the filing of a notice with the clerk. The burden would then be cast upon the clerk to notify the other parties. (2) It would be unnecessary to secure an extension of time for the filing of a bond and bills of exceptions. These might be filed and approved during vacation or after term without previous order. (3) The record would eliminate all duplications and immaterial matters and would be subject to correction at any time. It is clear that under these rules all of the present strictness and danger in the field of appellate procedure in this state would be removed.

## V

In conclusion: It is undoubtedly true that in this country the Puritan right of revolt still exists. Reform which is unacceptable to a decent majority of those involved is bound to fail, no matter how sound it is. If a majority of lawyers and judges in this state would treat an adoption of the Federal Rules as state rules in the same manner they treated the Code we are as well off under our present system. At the mid-winter and summer meetings of the State Bar Association this year motions recommending to the Supreme Court the adoption of the Federal Rules were passed without a dissenting vote. Curiously enough that is, to my knowledge, the only expression of opinion on the subject by the lawyers of the state.

I would suggest that a passive interest in a serious and meritorious suggested improvement of the administration of justice in this state does not meet the standards of professional conduct which describe the lawyer as an officer of the court. The public interest in an efficient and effective system of procedure designed to correct defects and injurious practices which experience demonstrates to exist is paramount to any

personal advantage or disadvantage inherent in the old or a new system.

A scientific and professional approach to this problem calls for an active consideration of the problem by the Bar, individually and collectively, and then further—the exertion of some pressure to bring about desirable remedies for observed deficiencies.