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Curtis G. Shake
Indiana Supreme Court

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CURTIS G. SHAKE*

The development of pleading and practice in the courts is one of the most interesting chapters in the history of our system of jurisprudence. In the earliest English courts all pleadings were by word of mouth. The litigants stood opposite each other at the bar of the court and orally stated their respective complaints and defenses. In time it became customary to enter a brief synopsis of the contentions of the parties on the roll or record of the court, and these memorandums afterwards formed the precedents for the first written pleadings.

The English courts established their own procedure in the same fashion that they developed the common law. Indeed, rules of pleading and practice were a part of the common law itself. It is significant though, that these rules were never formally stated or reduced to an express code. They were only to be found by examining the reported cases, until such time as the commentators and text-writers undertook to extract them from the decisions and restate them in an orderly fashion. This was the system of adjective law which was transplanted to the American continent and which found its way into the court practice of every state in the union with the single exception of Louisiana, which based its common law as well as its procedure upon the jurisprudence of France.

About a hundred years ago dissatisfaction with the common law practice became very pronounced in this country. A number of factors contributed to the situation. The members of the bar were, for the most part, self-taught or merely office-trained, and they experienced much difficulty in mastering the highly technical rules of common law pleading. Many of them found themselves lost in a maze of thirty or forty distinct forms of action with their incidental fictions, all couched in a language of formalism containing a liberal sprinkling of Latin verbage. There was a feeling, which was not altogether unjustified, that the few lawyers who

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were really experts in common law pleading enjoyed an unfair advantage over the average practitioners. In an effort to find relief from a situation which was regarded as intolerable, the advocates of a change turned to the legislative branches of the government rather than to the courts. There were those in that day who contended that this amounted to an unconstitutional intrusion of the legislative branch of the government into the realm of the inherent rights of the judiciary, just as there are those today who argue that to return to the courts their ancient prerogative to establish procedure by rule is an unauthorized delegation of legislative power. This is neither the time nor the place to discuss the merits of these academic contentions.

In 1848 the New York legilsature yielded to popular demand for a simplified system of practice and adopted the first civil code in this country. The movement was in full swing when the Indiana Constitutional Convention of 1850 met. Our Constitution contains the following unique provisions:

"The General Assembly at its first session after the adoption of this Constitution, shall provide for the appointment of three Commissioners, whose duty it shall 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 mode of pleading, without distinction between law and equity."

Commissioners were appointed pursuant to this mandate under a special act approved January 5, 1852. They promptly submitted a report adopting the features of the New York code in the main, and their report was approved June 18, 1852. This code, with its subsequent amendments, is the basis for the system of pleading and practice now prevailing in the State of Indiana. Other states followed until statutory practice in some form or another prevailed throughout the union, although our sister state of Illinois did not abandon the common law method until 1933. Meanwhile, England, the birthplace of the common law, succumbed to the American mode of pleading and practice and adopted a civil code in 1873.

The early codes were prepared by capable lawyers and jurists and were fine examples of legislative draftsmanship. One of the dreams of the proponents was that ultimately a

single uniform system of practice would prevail throughout the country. All the codes possessed certain common features. They substituted a single form of action for the many forms authorized by the common law. They abolished the distinctions in pleading between law and equity and simplified and expedited the making of new parties and the closing of issues.

It was the hope of the profession that the time would come when lawyers might go from one jurisdiction to another and find themselves at once familiar with the prevailing rules of practice. This dream was not realized. Having gone to the legislative assemblies for the enactment of the codes, the profession found itself thereafter subject to all manner of legislative whims when amendments were sought which would make for simplicity and uniformity. Impractical and ill-advised changes in the practice acts were proposed and sponsored by members of the legislatures who had no knowledge of the subjects with which they were dealing. As a consequence, the codes gradually became less alike than they were when first conceived, and less uniformity prevailed than when all the states followed the common law system. For relief from this situation, the profession has turned back to the courts. The modern approach to the problem is to establish a system of practice defined by specific rules promulgated by the courts of last resort. It is the belief of those who advocate this innovation that it will preserve the good points and at the same time obviate the faults found in both the common law practice and the statutory codes.

The virtue of the common law was the fact that it was the product of minds actually trained in the administration of the law. Its faults were that it became precedent-bound and that it was not always clearly and precisely stated. The statutory codes, on the other hand, were more definitely stated and more flexible, though, as pointed out above, they frequently came to reflect non-expert ideas. A system of procedure prescribed by court rules theoretically guarantees a procedure which has been judicially considered and which is expressed as exactly as the average statute.

The movement to re-invest courts with authority to make the rules pertaining to pleading and practice was accelerated by the situation which existed for a long time in

the Federal district courts. These courts endeavored to follow the practice prevailing in the states where they sat. This emphasized the lack of uniformity and provoked a search for a better system. In 1912 the Supreme Court of the United States adopted a set of equity rules for use throughout the Federal judicial system. The result was so satisfactory that in 1935 Congress authorized that court to exercise a similar function with respect to the civil side of the practice. After prolonged consideration on the part of a committee of eminent members of the bar, a code of rules was formulated and recommended and became effective in 1938. These rules have served to stimulate renewed interest in the possibility of a nationwide system. To date 22 states have conferred upon their courts of last resort the power to prescribe rules of civil procedure. Indiana did so at the 1937 session of its General Assembly. Our act went so far as to provide that the existing provisions of the code should only have the effect of court rules until such time as they were modified or superseded. Even before the rules promulgated by the Supreme Court of the United States became effective, the lawyers of Indiana expressed themselves by a five to one referendum conducted by the Judicial Council as favorable to the adoption of the Federal rules in so far as practicable. The Indiana State Bar Association and a number of local associations likewise recommended that the statutory code be superseded by the Federal rules.

Mindful of their responsibility in the premises, the members of the Supreme Court carefully considered this matter for a period of two years. Their final conclusion was that it would be unwise to take the suggested step at this time. A number of reasons would seem to support this decision. It will suffice to enumerate a few of them. In the first place, a careful comparison of the Federal rules with our present statutes revealed that the new Federal rules are very similar to our existing practice. The differences are more a matter of language than of substance. In other words, the lawyers of Indiana will not be deprived of any substantial convenience if the Federal rules are not adopted, except with respect to a few provisions which will hereafter be noted.

It was also felt that a radical change in the pleadings and practice ought to be made with reluctance. An examination of the Indiana reports covering the quarter of a century

following the adoption of the code of 1852 revealed that the greater part of the courts' time was consumed in the consideration of procedural questions. Practically every provision of our code has received judicial construction, so that the civil practice in Indiana may be said to be now fairly well settled. As a consequence, fewer decisions of our appellate courts now turn on matters of practice, and, in most instances, the substantial issues sought to be presented are considered and determined on their merits.

The new Federal rules are an admirable piece of work and are as definite and specific as could be expected. Nevertheless, every provision, every clause, and almost every word will ultimately be the subject of judicial construction. The facilities for accomplishing this are not the most expeditious. In the first instance, these rules must be used in 83 different United States district courts, from which appeals may find their way to 10 separate circuit courts of appeal. The final arbiter in their interpretation must be the Supreme Court of the United States, and the reluctance with which that tribunal has concerned itself with purely procedural matters indicates that it may be many years before the meaning of the Federal rules is finally determined.

Meanwhile, if we should adapt the Federal rules in this state, much confusion and uncertainty would result. For example, what course would our own courts pursue with regard to lower Federal court interpretations which are at variance with themselves? It would appear to be the better part of prudence to postpone the adoption of the Federal rules in toto until such time as their language has received final interpretation. The uncertainty that must exist in the meanwhile is indicated by the fact that a great many Federal decisions are now being handed down interpreting rules. The journal of the American Bar Association devotes a department in each issue to a summary of these decisions, and the West Publishing Company, which serves more members of the profession than any other single publishing house in America, has inaugurated an advance sheet called "Federal Rules Decisions," exclusively devoted to reporting cases in which matters of procedure have been considered by the various Federal courts.

The members of the Indiana Supreme Court share the hope of the profession that the time may come when we may

have one single unified system of court procedure operative in every jurisdiction of the land. We consider it our duty to aid in the accomplishment of that dream. To that end, the court concluded to adopt such of the Federal rules as seem to fill a distinct need and to modify our own practice accordingly. On April 17th the court promulgated seven rules which constitute, in its judgment, a step toward bringing our practice into harmony with the Federal procedure, without unnecessarily exposing ourselves to the dangers of becoming embroiled in intricate procedural controversies over matters of form and language. It is believed that these seven rules, which become effective on September 2nd, will in a large measure bring our practice in step with that of those jurisdictions which have already adopted or propose to adopt the Federal practice. The concern manifested by the lawyers of Indiana over the effect of these rules confirms our conclusion that it would have been a mistake to do more at this time. It will be easier to digest seven than 70 new rules at one time. As rapidly as these rules are assimilated others may be adopted, until the Federal practice eventually may supplant the provisions of the code of 1852.

With this statement of the background, I shall undertake to point out, in a very general way, the objectives of our new rules applicable to the trial courts of the state. It is to be expected that questions will arise as to the application and interpretation of these rules, and I am sure that you will excuse me from anticipating these controversies or expressing opinions with respect thereto. These matters will be met and determined when they are directly presented to the courts. A few general observations with respect to the scope and purpose of the rules will therefore be harmless, if they are not helpful.

RULE 1-2. STATING CLAIM OR DEFENSE.[1]

Rule 1-2 is similar to Federal rule 10(b). It is also found in the codes of New York, Illinois, and Connecticut. Its purpose is to promote more definite and specific affirm-

[1] Ind. Sup. Ct. Rules (1940) 1-2. *Stating Claim or Defense.* In all except criminal proceedings, all averments of claim or defense made in any pleading, or paragraph thereof, shall be stated in separate rhetorical paragraphs, numbered consecutively, so that the contents of each rhetorical paragraph shall be limited, so far as practicable, to the statement of a single set of related circumstances.

ative pleadings. Many good lawyers have voluntarily written their pleadings in accordance with the spirit of this rule for years. One of them, who I regard as one of the best pleaders I know, told me that by following this practice he had formed the habit of pleading with a "rifle instead of a shotgun," and I think you will agree with me that it is highly desirable to discourage "shotgun pleading."

I shall try to illustrate the use of this rule in the preparation of two types of complaints, one a very simple one and the other not quite so simple. Take for example the ordinary action for divorce. We all know that it is only necessary to plead the facts disclosing jurisdiction, the marital relationship and separation of the parties, and one or more of the statutory causes for divorce. These indicate the logical order for grouping the facts to be alleged into rhetorical paragraphs, as required by this rule. Take, also, an action for damages on account of personal injuries. The complaint must disclose a duty owed by the defendant to the plaintiff, a violation of that duty on the part of the defendant, an injury proximately resulting, and consequent damages. Here again we have the component parts of complaint in an action of this character, yet I dare say that all of you have seen such complaints where the allegations were so intermingled and confused as to render it next to impossible to determine the pleader's theory. A good faith compliance with this rule will make for better pleadings, and consequently for better lawyers in Indiana.

RULE 1-3. GENERAL DENIALS ABOLISHED.[2]

This rule is not as revolutionary as it sounds. It is not unlike Federal rule 8(b) and it has been in the Federal Equity Rules since 1912. It is calculated to remove from the

[2] Ind. Sup. Ct. Rules (1940) 1-3. *General Denials Abolished.* The general denial as heretofore known in the practice of this state is hereby abolished. Instead, the party answering or replying to a pleading shall specifically state that he admits, denies, or is without information as to the facts stated in each rhetorical paragraph thereof. A pleader may admit a part and deny a part of a rhetorical paragraph, in which event he shall specify the allegations which he admits and those which he denies. A statement in an answer that the pleader has no information as to an assignment in the pleading answered shall have the effect of a denial. This rule shall not operate to prohibit affirmative answers and replies, but any and all defenses heretofore available under a general denial shall be provable under the answer herein prescribed.

realm of controverted issues those allegations that may be required by the fixed rules of pleading, but which ought to be admitted without proof. Much of the time of the trial courts is unnecessarily consumed in hearing evidence to support purely formal allegations about which there is no real controversy. Who has not had to procure certified copies of documents from the Secretary of State to establish that the plaintiff was a corporation, or carry cumbersome books from the county recorder's office to prove record title to real estate, when these matters were purely incidental to the main issue? It was observed in a recent number of the West Virginia Law Quarterly that "there could hardly be one case in a thousand which is so completely fictitious that there would not be something in the pleadings that the other party knows is true."

RULE 1-4. PRE-TRIAL PROCEDURE.[3]

Pre-trial procedure had its inception in the congested courts of some of our metropolitan centers. It is not coercive; it simply provides the machinery for an informal conference in advance of the trial, where an impartial judge and ethical lawyers may consider such matters as may expedite the hearing of the case and reduce the agreements reached to a binding order or stipulation. This rule has worked admirably where it has been tried, and there are those who go so far as to assert that it is the most forward step of our generation

[3] Ind. Sup. Ct. Rules (1940) 1-4. *Pre-Trial Procedure.* In any action except criminal cases, the court may in its discretion and shall upon motion of any party, direct the attorneys for the parties to appear before it for a conference to consider:

(a) The simplification and closing of the issues;
(b) The necessity or desirability of amendments to the pleadings;
(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof or the introduction of unnecessary evidence;
(d) The limitation of the number of expert witnesses;
(e) Such other matters as may expedite the determination 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 which limit the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified thereafter to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calender on which actions may be placed for consideration as above provided, and may either confine the calendar to jury actions or non-jury actions or extend it to all actions.

in the matter of procedural reform. An illustration of its virtue is found in the practice which prevails before the Industrial Board of Indiana, where, in effect, a pre-trial conference precedes every hearing. The board member ordinarily begins a hearing by asking if it may be stipulated that the claimant was an employee of the defendant. That being conceded, he inquires if the parties can agree as to the employee's weekly wage, whether he received an injury arising out of and in the course of employment, etc., until a disputed issue is reached. The hearing is then confined to that issue. In that manner the board member is able to hear in two or three hours or a half day a case which if tried in court would require several days or perhaps a week.

The rules relating to the stating of claims and defenses in affirmative pleadings in separate rhetorical paragraphs, abolishing the general denial, and providing for pre-trial conferences are to be regarded as interdependent, all looking to the simplification of the issues of fact and expediting the disposition of cases. They are the profession's answer to the popular complaint against the law's delay. They are calculated to attain that standard of judicial administration which our fathers had in mind when they wrote into our State Constitution that: "Justice shall be administered freely, and without purchase; completely, and without demise; speedily, and without delay."

RULE 1-5. EXCEPTIONS NOT NECESSARY.[4]

This rule is simple and the subject-matter is covered by local rules in most of the courts of the state. It merely dispensates with the necessity of claiming formal exceptions to adverse rulings, but it is well to bear in mind that it does not affect the present practice with regard to proper and timely objections. Rule 1-5 has a counterpart in Federal rule 4-6, and it is also found in most modern state codes. By its adoption we eliminate another useless technicality.

[4] Ind. Sup. Ct. Rules (1940) 1-5. *Exceptions Not Necessary.* The record need not show exceptions to adverse actions, orders, or rulings of the court in order to present alleged errors with respect thereto for the purposes of a motion for a new trial or on appeal. This rule is not intended to affect in any manner the present practice in regard to objections.

RULE 1-6. JOINT AND SEVERAL.[5]

The purpose of Rule 1-6 is to restore to our practice a provision adopted by the General Assembly in 1917 and repealed in 1921. The act was satisfactory to the profession and I have never heard why it was stricken from the statute books. Perhaps it was another unfortunate case of laymen undertaking to legislate on the subject of court procedure.

RULE 1-7. INSTRUCTIONS.[6]

Rule 1-7 is two-fold in its purpose. It undertakes to provide one simple method of making instructions a part of the record, in lieu of the optional means authorized in the several statutes bearing upon the subject. It also adopts the provisions of Federal Rule 51 with reference to the manner of saving objections to instructions. Under the practice now prevailing, a lawyer may stand by and observe the trial court commit an error in the giving of an instruction without being under any obligation to point out the error. He may ask for a new trial without advising the court of the defect upon which he relies. Not until the case reaches the appellate tribunal is he required to disclose his hand and specifically point out what he perceives to be wrong with the instruction. All this is changed by the new rule, and if

[5] Ind. Sup. Ct. Rules (1940) 1-6. *Joint and Several.* All demurrers and motions of any kind addressed to two or more paragraphs of any pleading, or filed by two or more parties, shall be taken and construed as joint, separate, and several demurrers or motions to each such paragraphs and by each of such parties. All motions containing two or more subject-matters shall be taken and construed as separate and several as to each subject-matter. All objections to rulings made by two or more parties shall be taken and construed as the joint, separate, and several objections of each of such parties.

[6] Ind. Sup. Ct. Rules (1940) 1-7. *Instructions.* Where instructions are tendered, the court shall indicate thereon in advance of the argument the instructions that are to be given and the instructions refused. After the court has indicated the instructions to be given, each party shall have a reasonable opportunity to examine such instructions and to state his specific objections to each, out of the presence of the jury and before argument, or specific written objections to each instruction may be submitted to the court before argument. No error with respect to the giving of instructions shall be available as a cause for new trial or on appeal, except upon the specific objections made as above required.

All instructions given or refused, and all written objections submitted thereto, shall be filed with the clerk and become a part of the record in the cause without a bill of exceptions. Objections made orally shall be taken by the reporter and may be made a part of the record by a general or a special bill of exceptions.

he desires to save any questions as to instructions which the court has indicated it intends to give, he must state his objection thereto before the commencement of the argument. Provision is made for the allowance of a reasonable time to reduce the objections to writing, or to dictate them to the court reporter. It may be pointed out in support of this rule, that it exacts the same promptness and frankness upon the part of the trial lawyers with regard to instructions as they have heretofore been required to exercise with respect to objections to the admission of evidence. Objections to testimony are required to be made at the time, and reasons not then assigned are waived. It is hoped that new trials may be avoided by affording trial judges an opportunity to correct errors in instructions before they are given to the jury. The only danger in this rule, as I see it, is the possibility that it may unduly delay the trial of the cases, though that can not be said to be true in the Federal courts where a similar rule has prevailed for some time.

RULE 1-8. POWER OF COURT IN CASES TRIED WITHOUT A JURY.[7]

This, again, is substantially like Federal rule 52(b). It seeks to obviate the necessity of granting new trials in cases tried by the judge where the errors pointed out in motions for a new trial may be corrected by merely reopening the case.

In conclusion, I think it ought to be stated that too much ought not be expected of any set of rules dealing with such intricate subjects as pleading and practice. The rules recently adopted are not offered to the profession as a panacea for all the problems pertaining to court procedure. Perfection in pleading will probably never be attained. It is merely hoped that these rules will answer some of the complaints that have been laid at the door of the former practice, and that time will demonstrate that their adoption was a step in the right direction.

[7] Ind. Sup. Ct. Rules (1940) 1-8. *Power of Court in Cases Tried Without a Jury.* On a motion for a new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law ,or make new findings and conclusions, and direct the entry of a new judgment.